THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 24, 2012

Via email: FINA@parl.gc.ca

James Rajotte, M.P.
Chair, Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Rajotte:

Re: Charitable Giving Consultation

We welcome the House of Commons' Standing Committee on Finance study of charitable giving incentives and related matters. We write to offer comments about the treatment of donations and registered charities under the *Income Tax Act* (the "Tax Act").

The Canadian Bar Association ("CBA") is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The CBA's primary objectives include improvement in the law and in the administration of justice. This submission was prepared by the National Charities and Not-for-Profit Law Section of the Canadian Bar Association (the "CBA Section"). The CBA Section represents lawyers from across Canada who advise or serve on the boards of charitable and non-profit organizations.

The charitable and not-for-profit sector is an important contributor both to Canada's prosperity and to the quality of life enjoyed by Canadians. The CBA Section:

- welcomes new measures designed to foster charitable[1] donations, both to better leverage private contributions to support philanthropic work and to enhance the sustainability of giving by Canadians; and
- supports streamlining of regulation to reduce the administrative burden on registered charities and other qualified donees and other measures that promote efficiency and effectiveness in the charitable sector while ensuring that resources available for charitable work are maximized.

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[1] Although the term "charitable" is typically used to describe tax-supported donations, under the *Income Tax Act* receipts may be issued for contributions to certain other entities, which are termed "qualified donees", as well as to registered charities,. In this submission the word "charitable" should be taken as referring to the wider category of entities eligible to give receipts for donations.

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Fostering Charitable Giving

We support promoting increased charitable donations through additional Tax Act measures providing more favourable tax treatment of certain gifts.

Attracting new donors is crucial to ensuring the sustainability of giving. There is room for growth in the donor pool with appropriately tailored incentives. Although the most recent Statistics Canada figures showed an increase in tax-receipted charitable giving for 2010, over the longer term there is concern that the donor pool (i.e., the percentage of tax filers claiming the donation tax credit) remains stagnant. Only about 25% of Canadian tax filers claim charitable donations. Modest increases in total donations associated with demographic shifts, individuals who do donate making larger contributions or more favourable economic conditions are unlikely to meet the on-going growth in demand for the services offered by the charitable sector.

Other enhanced measures to encourage giving would make donations to charities less subject to stock market fluctuations. Initiatives to promote donations through preferential treatment of capital gains on gifts of publicly-traded shares, beginning in the late 1990s, successfully spurred a marked increase in charitable contributions of that asset class over the past decade and a half. However, the appeal of such donations fell with the sharp downturn in the stock markets in 2008.

This is especially important at a time when the availability of funding from sources other than donations, such as government grants and earned income, is likely to be increasingly uncertain. With uncertain funding from other sources, leveraging private contributions will be more crucial than ever if Canadians are to continue to enjoy access to the services delivered by the charitable sector.

The CBA Section supports the technical changes recently proposed by our colleagues in the CBA National Wills, Estates and Trusts Section. A copy of this submission is available at: http://www.cba.org/CBA/submissions/PDF/11-62-eng.pdf.

We also support more general measures, such as Imagine Canada's stretch tax credit (which we endorsed in our 2009 brief to the Standing Committee of Finance), that would have wider appeal and potentially greater impact in expanding the donor pool.

Reducing Administrative Burden

To ensure the value of new donation incentives is maximized, we support elimination of measures that are unnecessarily complicated or that are not supported by a strong policy rationale. Efforts to bolster charitable giving are of limited value when administrative costs consume significant portions of monies raised. Simplifying regulation would allow organizations to devote more resources to frontline work and reduce administrative costs.

The current regulatory environment is complex and uncertain. This is difficult for small organizations or those with limited resources. The regulatory regime governing registered charities (and various categories of organizations treated under the Tax Act as akin to registered charities) has developed incrementally over several decades. It is not unusual for the policy rationale for a particular measure to have become outdated or superseded over time. Major legislative provisions announced as long ago as 2002 have yet to be enacted. When enacted, because of the long period during which measures were announced but not legislated, the pending statutory changes can be anticipated to raise questions about applicable limitation periods if the Canada Revenue Agency and/or taxpayers have relied on proposed rules not yet enacted and assessments made on proposed law become statute barred.

