January 10, 2013

Mr. Bill Jones
Deputy Commissioner of Revenue Acting as Commissioner of Revenue
7th Floor
555 MacKenzie Avenue
Ottawa, ON K1A 0L5

Dear Mr. Jones:

Re: CPP remissions for Final Clearance Certificates

I am writing on behalf of the Wills, Estates and Trusts section of the Canadian Bar Association (the CBA Section). The CBA is a voluntary association of more than 37,000 Canadian lawyers, judges, notaries, law teachers and students. Members of the CBA Section practice in the areas of wills, estates and trusts law.

We write about refusals by the Canada Revenue Agency to issue a Final Clearance Certificate on the grounds that the executor of the will or estate trustee did not deduct and remit Canada Pension Plan contributions for compensation from the estate for acting as executor or estate trustee. Acting for executors or estate trustees, our members have experienced these refusals on many occasions. In our view, the correct treatment of executor remuneration is for the executor or trustee to report and pay CPP contributions on self-employment income.

Refusing to issue certificates creates unnecessary expense and paper work in estate administration, and delays the distribution of estates to beneficiaries.

It appears that the request for CPP contributions to be deducted and remitted by the estate arises from section 23 (5) and 23 (5.1) of the *Canada Pension Plan Act.* We believe this is being erroneously interpreted by CRA.

Section 23 (5) and (5.1) read:

> Certificate before distribution
> (5) Every person, other than a trustee in bankruptcy, who is an assignee, liquidator, receiver, receiver-manager, administrator, executor, liquidator of a succession or any other like person, in this section referred to as the "responsible representative",

> administering, winding-up, controlling or otherwise dealing with a property, business or estate of another person, before distributing to one or more persons any property over which he or she has control in his or her capacity as the responsible representative, shall obtain a certificate from the Minister certifying that all amounts
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> > (a) for which any employer is liable under this Act up to and including the date of distribution, and
> >
> > (b) for the payment of which the responsible representative is or can reasonably be expected to become liable in his capacity as the responsible representative
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> have been paid or that security for the payment thereof has been accepted by the Minister.
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> Personal liability
> (5.1) Where a responsible representative distributes to one or more persons property over which he has control in his capacity as the responsible representative, without obtaining a certificate under subsection (5) in respect of the amounts referred to in that subsection, the responsible representative is personally liable for the payment of those amounts to the extent of the value of the property distributed and the Minister may assess the responsible representative therefor in the same manner and with the same effect as an assessment made under section 22.

CRA's T4001 (E) Rev. 11 "Employer's Guide – Payroll Deductions and Remittances," Chapter 2 refers to amounts that an employer is required to deduct, and includes:

> honorariums from employment or office, a share of profit that an employer paid, incentive payments, director's fees, management fees, fees paid to board or committee members, and executor's, liquidator's, or administrator's fees earned to administer an estate (as long as the executor, liquidator, or administrator does not act in this capacity in the regular course of business);

Requiring a deduction for the executor or trustee's own remuneration misconstrues the estate of a deceased person as an employer of the executor or estate trustee. In law, an estate is not a person.[1]

There is an exception to the principle that an estate is not a person. For the purposes of the *Income Tax Act*, a trust, which is defined to include an estate, is "deemed to be in respect of the trust property an individual."[2] This alters the common law for the *Income Tax Act* only. It is necessary for the operation of the income tax regime because at common law an estate or trust is not a separate person.

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1 The Supreme Court of Canada said in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 SCR 429, when considering whether the estate of a deceased person is entitled to a remedy for a breach of the *Charter of Rights and Freedoms*, "[i]n the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died."

2 *Income Tax Act*, s. 104(2)

The *Canada Pension Plan Act* does not contain a deeming provision analogous to section 104(2) of the *Income Tax Act*. The common law prevails in determining whether an estate can be an "employer" of the executor or estate trustee under that *Act*.

Further, the remuneration and executor or estate trustee is not paid income from an office, which is defined in *the Canada Pension Plan Act*:

> "office" means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a lieutenant governor, the office of a member of the Senate or House of Commons, a member of a legislative assembly or a member of a legislative or executive council and any other office the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity, and also includes the position of a corporation director, and "officer" means a person holding such an office

First, an executor or estate trustee is not usually entitled to a fixed or ascertainable remuneration. Unless remuneration is expressly indicated in the will appointing the executor or estate trustee is, or in a contract, remuneration is determined in most provinces and territories by a court on a passing of accounts or with the approval of all adult residual beneficiaries.

Second, an executor or estate trustee acts personally when administering the estate, not in a representative capacity. For example, executors or estate trustees are personally liable for their acts.

Accordingly, subsections 23(5) and (5.1) only apply for employees of the deceased or, if the executor or estate trustee continues to operate the deceased's business, for persons employed in the business, but not to the executor or estate trustee's own remuneration.

Executor remuneration is properly treated as self-employment earnings under the *Income Tax Act*, and CPP contributions are payable by the executor or trustee under section 10 of the *Canada Pension Plan Act*. That is a separate matter and should not affect the final clearance certificate for the estate.

If CPP contributions are administered as earnings from self-employment, this will simplify estate administration, minimize delays, and correctly reflect the law, without affecting the amounts of CPP contributions.

We urge you to clarify the appropriate grounds for which a Clearance Certificate should and should not be issued. Members of the CBA Section would be pleased to assist in the drafting of such a clarification as well as to answer any questions you may have. Please contact the undersigned should you wish to discuss this.

Yours truly,

(original signed by Rebecca Bromwich for Cynthia Hiebert-Simkin)

Cynthia Hiebert-Simkin
Chair, Wills, Estates and Trusts Section