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Attn: Policy, Planning, and Legislation Division

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The changes to the *Income Tax Act* introducing the qualifying disbursement regime are significant. We recognize that creating guidance to effectively address the many facets and implications of this new regulatory environment is challenging and will likely take many years of learning, testing, and revising before it can be considered complete. In reviewing this guidance, we have come at it from MakeWay's significant experience with grantmaking, as we believe the experiences of grantors and grantees will offer invaluable lessons for the CRA and the sector more broadly. We encourage the CRA Charities Directorate to continue to solicit feedback on these guidelines, proactively engage grantors, grantees, and monitor the broader sectoral impacts of these changes. In your efforts to understand how these guidelines function for practitioners, which includes grantors and grantees, the CRA has a willing partner in MakeWay. We welcome continued dialogue with the CRA Charities Directorate as we all adjust to these new practices.

### **About MakeWay**

MakeWay is a national charity and public foundation with a vision to enable nature and communities to thrive together. We have a twenty-year history of building strong collaborative relationships with community-led initiatives, predominantly Indigenous communities, and philanthropic funders. We operate the country's largest and most comprehensive shared platform, an innovative model that provides key strategic and administrative supports for community-led initiatives. We have hosted dozens of funding collaboratives, and offer a unique fund model where we direct strategic grantmaking programs and manage a portfolio of community and donor advised funds to advance the visions of our partners.

### **Purpose of Submission**

Our commentary in this document represents the experiences and conversations we have had with grassroots community-led initiatives, grant-makers, and other sector partners recently and over the years.

Our overall assessment of the guidance is that, while it offers some clarity on how funders can meet accountability requirements, it requires strengthening on key subjects, streamlining in some areas, and it must expand to offer more support for grantees.

### **Summary of our recommendations**

- a. Use terms other than grant and grantee as these have established meanings within the sector
- b. Allow charities to retroactively supplement their charitable purposes in a simple manner
- c. Create a section focused on *grants to individuals* to provide answers and resources for potential grantees and recommendations to grantors on what to communicate to potential grantees
- d. Clarify and add detail around the *private benefit* aspects of the guidance

- e. Eliminate the pooled grants section
- f. Clarify the directed donations section to note it applies to public gifts into charities not agreements between charities
- g. Remove references to outside experts and increase the frequency of suggestions to contact the CRA Charities Directorate for advice

## Guidance Commentary

### a. Terminology in relation to grants/grantees

The terms *grant* and *grantee* have well established meanings in the charitable sector unrelated to nonqualified donees. The use of these terms in this guidance will cause confusion and have real costs for many charities who may need to adjust websites, print materials, internal documents, and information systems. We've also heard from community partners that the term *nonqualified donee* is unsatisfactory.

We recommend language other than grants to grantees or non-qualified donees.

### b. Implications to charitable purposes for many foundations

Many foundations have only a single charitable purpose: to fund qualified donees. With respect to *grants to grantees*, this presents an obvious issue; it is rather difficult to further this purpose by granting to a nonqualified donee. Since charitable purposes are an important piece of governance for charities, many will rightfully engage their boards and/or membership to determine if they wish to provide *grants to grantees*. Therefore a blanket administrative change to charity purposes instituted by the CRA without direction from each charity is not feasible. However, to support active grantmaking under this guidance, charities with the purpose to fund qualified donees should receive some special consideration from the CRA.

We recommend the CRA provide a *simple process* for charities to supplement their purposes to include issuing qualifying disbursements, with retroactive application to the date of the final guidance release.

### c. Significant considerations regarding Grants to Individuals

There are enough special considerations related to granting to *individuals* as a distinct category of *Non-qualified donee* to warrant a section in the guidance dedicated to this subject. From our perspective, these are not limited to but include:

#### ***Taxes***

For many individual *grantees*, this may be their first time receiving income for their charitable work. To avoid unintended harms in these and other *grants to individuals* instances, grantees must be aware of the taxation implications *in advance* of any decision to accept a *grant*. The guidance should provide answers, or links to other areas of the CRA website, to address questions such as:

- What type of income is a *grant* for the purposes of individual tax filing?

- How are expenses for charitable activities reported on personal income taxes?
- What taxation forms are required when receiving a *grant*?

As a document that also offers practical advice to *grantors*, the guidance should include the recommendation that charities disclose to potential grantees that there may be tax implications associated with receiving a grant and direct them to an appropriate CRA resource. Grantors should also indicate to potential grantees that *grants* may impact access and/or amounts related to assistance programs depending on provincial policy.

### ***Privacy & Data Use***

Grantees should be aware of any privacy and/or data use implications of accepting a *grant* as an individual. The guidance should address these matters directly, noting where and how information regarding individuals receiving grants will be available, for example, the publicly available *Nonqualified donees worksheet* on the CRA website. Further, CRA should recommend that grantors disclose this to potential grantees in advance of any agreements, similar to the taxation recommendation above.

As well, the safeguard in Section 80 is insufficient. Charities can submit a special request to the CRA that certain information not be made available to the public; however, for this to be an effective method, the CRA would have to turn around such requests very quickly and provide confirmation to the charity in advance of the *grant* being issued.