The CBA Section advocated in the late 2000s for reform of the Disbursement Quota in order to reduce administrative burdens. Prior to 2010, the Tax Act disbursement quota provisions – among other requirements – imposed an arbitrary and inequitable spending obligation on registered charities. These provisions placed a disproportionate burden on small charities and organizations that relied heavily on funding revenues, without effectively accomplishing the underlying policy objective of limiting fundraising costs. They were superseded by Canada Revenue Agency guidance to ensure fundraising costs are reasonable. In the 2010 Budget, the disbursement quota requirements were narrowed to only mandating appropriate spending from capital assets and dealing with certain inter-charity transfers.

While we applaud certain changes made in the 2010 Budget, the language prohibiting certain types of inter-charity transfers is overbroad and imposes an unnecessarily restrictive limitation on how charities operate. It is unclear what policy objective is served by casting the prohibition so widely. The vagueness of some terminology and concepts makes advising charities on inter-charity transfers difficult. Although there is scope for the Canada Revenue Agency to exercise discretion in administering the provisions, in practice this leads to greater uncertainty. These provisions should be narrowed or eliminated so that charities can structure their affairs in a way that is most operationally efficient. Our recent submission to the Department of Finance regarding this matter is available at: http://www.cba.org/CBA/submissions/PDF/11-58-eng.pdf.

Similarly, some of the measures in the June 2011 Budget and now enacted by Bill C-13 impose an unnecessarily onerous burden on registered charities. The provisions dealing with ineligible individuals holding directorships or other positions of authority within an organization are administratively unworkable in their present form. Casting these provisions in narrower and more precise terms could enhance compliance. This could be done without sacrificing the policy objective of providing the Canada Revenue Agency with a tool to preclude directorships or senior staff positions in charities being held by undesirable individuals. Our recent submission to the Department of Finance dealing with this and other matters is available at: http://www.cba.org/CBA/submissions/PDF/11-41-eng.pdf.

Another reduction in administrative burden could be achieved through streamlining the excess business holdings provisions related to private foundations. This regime is modeled on a similar system used in the United States, where the regulatory requirements for charities are different than in Canada. These measures are overbroad and unnecessarily narrow the scope for charities to decide how they can best operate. Interference with charities' operational decisions, particularly since the operation of charities is a matter of exclusively provincial jurisdiction pursuant to s.92 (7) of the *Constitution Act*, should only happen where there is a clear and precise tax policy rationale for doing so. Other regulatory requirements are available to deal with the unacceptable practices.

Finally, we strongly urge the Committee to fully consider the administrative impact on charities if it makes recommendations with respect to the regulatory regime beyond additional donation incentives. To maximize the return on new donation incentives, organizations should not be required to divert valuable resources to unnecessary work that does not further their core mandate. There exist opportunities for better cooperation between branches of the federal government and with other governments to reduce administrative costs currently borne by charities.

Thank you for providing us the opportunity to comment on charitable donation incentives and the broader regulatory framework applied to registered charities. We are available to answer

any questions you may have on the CBA Section's recommendations, and would be pleased to attend one of the hearing sessions if invited.

Yours truly,

(original signed by Rebecca Bromwich for Peter Broder)

Peter Broder
Chair, Charities and Not-for-Profit Law Section

encl.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

December 19, 2011

Via email: Flaherty.J@parl.gc.ca

The Honourable James M. Flaherty, P.C., M.P.
Minister of Finance
Finance Canada
140 O'Connor Street
Ottawa, ON K1A 0G5

Dear Minister Flaherty:

Re: Proposals to amend the Income Tax Act to Support Charitable Giving

I am writing on behalf of the National Wills, Estates and Trusts Section of the Canadian Bar Association (CBA Section). The CBA Section comprises lawyers specializing in wills, estates and trusts law from every part of Canada.

