submission

SUBMISSION

TO THE

STANDING COMMITTEE ON FINANCE

RE: BILL C-377

An *Act to Amend the Income Tax Act*

(Requirements for Labour Organizations)

OCTOBER 2012

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OVERVIEW

Under Bill C-377, trade unions, labour organizations and labour trusts will be compelled to assemble and make public extensive information about their internal workings and affairs. While the onerous new obligations are said to be necessary for income tax purposes, no other legal entity – profit, non-profit or charitable – will be subject to the same costly and invasive requirements.

The Canadian Foundation for Labour Rights submits that Bill C-377 is a thinly disguised anti-union measure, designed to upset the balance of power in collective bargaining relationships across Canada. Bill C-377 not only intrudes on the provincial field of labour relations and violates the privacy rights of third parties, it interferes with the freedom of workers to associate, to organize, and to meaningfully advance collective goals with their employers. The main provisions of the bill are based on legislation from the United States, where respect for collective bargaining rights is much different than in Canada. Unionization rates in the U.S have dropped to historic lows compared to Canada. This Committee should recommend that the Bill be rejected by the House of Commons.

CFLR

The Canadian Foundation for Labour Rights (CFLR) is a national organization established to create public awareness and understanding of the history and role of labour rights as an important means to strengthen democracy, equality and economic justice. Freedom of as-

sociation and free collective bargaining are fundamental human rights protected by constitutional and international law. The CFLR promotes education, research and study regarding labour rights as a critical component of human rights.

BILL C-377 AND LABOUR RELATIONS

Under the *Constitution Act*, 1867, labour relations are presumptively an area of provincial jurisdiction as matters dealing with property and contractual rights.[1] As an exception, the federal government may assert labour relations jurisdiction over industries that are interprovincial in nature or which otherwise fall under another field of federal competence. Bill C-377 proposes to amend the *Income Tax Act* (ITA) by imposing obligations on all trade unions and labour organizations across Canada, regardless of whether or not they are certified in industries that exclusively fall under federal jurisdiction. As legislation primarily directed at labour relations, Bill C-377 is an unconstitutional intrusion into an area of exclusive provincial authority.

While the federal government has the jurisdiction to pass legislation dealing with income tax matters, including legislation that affects trade unions, it cannot introduce laws that purport to deal with taxation but in fact are designed to regulate labour relations. The Supreme Court of Canada has said that a law falls under provincial jurisdiction if the purpose of the provision is most closely related to a provincial head of power.[2] For several reasons, it is evident that the purpose of Bill C-377 – or its "pith and substance" – is to affect labour relations, not taxation.

First and foremost, the proposed amendments are not directed at the legitimate differences between trade unions and comparable legal entities under the *Income Tax Act*, such as charities, professional asso-

1 *Constitution Act*, 1867, section 92(13). See, e.g., Toronto Electric Commissioners v. Snider, [1925] A.C. 396; Montcalm Construction Inc. v. Minimum Wage Commission (1978), [1979]1 S.C.R. 754; and Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, 2009 SCC 53

2 Reference Re *Employment Insurance Act*, [2005] 2 SCR 669, at para. 8, and numerous cases cited therein.

ciations, and non-profit organizations. All are exempt from paying taxes under the ITA and all have different reporting requirements to the Canada Revenue Agency.[3] But these requirements are primarily designed to ensure the organization satisfies or meets its tax-exempt definition. For trade unions, there is generally no question about their legal status, and accordingly no reporting requirements were previously applied.

MP Russ Hiebert, the sponsor of Bill C-377, has declared that the purpose of the bill is "to increase transparency and accountability" in labour unions. Mr. Hiebert suggests that this is necessary because unions receive "generous public benefits".[4] Yet the detailed information reporting that would be imposed on trade unions under Bill C-377 is vastly more onerous and costly than that required for other tax-exempt organizations that receive the "public benefit" of tax-exempt status under the *Income Tax Act*. Mr. Hiebert has offered no explanation or rationale for this discrimination towards trade unions.

