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Via email: grant.nash@fin.gc.ca; Bill.Murphy@fin.gc.ca; Cathy.hawara@cra-arc.gc.ca

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Dear Ms. Hawara, Mr. Murphy and Mr. Nash:

Re: Invitation to June 30, 2015 meeting with CBA Charities and Not-for-Profit Section

On behalf of the Charities and Not-for-Profit Law Section of the Canadian Bar Association (the CBA Section), I write, first, to commend the government on recent changes made to the *Income Tax Act* (the Act) related to estate donations.

The CBA is a national association representing 36,000 jurists including Canadian lawyers, notaries, law teachers and students. Its primary objectives include improvement in the law and the administration of justice. The CBA Section represents lawyers from across Canada who advise registered charities and other not-for-profit organizations.

The CBA Section also wishes to bring to your attention certain concerns it has identified with the implementation of these new rules. My letter follows on CBA Section executive member Karen Cooper's February 10 conversation with Mr. Nash and her subsequent correspondence with

Sharmila Khare and Mr. Murphy. Since Ms. Cooper's correspondence, the Budget has been introduced, which includes a number of other items with an impact on registered charities. We will comment on those items here as well.

Last, we invite representatives of the Tax Policy Branch and Charities Directorate to meet with the CBA Section, proposed for June 30 in Ottawa, to discuss these matters, and others of mutual interest to the CBA Section and the Charities Directorate (if represented at the meeting). Once a meeting date is confirmed, we will work with you to finalize an agenda based on the issues in this letter and others you may suggest.

2014 Amendments Related to Charitable Gifts by Graduated Rate Estates

As we understand it, provisions in the *Economic Action Plan 2014 Act, No. 2* (S.C. 2014, c. 39, formerly Bill C-43) enable the creation of a "graduated rate estate" (GRE) by which an individual's estate that is a testamentary trust arising as a consequence of their death will continue to have access to graduated rates for the first 36 months after their death, if certain other requirements are met. These provisions include further measures designed to increase flexibility in the application and administration of charitable donation tax credits. Gifts by will and direct designation (insurance, RSP, RRIF, TFSA) will be deemed to have occurred at the time the property to be donated is transferred by the GRE to the charity or qualified donee. At the same time, the trustee will be able to apply the charitable donation to either the taxation year of the estate in which the charitable donation was made, an earlier taxation year of the estate, or the individual's last two taxation years.

The CBA Section appreciates the flexibility these new measures provide insofar as they increase the likelihood that gifts are made by enabling the estate to do so in a timely and tax efficient manner. However, we share some of the concerns expressed by our colleagues on the Joint Committee on Taxation of the CBA and Chartered Professional Accountants of Canada¹ and reflected in submissions by other organizations². Our specific concerns relate to the following issues:

1. **36-month limitation period:** The definition of a GRE limits the availability of the donation tax credit for gifts by will to those gifts actually distributed to the charity by the trustee within 36 months of the death of the testator. In many estate situations the actual distribution to a registered charity might be delayed beyond 36 months. When these issues arise, the trustee is not in a position to make a distribution to a registered charity within 36 months, nor in many cases is the trustee able to determine the quantum of the gift to be made to the registered charity. The inability to use the donation tax credit in the terminal T1 return will compound the difficulties for the trustee and the beneficiaries of the estate. The CBA Section requests that consideration be given to providing a mechanism for an extension of the 36-month limitation period in certain circumstances.
2. **Intervening Life Estates and Charitable Remainder Trusts:** The impact of the new measures on charitable gifts on the death of a life tenant under a will and charitable remainder trusts remains unclear. This puts into question the tax consequences of existing arrangements and reduces the likelihood of gifts being made.
3. **Capital Gains:** The Act provided that a nil capital gain can be claimed in the terminal return of a taxpayer for qualifying gifts of ecologically sensitive property, cultural property and publicly-traded securities. The new measures will only allow a nil capital gain in the

¹ <http://www.cba.org/CBA/submissions/pdf/14-54-eng.pdf>

² Society of Trust and Estate Practitioners; Conference for Advanced Life Underwriting; and Canadian Association of Gift Planners

terminal return if the estate is a GRE and subsection 118.1(5.1) applies. These changes will inappropriately reduce the benefit of making such gifts by will or through a designated gift. Consideration should be given to eliminating the requirement that such gifts be made through a GRE in order to claim nil capital gain.

4. Incidence of Liability for Tax: New subsection 104(13.4) of the Act provides that liability for the tax realized on the deemed disposition of the assets in a life interest trust at the time of death of the surviving beneficiary is in the estate of the surviving beneficiary. Previously the liability was in the life interest trust. A charity is often the capital beneficiary of such a trust and we foresee a situation where the charity receives the assets, with the tax bill left with the family of the now deceased life tenant. Charities are concerned that this will reduce potential gifts because of the tax incongruity. Failing to deal with the grandfathering aspect may lead to public condemnation of charities that receive assets within this structure. The joint and several liability clause does not assist.

Economic Action Plan 2015

The CBA Section supports the proposals in *Economic Action Plan 2015* to give registered charities flexibility to invest in limited partnerships and the additional incentive to be granted gifts of the proceeds of sale of real estate and private company shares.

We would welcome the opportunity to discuss the proposed mechanics for investment in limited partnerships, in particular the issues that arise regarding the percentage of ownership when entering into a limited partnership and the addition or removal of limited partners over time.

The CBA Section is also interested in discussing the possibility of making eligible, as an additional incentive, a gift of real property made directly to a registered charity (not just the donation of the proceeds of sale to a third party) where the real property is intended to be used by the charity in its charitable activities.

We look forward to meeting with you to discuss these matters. If representatives from the Charities Directorate are available to attend a June 30 meeting (or another convenient date), we suggest adding topics to the agenda related to political activities and social media. We are seeing many issues arise in these areas in the context of audit activities by the Directorate. It would help to have clearly articulated guidelines to communicate to registered charities.

Please let me know by email at mhm@bht.com if representatives from the Tax Policy Branch and Charities Directorate are available to meet with the CBA Section on June 30. Once confirmed we will work out the details of the agenda and location.

We look forward to hearing from you soon.

Yours truly,

(original letter signed by Sarah MacKenzie for Margaret H. Mason)

Margaret H. Mason
Chair, Charities and Not-for-Profit Law Section