The CBA Section is aware that on September 20, 2011, the Finance Committee passed a motion to undertake "a compressive [sic] study of … the current tax incentives for charitable donations with a view to encouraging increased giving … and will report its finding to the House" at a future date.[1] This submission proposes changes to the *Income Tax Act* (ITA) that are intended to make charitable giving easier for Canadians.

We are proposing six technical amendments to the ITA to make the tax treatment of charitable giving more flexible, and relieve donors from a number of technical obstacles to tax-effective charitable giving. Sophisticated tax advice is required for prospective donors to overcome these obstacles, without which tax-driven conditions result that do not necessarily reflect the donor's charitable intention. The proposed amendments are not intended to result in additional tax benefits for charitable giving, but rather make the existing rules and tax benefits of charitable giving more equitable, intuitive, accessible and rewarding.

CBA Section members have encountered in their day-to-day practice difficulties in making tax effective charitable donations through trusts and wills. Either the rules prohibit a charitable donation tax credit, or the recognition of income for tax purposes and the timing of the charitable donation tax credit do not line up. These difficulties have been the subject of much discussion in the profession, and have resulted in numerous requests for technical interpretations and advance

[1] Parliament of Canada, Minutes of Proceedings of the Standing Committee on Finance, September 20, 2011, Meeting No. 8.

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rulings from the Canada Revenue Agency (CRA). In some cases, these difficulties can be addressed with careful planning. However, the solutions are not always effective and are complex and sophisticated requiring a high degree of professional expertise to design and implement. They may also impose arbitrary conditions that discourage charitable giving.

The CBA Section believes that its proposed amendments to the ITA would result in greater tax efficiency and fairness. They would simplify estate planning by removing arbitrary and unnecessary distinctions, and would advance the existing public policy purpose of the ITA to "encouraging charitable giving by Canadians." We propose amending:

1. subsection 118.1(5) to permit transfers to a charity as a consequence of the individual's death to be deemed a gift by the individual through their will;
2. subsection 118.1(5) to give the legal representative of an individual's estate the right to designate all or any part of a gift made *as a consequence of death* (under the first proposal) to have been made by the estate;
3. to permit the legal representative to designate all or part of the Undesignated Gift Portion to be transferred to any testamentary trust created under the individual's will;
4. to permit a transfer to a registered charity pursuant to the terms of a trust in satisfaction of a capital interest in the trust to be a "gift";
5. to ensure that gifts made under the terms of a trust upon the termination of a life interest (including deemed gifts under the fourth proposal) be subject to an amended subsection 118.1(5) with similar designations and the carry- forward of unused amounts; and
6. to ensure that where a registered charity is a beneficiary of a trust and there is a transfer to the charity by a trust that qualifies as a gift under the fourth proposal, the transfer qualifies as a gift only if no charitable donation tax credit is being claimed for a contribution to a charitable remainder trust.

A gift to a registered charity[2] gives rise to a charitable donation tax credit that can offset the donor's net income in the year of the gift. However, a gift made in the year of the donor's death offers two enhanced benefits over a gift made in any preceding year. First, the limit on the amount of the gift that qualifies for a charitable donation tax credit is increased from 75% of net income to 100%. Second, any amount of the charitable donation tax credit that remains after being applied to reduce the testator's year-of-death net income to nil can be carried back to the taxation year immediately preceding the year of death and be offset against the net income for that taxation year as well.

To gain the enhanced charitable donation tax credit, individuals do not have to foresee the year of their death to ensure the charitable gift is made in that year. Subsection 118.1(5) of the ITA says that "where an individual, by the individual's will makes a gift, the gift is, for the purpose of this section deemed to have been made by the individual immediately before the individual died."

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[2] Although this letter deals with gifts made to a registered charity, the relevant provisions of the *Income Tax Act* address gifts to a "qualified donee". The CBA Section takes no position as to whether the amendments should be crafted to govern gifts to other entities that fall under the definition of "qualified donee".

