THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 23, 2012

Via email: FINA@parl.gc.ca

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

Dear Mr. Rajotte:

Re: Bill C-377 – *Income Tax Act* amendments (requirements for labour organizations)

We are writing on behalf of the Canadian Bar Association's Privacy and Access Law Section, Constitutional and Human Rights Law Section, and the Pensions and Benefits Law Section (CBA Sections) to provide further comments on Bill C-377, as requested at the Finance Committee hearing on October 25, 2012.

The CBA Sections would like to reiterate our opposition to Bill C-377. The Bill is fundamentally flawed and contains serious concerns from a privacy, constitutional and pensions law perspective. These issues are outlined in our September 17, 2012 letter (attached).

Members of the Finance Committee requested drafting language for possible amendments to the Bill. The CBA Sections support an amendment specifically exempting information protected by solicitor-client privilege. In addition, the following suggested amendments ensure that the Bill would not adversely impact employee benefit plans. These plans are separate entities from trade unions and provide many Canadians with important benefits, such as pensions, prescription drugs, disability benefits and skills training. The simplest way to exclude these plans is to eliminate the definition of "labour trust". In the alternative, a less comprehensive route would be to add an exemption clause to section 149.01. The amendments proposed in this letter are not comprehensive and cannot be interpreted as an endorsement of the Bill. The CBA Sections maintain that the Bill should not be adopted, even with these proposed changes.

The proposed exemption clause at sub-section 149.01(5) would read:

> 149.01(5) The definition of "labour trust" excludes any trust or fund that is an "excluded entity", and also excludes any trust or fund that would not be a "labour trust" but for the fact that one or more "excluded entities" (and therefore persons with beneficial

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interests in such excluded entities) have a direct or indirect beneficial interest in such trust or fund.

"excluded entity" means:

(a) a plan, trust or fund referred to in paragraph 6(1)(i) or paragraph 6(1)(d) or (f) of the *Income Tax Act*;

(b) a trust described in paragraph 149(1)(y) of the *Income Tax Act*;

(c) an employee trust;

(d) an arranagement the purpose of which is to provide education or training for employees of an employer or the members of a Labour Organization to improve their work-related skills and abilities;

(e) a trust or fund that is (or is governed by) an agent of Her Majesty in right of Canada or a province, a corporation not less than 90% of the shares (except directors' qualifying shares) or of the capital of which is owned by one or more persons each of which is Her Majesty in right of Canada or a province, a registered pension plan, a pooled registered pension plan, a retirement compensation arrangement, a deferred profit sharing plan, an employee benefit plan, an employees profit sharing plan, an employee trust, an employee life and health trust, a health and welfare trust, a trust or fund to provide training or education for employees, a trust or fund to provide income continuance or other assistance to employees with disabilities, a trust or fund pursuant to an act of Canada or a province establishing a pension plan, and any other trust or fund operated exclusively for the purpose of administering or providing retirement, superannuation or pension benefits or employee benefits;

(f) any entity described in paragraph 149(1)(o.1), (o.2) or (o.4) of the *Income Tax Act* or any person or entity described in subparagraph 149(1)(o.2)(iv) of the *Income Tax Act* including for greater certainty a "prescribed person" for the purposes of that subparagraph;

(g) a registered charity or a non-profit organization described in paragraph 149(1)(l) of the *Income Tax Act* (other than a labour organization);

(h) an authorized subsidiary of a corporation that was established pursuant to an act of a province and that administers a pension plan or other entity permitted under an act of a province , or an investment entity established by such an authorized subsidiary, provided that such authorized subsidiary or investment entity is permitted by an act of a province;

(i) a trust or fund established by or arising by virtue of an act of a province or an order or regulation made thereunder;

(j) a plan, trust or fund which is governed by a board whose members are appointed by both a Labour Organization and an employer or employers;and

(k) a prescribed entity.

These proposed amendments only address the very specific issue of who is captured by the Bill. The Bill would still require excessive reporting and disclosure of personal information. The CBA Sections are of the view that legislation requiring public disclosure of salaries and other personal information of employees of independently governed organizations should be carefully considered.