### ***Employment***

The changes to the *Income Tax Act* have introduced the possibility of a new type of legal relationship between charities and individuals. *Own activities* provides a certain safeguard for charity employees, charities must hire staff to conduct *their* work and, in cases when contractors are used, are responsible to the CRA for the *employee vs. self-employed determination*. This new grantee relationship does not have the same legal requirements. It is important that the CRA clarify how *grants* interact with employment law and ensure that the guidance does not create pathways to undermine employment rights for workers or would-be workers in charities. It must explicitly note how *grants to grantees* cannot be used as an outsourcing mechanism, whereby current or new employment positions are replaced with grantee relationships.

We recommend creating a *grants to individuals* section of the guidance to address taxation, privacy & data, employment, and other topics related to individuals receiving grants. This section should also include recommendations to grantors to communicate these matters to potential grantees.

#### **d. Making explicit the nature of private benefit**

In our experience, the considerations related to unacceptable *private benefit* are poorly understood in the charitable sector. With for-profits and individuals now able to accept charitable dollars, this lack of understanding may lead to even more issues. Therefore, it is important that the guidance more clearly articulate risks related to *private benefit*. While grants to for-profits and non-arm's length parties are noted as high-risk in the 5.1 chart *assessing risk*, there are other places in the guidance where the

possibility of unacceptable *private benefits* seems downplayed or miscommunicated. Here is one such instance.

In section 4.0, item 17 offers some examples of eligible grants. Example 3 is described as follows:

*A charity with purposes to protect the environment provides grants to grantees who are graduate students looking to launch non-profits that deliver charitable programs. Grant resources include cash, financial administration, and support from the charity's employees. The charity can also grant intellectual property assets, provided any private benefit concerns such as non-charitable use of the profits are addressed.*

In this example, the grant recipients are individuals receiving dollars to *launch non-profits*. They are not delivering programs with these funds - intention to deliver programs is not an activity that furthers the originating charity's purpose to protect the environment. Launching a nonprofit is not a charitable activity regardless of charitable programs that might take place after the launch, because it is an unacceptable *private benefit* for the nonprofit. Here, the provision of cash and staff time to a nonprofit is not mentioned as a possible *private benefit*, this omission is made worse as the intellectual property and profit aspects appear as the only *subjects* of concern with respect to *private benefit*.

Elsewhere in the guidance, *private benefit* is referred to in the context of charitable registration and public benefits. And throughout, the guidance refers to 'concerns' being 'addressed' rather than the possibility of *private benefit* being analyzed and mitigated, or even how it might make a *grant* non-compliant. The combined effect of these treatments of *private benefit* gives the reader the overall impression that it is a minor aspect of the *gifts to grantees* guidance. Yet we feel it is one of the more crucial components of guidance on *grants to grantees* and should be clearly articulated within this guidance regardless of other resources on the subject.

We recommend more space be dedicated to describing *private benefit*, how to assess it, and when it is unacceptable.

#### **e. Adding unnecessary confusion regarding Pooled grants/funding**

Section 7.7 of the draft guidance dealing with pooled grants is confusing and unnecessary. MakeWay is part of, and hosts, many different models of pooled grants, but the most common model occurs when charitable and/or non-charitable funders provide financial gifts to a single *host* charity in support of a particular granting program. This *host* charity serves as the legal entity that enters into agreements with recipients of funding from the pooled fund. The introduction of *grantees* to this equation does not constitute any new risk unusual to *pooled grants* and/or not already covered elsewhere in the guidance.

The draft guidance seems to offer an interpretation of a *pooled grant* where the 'pooling' takes place at the grantee level rather than at a *host* charity. In such instances, these should be treated in the guidance as they exist in the real world, each as separate *grants*. Should CRA wish to offer some clarification about sharing paperwork or processes, this could be mentioned in the accountability tools section; however, in our view there is no need to include a *pooled grants* section *provided there are sufficient amendments* to the *directed donations* section as per below. The inclusion of this pooled grants section may do more to discourage collaboration than promote it.

We recommend eliminating the pooled grants section.

**f. Directed donations language unclear**

The draft guidance section 7.4 *Directed donations and acting as a conduit* does not provide clarity on this subject in a manner that will assist charities. It seems from the guidance language, that this section is intended to address contributions *from the public* that are directed to support a pre-determined individual beneficiary. If this is the purpose of this section, it should be more explicitly articulated. Without this clarification, the guidance may unintentionally disrupt what should become a very common practice for *grant to grantees*: grantees named in funding agreements between charities.

When a foundation makes a program-restricted contribution to a charity, it often comes with an agreement that includes requirements to adhere to pre-determined budgets. Naming grantees in these agreements between two charities is fundamentally different than a directed donation from the public. Without the ability to name grantees in these documents, grantee organizations become structurally disadvantaged; their name and works can be used in the application to secure contributions, but they have no legal protection that they will receive any of these funds once they are awarded.

The guidance should note that this section pertains to contributions from individuals to charities, not agreements between registered charities. And further, that the naming of a *grantee* in an agreement between charities does not constitute a *directed donation*.

We recommend adding greater clarity to the *directed donations* section to note especially that it does not pertain to agreements between charities.

**g. “Experts” and CRA support**

In a few places, the guidance recommends that charities consult ‘experts’ with respect to the compliance and operational considerations of providing *grants to grantees*. But there probably aren’t any experts on this subject just yet. We believe that the CRA has an important role to play in the rollout of these guidelines and *they* are the subject-matter experts on their guidance. In the guidance, the CRA should promote their availability to support charities and grantees as they navigate this new regulatory landscape.

We recommend references to ‘experts’ be replaced with the recommendation to contact the Charities Directorate throughout the guidance.