1. Amending subsection 118.1(5) to permit transfers to a charity as a consequence of the individual's death to be deemed a gift by the individual through their will.

This amendment would allow an estate to claim a charitable donation tax credit for any transfer to a registered charity made from the estate of the deceased individual "as a consequence of the death of the individual," regardless of whether the transfer is by a will or by another means.

Subsection 118.1(5) is currently restrictive. It allows only "gifts" made by the individual through their will to be deemed to be made by the individual immediately before death. There are, however, circumstances in which an individual's death results in a donation to a charity that is not effected by the individual's will, and may not fall within the strict legal definition of a "gift."

In some jurisdictions (Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and soon, British Columbia), the statute governing wills offers relief from technical defects in a document purporting to be a will by means of a "substantial compliance" principle or a judicial "dispensation power" (see examples in Appendix A). The essence of these laws is not to deem the document to be a "will," but rather to declare that "the document or writing shall be fully effective as though it had been properly executed as the will of the deceased." The document is declared to have the same legal effect as a will. A charitable gift made in the document would not qualify for the enhanced charitable donation tax credit under the ITA because it is not a gift made "by the individual's will". There does not appear to be a policy rationale for treating a charitable gift made in a "near will" differently from one made in an actual will.

Disputes involving either a challenge to the validity of a will or the interpretation of a provision in a will are not always resolved by the court. Alternative dispute resolution, such as mediation or some type of collaborative process, has become a popular means of resolving these disputes. Ontario law, for example, makes mediation of estate disputes mandatory in Toronto, Ottawa and Essex County.

A mediated resolution of the dispute may result in a settlement that gives a charity more than the amount set out in the disputed will. However, since the amount is not a gift made "by the individual's will," the enhanced charitable donation tax credit will not be available, at least to the extent that the settlement exceeds the provisions in the disputed will (Appendix B provides an example based on a mediated settlement recently concluded in Ontario). In choosing to settle, rather than litigate, the charity accepts less than it would have received if it had prevailed before the courts. The CBA Section believes it is undesirable to deny the enhanced charitable donation tax credit for the full amount paid to the charity in this case, as it might inhibit parties from resolving a dispute through an alternative dispute resolution mechanism.

A dispute over the validity or interpretation of a direct beneficiary designation in favour of a charity can likewise be resolved by alternative dispute resolution. However, subsections 118.1(5.1) and 118.1(5.3) - which, on certain conditions, deem the designation to be a gift made by the individual to a charity in the year of death – refers to a payment made to a qualified donee "as a consequence of [the/an] individual's death." In the CBA Section's view, subsection 248(8) should also be amended to provide that an amount paid to a qualified donee pursuant to a legally binding settlement of a dispute pertaining to (i) an individual's will; or (ii) a direct beneficiary designation will be deemed to be an amount paid to such qualified donee as a consequence of the individual's death.

These limitations on access to the enhanced charitable donation tax credit can be overcome by amending subsection 118.1(5) to deem "a transfer to charity made as a consequence of death of an individual" to be a gift made by the individual through their will for the purpose of the subsection.[3]

2. Amending subsection 118.1(5) to give the legal representative of an individual's estate the right to designate all or any part a gift made as *a consequence of death* (under the first proposal) to have been made by the estate.

If subsection 118.1(5) were amended as proposed, the gift would be subject to the ordinary rules permitting the five-year carry-forward of charitable donations. Flexibility in treating one portion of the charitable gift as having been made by the taxpayer in the year of death and the other portion as having been made by the estate would encourage charitable giving by ensuring the maximum possible tax benefit in the circumstances is available. An individual for whom income tax considerations in charitable giving on death are important would not have to predict their income in the year of death. An example illustrating the current rigidity of subsection 118.1(5) is in Appendix C.

To achieve this objective, the CBA Section recommends that under subsection 118.1(5) only the portion of the gift designated by the individual's legal representative in the return for the taxation year in which the individual died be deemed to have been made by the individual immediately before death. The remaining portion of the gift would be considered to have been made by the individual's legal representative and be subject to the ordinary rules respecting charitable gifts.