In fact, non-profit organizations such as professional associations do not have to file any information returns under the *Income Tax Act* if they own less than $200,000 in assets and do not receive taxable dividends, interest or royalties in excess of $10,000.[5] Bill C-377, on the other hand, applies the same demanding disclosure obligations on all trade unions, regardless of size. And even when information returns are required, the CRA only asks non-profit organizations to file a simple two-page form.[6] This is no comparison to the extensive information return that will be imposed on unions, which will likely be hundreds of pages long.[7] By way of comparison, this means that professional associations that collect over $100-million in membership fees only have to file a two-page return with CRA, while a small union

3 *Income Tax Act*, sections 149(7)(non-profit corporations); 149(12)(non-profit organizations and associations); and 149.1(14) (charities).

4 Statement and Questions & Answers by Member of Parliament Russ Hiebert, accessed on his website www.c377.ca.

5 *Income Tax Act*, s. 149(12)

6 NPO Information Return, CRA Form T1044

7 As discussed later in this Brief, Bill C-377 is based on recently adopted reporting requirements for unions under the LMRDA in the United States. Unions in the U.S. have found that their information returns are several hundreds of pages long, with all itemized disbursements and statements of activities broken down into arbitrary categories. The information return for one union was more than 800 pages. See Scott Lilly, Beyond Justice: Bush Administration's Labor Department Abuses Labor Union Regulatory Authorities, Center for American Progress (December 2007) at p. 7.

representing 80 janitors with less than $25,000 in dues will be put to substantial cost in producing and filing an extensive information return.[8]

The other critical difference between how trade unions and professional associations would be treated under the *Income Tax Act* is public disclosure. Under Bill C-377, the information returns filed by trade unions – including practically every expenditure as well as the salaries of all union employees, from the receptionist to the president - would be posted online by the CRA for anyone to read.[9] Professional associations and other non-profit organizations are not subject to any public reporting provisions whatsoever. Again, this discriminatory treatment of unions is not explained by Mr. Hiebert.

The *Income Tax Act* does permit the CRA to publicly disclose certain information about charities. But most of the Charity Information Return is kept confidential by CRA, and the only data subject to public disclosure are aggregated financial statements. Further, the *Income Tax Act* does not require the CRA to disclose a charity's financial information; it is simply authorized to do so upon request.[10] Under Bill C-377, all information about trade unions must be posted online "in a format that allows for word searches to be performed and for cross-referencing of data."[11]

The purpose behind public disclosure of charities' information is to promote charitable giving in Canada by ensuring transparency for potential donors. There is no other legal means by which donors can learn about the financial affairs of charities. The situation is very different for union members, the vast majority of whom already have access to audited financial information about their unions. This is a matter of law in nearly every provincial labour relations statute in Canada.[12]

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8 The 2012 Audit Committee Report of the Law Society of Upper Canada shows the organization collected over $166-million in membership dues and levies.

9 Bill C-377, s. 149.01(4).

10 *Income Tax Act*, s. 241(3.2) and Registered Charity Information Return, CRA Form T3010. Also see explanation of the charity reporting requirements in D. Bourgeois, The Law of Charitable and Not-for-Profit Organizations, 3rd ed (Toronto: Butterworths, 2002) at 162-162

11 Bill C-377, s. 149.01(4).

12 See Appendix A for list of provincial labour relations statutes dealing with disclosure obligations of unions to their members.See Labour Relations Code, RSBC 1996,

The fact that provincial labour laws regulate disclosure of union information to union members underscores the point that Bill C-377 is really all about labour relations, not tax policy. Given its content, it is apparent that Bill C-377 is truly about enforcing an anti-union agenda across every jurisdiction in Canada, while trampling on provincial jurisdiction in the process. The CFLR submits that the Standing Committee should reject this manifestly unconstitutional bill.