In addition, the Bill interferes with the internal administration and operations of a union, which the constitutionally protected freedom of association precludes.

The CBA Sections appreciate the opportunity to comment on Bill C-377. Even with the proposed amendments, the Bill remains fundamentally flawed. Given the range of concerns we have outlined, we suggest that the Bill not be passed into law.

Yours truly,

(original signed by Noah Arshinoff for Sheryl Beckford)

Sheryl Beckford
Chair, Constitutional and Human Rights Law Section

(original signed by Noah Arshinoff for Mandy L. Woodland)

Mandy L. Woodland
Chair, Privacy and Access Law Section

(original signed by Noah Arshinoff for Michael Mazzuca)

Michael Mazzuca
Chair, Pensions and Benefits Law Section

cc: Russ Hiebart, M.P
Via email: russ.hiebert@parl.gc.ca

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

September 17, 2012

Via email: FINA@parl.gc.ca

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

Dear Mr. Rajotte:

Re: Bill C-377 – *Income Tax Act* amendments (requirements for labour organizations)

We are writing on behalf of the Canadian Bar Association's Privacy and Access Law Section, Constitutional and Human Rights Law Section, and the Pensions and Benefits Law Section (CBA Sections) to comment on Bill C-377, *An Act to amend the Income Tax Act,* requirements for labour organizations.

The CBA is a national association representing approximately 37,000 jurists, including lawyers, Québec notaries, law teachers and students from across Canada, with a mandate that includes seeking improvements in the law and the administration of justice, and promoting equality in the law. The CBA Sections consists of lawyers specializing in privacy and access law, constitutional law, and pensions and benefits law from every region in Canada.

As a threshold statement, it is unclear what issue or perceived problem the Bill is intended to address. The Bill mandates greater public disclosure of details of the financial operations of labour unions, and limitations on their political and lobbying activities using mechanisms that could be problematic from a constitutional and a privacy perspective.

The CBA Sections have serious reservations about the Bill from a procedural point of view. The Bill could have a pronounced impact on the operations of labour unions, yet these processes are embedded in amendments to the *Income Tax Act.* In our view,it is inappropriate for operational restrictions to be brought forward as amendments to taxation legislation.

Privacy Concerns

Bill C-377 lists financial disclosure procedures that would be required by "every labour organization and labour trust." It is unclear whether the requirements to disclose salaries and benefits paid to officers, directors, trustees, employees and contractors would require particularized disclosure or global disclosure of all payments in these categories. To the extent that the Bill would require particularized disclosure, it obliges disclosure of personal information which is normally considered among the most sensitive – financial information and information about political activities or political beliefs. The ambiguity in the language in section 149.01(3)(b)(vii) is of concern, because it is not clear whether the statement of time spent on political activities must be particularized. Even if more generalized disclosure is envisaged, for smaller organizations this could result in a direct privacy impact because it may be obvious to whom the information relates. The basket clause at 149.01(3)(b)(xx) authorizing further statements to be required by regulation ("any other prescribed statements") raises the specter that additional disclosure requirements may be imposed by regulation.

Without further clarity on the underlying problem the Bill is intended to address, the Bill lacks an appropriate balance between any legitimate public goals and respect for privacy interests protected by law. The Bill appears to directly target activities protected by the *Canadian Charter of Rights and Freedoms* by requiring disclosure of time spent on political activity. Privacy is recognized as a fundamental constitutional right under Canadian law, and this Bill has the potential to invite constitutional challenge and litigation.

While some government and public body employees in a few jurisdictions are now subject to the privacy-related impact of public sector disclosure legislation, the extension of this Bill's privacy impact beyond the public sector to those employed by independently governed organizations raises serious concerns. The CBA Sections are of the view that any legislation requiring public disclosure of salaries and other personal information of employees of independently governed organizations should be carefully considered.