3. Permitting the legal representative to designate all or part of the Undesignated Gift Portion to be transferred to any testamentary trust created under the individual's will.

This new provision would allow all or part of a gift made by an individual's will that is not subject to the designation referred to above, i.e., the Undesignated Gift Portion, to be subject to a further designation by the legal representative. The Undesignated Gift Portion would be available to be applied against estate income according to the ordinary rules respecting charitable gifts. However, the estate may have insufficient income to utilize the consequential charitable donation tax credit because the will provides for the establishment of one or more testamentary trusts.

Where income-earning estate assets are transferred to a testamentary trust, the estate would have no more income against which the unused portion of the charitable donation tax credit (arising from the Undesignated Gift Portion) could be applied. The testamentary trust would have no access to that unused portion of the charitable donation tax credit in the calculation of its income derived from assets received from the estate. The CBA Section believes it is undesirable from a policy perspective that the unused portion of the charitable donation tax credit would be unavailable by virtue of a specific testamentary scheme set out in the will.

The CBA Section recommends that section 118.1 be amended to allow the legal representative to designate all or part of the Undesignated Gift Portion as a testamentary trust created under the individual's will. Where more than one testamentary trust is created by the will, the allocation could be required to be proportional to the respective values of the assets transferred to the testamentary trusts as between or amongst themselves.

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[3] The extended meaning of "as a consequence of death" in subsection 248(8) will apply to the situations described assuming the reference to "taxpayer" includes "individual" for the purposes of subsection 118.1(5).

4. Deeming a transfer to a registered charity pursuant to the terms of a trust in satisfaction of a capital interest in the trust to be a "gift."

The CRA disallows a charitable donation tax credit for distributions of capital under the terms of a trust to a registered charity if the terms of the transfer to the charity are mandated under the terms of the trust. The transfer is not considered a "gift" but rather a distribution to a beneficiary in satisfaction of an interest in a trust and no charitable donation credit is permitted.

If, however, there is an "element of discretion" on the part of the trustee or legal representative with respect to the transfer to the charity from the trust, the transfer may be considered a gift rather than a distribution of capital. The CRA has had numerous requests for informal interpretations and advance rulings to clarify what it considers to be sufficient "discretion" to convert a distribution in satisfaction of a capital interest in a trust into a gift by the trust or estate. It remains unclear. Terms permitting trustee discretion on the amount or identity of the charity are now being included in will and trust planning solely to ensure tax relief for charitable giving from the trust is available. In other cases, taxpayers and their advisors are unaware that gifts to charity from a trust will not produce a charitable donation tax credit. The requirement for an undefined element of discretion is not only arbitrary, but can present a trap for the unwary, and introduces undesirable uncertainty for the settlor or testator, the trustee or executor, and the charity.

Immediate gifts in a will are not subject to this discretionary requirement. The CBA Section sees no reason why an immediate gift to charity in a will, and one that takes place under the terms of a will at a later time from a testamentary trust or under the terms of an *inter vivos* trust should be denied the donation tax credit. The CBA Section recommends amending the ITA to deem a transfer to a registered charity pursuant to the terms of a trust in satisfaction of a capital interest in the trust to be a "gift."

5. Ensuring that gifts made under the terms of a trust upon the termination of a life interest (including deemed gifts under the fourth proposal) be subject to an amended subsection 118.1(5), with similar designations and the carry- forward of unused amounts.

The CBA Section recommends amending the ITA to ensure that where there is a gift to charity (including a gift under the fourth proposal above), and under the terms of the trust the gift takes place on the termination of a life interest, the portion of the gift designated by the trustee or legal representative will be deemed to be made by the trust immediately before the death of the life tenant, with any Undesignated Portion available to any ongoing or successive trust.