ACCOUNTABILITY AND TRADE UNIONS

The sponsor of Bill C-377 has expressed concerns about the "transparency and accountability" of trade unions. [13] These comments suggest that Mr. Hiebert and other supporters of the bill are unaware of how trade unions actually operate and function.

Unions are inherently democratic organizations, holding conventions regularly to elect their leadership and vote on other important union business, such as constitutional amendments, dues increases, significant spending decisions, and so on. As the Supreme Court of Canada has observed, unions are "self governing and democratic institutions", and "the entire process of union representation carries the hallmark of democracy."[14] Very few other organizations in society are managed in accordance with democratic principles.

Consistent with the democratic nature of unions, all members are allowed to see audited financial statements. While this is a requirement in most labour relations statutes in Canada,[15] practically every union constitution already includes a provision making financial statements available to its membership. The argument that Bill C-377 will make

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c. 244, s. 151; *Labour Relations Act*, CCSM c. L10; *Labour Relations Act*, 1995 S.O. 1995, c. 1, s. 132.1; Labour Code, RSQ c. C-27, s. 47.1; *Industrial Relations Act*, RSNB 1973, c. I-4, s. 139(4); *Trade Union Act*, 1989, c. 475, s. 76; *Labour Relations Act*, RSNL 1990, c. L-1, s. 143; and Canada Labour Code, RSC 1985, c. L-2, s. 110

13 Statement by Member of Parliament Russ Hiebert, accessed on his website www.c377.ca.

14 Lavigne v. Ontario Public Service Employees Union,[1991] 2 SCR 211 at 302 and 338.

15 See Appendix A for list of provincial labour relations statutes dealing with disclosure obligations of unions to their members. Note 12, supra.

unions more transparent or accountable to union members is therefore simply ill-founded.

However, it is true that Bill C-377 will make the financial affairs of unions more transparent to other "interested parties", namely employers and consultants hired for 'union-busting'.[16] It would seem that the real motivation behind Bill C-377 is making confidential union information easily available to employers and anti-union organizations. Given that union members already have access to union information, there can be no other reason for making a union's financial affairs public. As with other organizations, unions and union members should be entitled to privately manage their own affairs, without disclosure to others who may want to use that information unfairly or to gain strategic advantage.

The CFLR calls on the Standing Committee to recognize that unions are democratic organizations, fully accountable to their membership. Unfair or discriminatory provisions that seek to impose burdens on unions that do not apply to other types of organizations, or which interfere with autonomous and democratic union governance, would be incompatible with the right to freedom of association.

PRIVACY RIGHTS

Bill C-377 represents an unprecedented intrusion into the privacy of individuals who work for trade unions. It also targets businesses that provide unions with goods or services. Under the proposed law, unions will be required to disclose the name and address of every employee or business that receives more than $5,000 from the union in a fiscal year. No other entities in Canada, including governments, are exposed in such a wide-ranging fashion.

16 The Fraser Institute published a paper in 2006 called, Union Disclosure in Canada and the United States. At page 3, the authors note that public disclosure of unions' financial information will allow "interested parties" to "gauge the financial health" of particular unions. The paper, no doubt one of the inspirations for Mr. Hiebert's bill, notes at page 5 that public disclosure of union information will lead to "labour market flexibility", code language for lower unionization rates.

Earlier this year, Treasury Board Minister Tony Clement told Parliament that the government could not disclose the names and exact salaries of government employees because it would violate the *Privacy Act*.[17] Yet Bill C-377 would not only reveal this information for every single person employed by a union anywhere in Canada, it would also be mandatory to divulge and publish online their home addresses. (The CFLR understands that Mr. Hiebert is belatedly proposing to amend the Bill by removing the address disclosure requirements for individuals. This does not change the fact that Mr. Hiebert would see the online public disclosure of the income of every union employee in Canada, while the chief of staff to the Prime Minister can rely on the *Privacy Act* to protect disclosure of his own salary.[18])

Other Canadians enjoy the right of privacy with respect to their personal salaries and home addresses. Why should union employees be treated differently? It is difficult to justify such a discriminatory measure, unless the goal is to create a deterrent for people working for unions.