The definition of "labour organization" in section 149.01(1) of the Bill would encompass any organization "formed for purposes which include the regulation of relations between employers and employees". This definition could potentially extend to employer organizations or parity committees. While union dues are deductible, the situation for unions is not distinguishable from other employers who may deduct the pay and benefits offered to employees. Any distinction between union members' alleged interests and rights to know all the details of their union's expenses (including personal information of their employees) and that of shareholders to know similar details about a corporation's activities (whether public or privately owned), is not immediately obvious.

Costs

Federal and provincial labour legislation already imposes obligations on labour unions to publish or make available regular financial statements to their members, and some of those obligations are quite extensive. Labour organizations operate for the benefit of their membership and in this way more closely resemble that of a closed corporation. The governance and transparency of the organization should be a matter of general concern to its membership, not the public at large.

The additional cost of administration to meet the Bill's requirement would be significant. Unions could be forced to raise dues or reduce services to their members. If dues are raised, unions may in turn seek higher wages to compensate members, potentially resulting in increased costs for

employers. Finally, the federal government could also be subject to significant new costs to administer its own obligations under the Bill.

Constitutional Concerns

The Bill imposes requirements that are of concern from a constitutional law perspective. Section 149.01(3)(b)(ix)-(xx) would require labour organizations to express statements reflecting a wide range of disbursements that go beyond any normal statement of disbursements that a labour organization needs to express publicly. In particular, the requirements that the labour organization file a statement detailing its disbursements for political activities, lobbying activities, organizing activities and collective bargaining activities could be unconstitutional, counter to the *Charter's* protection of freedom of expression under s. 2(b) and freedom of association under s. 2(d).

The Bill interferes with the internal administration and operations of a union, which the constitutionally protected freedom of association precludes, unless the government interference qualifies as a reasonable limitation upon associational rights. It is unclear from the Bill what the justification is for these infringements.

As a result, the CBA Sections recommend deleting clauses 149.01(3)(b)(ix)-(xx) and deleting any provision that may hinder the internal administration of a union.

Impact on Pension and Benefit Plans

Several aspects of the Bill are of concern from a pension and benefits law perspective. The Bill's definition of "labour trust" includes "a trust or fund…that is established or maintained in whole or in part for the benefit of a labour organization, its members, or the persons it represents." This definition would capture any pension or benefit fund that has any unionized beneficiaries, including some of the country's largest plans in the public and quasi-public sectors.

The disclosure requirements of the Bill are broadly worded and seem to require disclosure of any expenditure over $5,000, and not limited to those in the list of specific categories. Use of the word "including" implies that this is not an exhaustive list. The plain reading of the Bill is that any transaction greater than $5,000 must be disclosed. Many pension and benefit payments exceed this amount, including commuted value payments, death benefits, life and health insurance, and accidental death and dismemberment insurance. The Bill requires disclosure of the name and address of the person to whom these payments are made and it is quite possible that requiring that the purpose and description of the payment be disclosed will require the disclosure of sensitive medical and financial information.

In addition, the statement must include the purpose and description of the transaction, and the amount that has been paid or received. Investment managers at a large pension fund might enter into thousands of transactions per year. The disclosure required will be staggering, and there will be significant compliance costs. This is especially problematic as many pension funds are currently struggling with low interest rates and a fragile world economy. The disclosure and publication of this amount may also make it difficult for pension plans to retain professional advisors, as some advisors may not be comfortable with their fees being disclosed, and professional asset managers will likely be very uncomfortable with their investment decisions being publicly available. Furthermore, these funds are already subject to significant public disclosure under provincial labour and pension legislation and under existing provisions of the *Income Tax Act*. For example, section 93 of Ontario's *Labour Relations Act 199,* requires administrators of plans with unionized

beneficiaries to file an annual statement with the Minister of Labour, and to make that statement available to any union member who requests it.

Finally, from a pension and benefits standpoint, the legislation appears overbroad. If the purpose of the Bill is to improve union transparency and accountability, it does not make sense that it will require disclosure from organizations, such as pension funds, which are not funded by union dues and not directed by unions.

The CBA Sections appreciate the opportunity to comment on Bill C-377. Given the range of concerns we have outlined, we suggest that the Bill not be passed into law.

Yours truly,

(original signed by Noah Arshinoff for Sheryl Beckford)

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