This proposal would address timing difficulties where a deemed disposition on the death of a life tenant may not occur in the same taxation year as the actual gift to charity. For example, there is a deemed disposition on the death of the life tenant of a spousal trust or alter ego trust, or on the death of the last life tenant to die in a joint partner trust. If the charitable donation tax credit is available, but the actual donation is made after the year of death, the charitable donation tax credit is not available to offset the tax liability arising in respect of the deemed disposition. This may occur, for example, if the life tenant dies late in the taxation year of the trust or estate before there is time to make the donation, or if time is needed to liquidate assets to complete the donation.

6. Ensuring that where a registered charity is a beneficiary of a trust and there is a transfer to the charity by a trust that qualifies as a gift under the fourth proposal, the transfer qualifies as a gift only if no charitable donation tax credit is being claimed in respect of a contribution to a charitable remainder trust.

This restriction would prevent "double dipping" that could occur as a result of the CBA Section's fourth proposal where the trust qualifies as a charitable remainder trust.

Currently, if the trust qualifies as a charitable remainder trust, a charitable donation tax credit may be available on the creation of the trust. For example, where there is no power to encroach on capital for non-charitable beneficiaries, the CRA's administrative policy permits a charitable donation tax credit for the present value of a gift to a charitable remainder trust provided the charity is the ultimate beneficiary and there is an intervening life interest. However, it is not always beneficial to the taxpayer to claim the charitable donation tax credit at the time of the transfer to the trust. This would be the case where there is a spousal rollover, or a rollover to an alter ego trust or joint partner and common-law partner trust.

In all these cases, there is a rollover on death or on the contribution of property to the trust, but a deemed disposition on the death of the life tenant or surviving life tenant in a joint partner trust. Where a transfer to the charity occurs, it may not qualify as a gift under current law if there is not sufficient discretion with respect to the transfer to make it a gift. In a worst case, no charitable donation tax credit may be permitted under current law at any time if the trust does not qualify as a charitable remainder trust under the CRA's administrative policy, and the transfer to charity is considered a distribution in satisfaction of a capital interest in a trust. The fourth and sixth proposals above would remedy these difficulties.

We trust that these proposals will assist Finance Canada in its important work. We would be pleased to provide further information or to respond to any questions at your convenience.

Yours truly,

(original signed by Judy Hunter for Wendy D. Templeton)

Wendy D. Templeton
Chair, National Wills, Estates and Trusts Section

APPENDIX A

EXAMPLES OF PROVINCIAL STATUTES WITH "SUBSTANTIAL COMPLIANCE" OR "JUDICIAL DISPENSING POWER"

Saskatchewan - *Wills Act*,[4]

37 The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies:

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.

Manitoba - *Wills Act*[5]

23. Where, upon application, if the court is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

New Brunswick - *Wills Act*[6]

35.1 Where a court of competent jurisdiction is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of the deceased, or

[4] The *Wills Act*, Chapter W-14.1, 1996, Saskatchewan.

[5] The *Wills Act*, C.C.S.M., c. W150, Manitoba.

[6] The *Wills Act*, c. W-9, New Brunswick.

(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the document or writing was not executed in compliance with the formal requirements imposed by this Act, order that the document or writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

Prince Edward Island - *Probate Act*[7]

70. If on application to the Estates Section the court is satisfied

(a) that a document was intended by the deceased to constitute his will and that the document embodies the testamentary intentions of the deceased; or

(b) that a document or writing on a document embodies the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act but provided that the document or writing is signed by the deceased, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

Nova Scotia - *Wills Act.*[8]

Writing not in compliance with formal requirements

8A Where a court of competent jurisdiction is satisfied that a writing embodies

(a) the testamentary intentions of the deceased; or

(b) the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the writing was not executed in compliance with the formal requirements imposed by this Act, order that the writing is valid and fully effective as if it had been executed in compliance with the formal requirements imposed by this Act.

[7] *Probate Act*, c. P-21, Prince Edward Island.

[8] *Wills Act*, R.S.N.S., 1989, c. 505, Nova Scotia.

British Columbia - *Wills, Estates and Succession Act (*not yet in force)[9]

58(3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
(a) as the will or part of the will of the deceased person,

(b) as a revocation, alteration or revival of a will of the deceased person, or

(c) as the testamentary intention of the deceased person.

[9] Bill 4 – British Columbia.

APPENDIX B

MEDIATED SETTLEMENT OF A DISPUTE INVOLVING A CHARITABLE BEQUEST

T, domiciled in Ontario at the time of death, died in 2009, leaving a net estate of $1 million. A few days before death, T purported to revoke a Will made in 1989 (the "1989 Will") and make a new Will (the "2009 Will"). T's net income for 2009 was $150,000 and for 2008 was $250,000.

1989 Will

1. A bequest of $100,000 was left to Jane Smith.
2. Residue of estate was left to Charity A.

2009 Will

1. Jane Smith was appointed as executor.
2. A bequest of $100,000 was left to Charity A.
3. Residue of estate was left to Jane Smith.

When Jane applied for probate of the 2009 Will, Charity A challenged the Will by filing a Notice of Objection alleging that T did not have testamentary capacity and/or that Jane Smith unduly influenced T to make a new Will substantially in her favour. The proceeding was subject to mandatory mediation under Rule 75.1 of Ontario's *Rules of Civil Procedure*. The dispute settled at mediation, with Jane Smith agreeing to give Charity A $400,000 in exchange for Charity A's agreement to withdraw the Will challenge, allowing Jane Smith to complete the probate and obtain the testamentary grant.

Because the 2009 Will contained a charitable gift of only $100,000, the charity was not able to issue a donation tax receipt in excess of that amount. Jane Smith was able to reduce T's tax liability for 2009 to nil. If she had been able to treat the entire $400,000 payment as a charitable gift made in a Will, she would have been able to reduce T's tax liability for 2008 to nil as well.

APPENDIX C

APPLICATION OF SUBSECTION 118.1(5) OF THE *INCOME TAX ACT*

T died in February of 2009, owning a property qualifying as T's principal residence with a date-of-death value of $500,000, as well as a portfolio of fixed income securities with a fair market value of $500,000. T left neither a surviving spouse nor a common-law partner. T's Will provides that the residue of the estate is to be held in trust for T's parent, P, and that all of the trust income is to be paid to P. The trustee is not permitted to make any distributions of trust capital to P. T's Will further provides that on P's death the trust capital is to be paid or transferred to Charity A. Charity A has determined that the fair market value of its remainder interest in the trust is $500,000 and has issued a donation tax receipt in that amount to T's executor.

In the year of death, T's net income was $5,000, consisting only of the income derived from the investment portfolio during the short period in 2009 that T was alive. In 2008, T's net income was $30,000. The sale of T's principal residence creates a pool of capital that generates $60,000 a year for P.

Pursuant to subsection 118.1(5) of the ITA, T is deemed to have made a gift to Charity A in 2009 (assuming CRA will recognise the testamentary trust as a charitable remainder trust). T's executor can apply $5,000 of the donation tax credit to reduce to nil T's net income in 2009 and can apply a further $30,000 of the donation tax credit to reduce to nil T's net income earned in 2008. T's executor is left with an unused donation tax credit of $465,000.[1]

Under the CBA Section's proposed amendment to subsection 118.1(5), T's executor could designate only $35,000 of the donation tax credit to have been made in the year of T's death and to apply the balance of the donation tax credit against the annual net income earned by the testamentary trust established for P until the donation tax credit has been exhausted, the normal five-year carry-forward period, or until P dies, whichever event first occurs.[2]

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[1] Nor is there any surviving spouse or common-law partner who, according to the long-standing policy of the Canada Revenue Agency, would have been able to make use of that unused donation tax credit on the basis that a charitable gift made by a spouse or common-law partner is considered to be a gift by the "family unit" and shareable between the spouses or common-law partners in any proportions, irrespective of the name in which the donation tax receipt was issued.

[2] Pursuant to subsection 104(13.1), the trustee would designate all of the trust income earned in each year to be taxable to the trust, despite its being payable to P under the Will.