Bill C-377 would also require unions to disclose "the purpose and description of the transaction" for every business or contractor that provides goods or services in excess of $5,000. There are no exceptions to this requirement, such as can be found in the *Access to Information Act*. Under s. 20(1) of the *Access Act*, the government is required to withhold confidential financial and commercial information of private businesses. Bill C-377 contains no such protections, and would see potentially sensitive or competitive pricing information of third parties made public. By directing only unions to divulge such information, Bill C-377 again treats trade unions in a discriminatory manner by targeting others that associate or do business with them.

Another side effect – or perhaps an intended consequence – of Bill C-377 would be the mandatory disclosure of the nature of any "trans-

17 Hansard, 41st Parliament, 1st session (January 30, 2012) at 4562. On the same date, House Leader Peter Van Loan even declined to provide the salary of the Prime Minister's chief of staff, indicating that it was being withheld "in accordance with the principles of the *Access to Information Act* and the *Privacy Act*." See p. 4561.

18 Hansard, 41st Parliament, 1st session (January 30, 2012) at 4561.

action" between a trade union and its legal counsel. This would constitute a flagrant violation of solicitor-client privilege, a tenet of the Canadian legal system that is described by the Supreme Court of Canada as "a principle of fundamental justice and civil right of supreme importance in Canadian law".[19] Again, it is understood that Mr. Hiebert is proposing to amend this aspect of the Bill by excluding solicitor-client information from the mandatory disclosure rules. But the amended Bill would still require "a statement of disbursement on legal activities". This would see unions forced to publicly disclose the fact and extent to which legal counsel has been consulted. This type of disclosure, in and of itself, may constitute a violation of solicitor-client privilege.

The CFLR submits that, if passed, Bill C-377 would represent an unprecedented statutory violation of the right to privacy. Needless to say, there are no comparable provisions in the *Income Tax Act* for any other type of entity or organization. There can simply be no justification for interfering with such important legal rights under the guise of tax policy.

IMPACT ON COLLECTIVE BARGAINING AND FREEDOM OF ASSOCIATION

Bill C-377 not only violates the division of powers under the *Constitution Act* of 1867, it also infringes on freedom of association, as guaranteed by s. 2(d) of the *Charter of Rights and Freedoms*. The Supreme Court of Canada has recognized that freedom of association also encompasses the right to free collective bargaining.[20] The CFLR submits that Bill C-377 is specifically designed to make it harder for unions to organize and engage in collective bargaining. This unjustified and substantial interference with the freedom of association would not withstand *Charter* scrutiny.

19 Lavallee, Rackel and Heintz v. Canada (Attorney General), [2002] 3 SCR 209, at para. 36

20 Health Services & Support Facilities Subsector Bargaining Assn v British Columbia, 2007 SCC 27 ["B.C. Health Services"] at paras. 2 and 35

What is clear is that Bill C-377 was modelled on United States legislation used during the Bush years as a "tool for harassing" workers.[21] The *Labor-Management Reporting and Disclosure Act* (LMRDA) was first passed in the U.S. in 1959. As with financial disclosure obligations found in provincial labour relations statutes in Canada, the original purpose of the LMRDA was to ensure financial accountability of unions to their members. But in the 1990s, Republican House Leader Newt Gingrich suggested that the law could be used to impose burdensome reporting requirements on unions. In his view, this would "weaken our opponents and encourage our allies."[22] The first President Bush could not pass this legislation before losing to Bill Clinton, but the concept was revived following the election of President George W. Bush. In 2003, the U.S. Labor Department introduced onerous new reporting requirements for unions. According to Grover Norquist, a U.S. Republican activist, this was a good thing because "every dollar that is spent on disclosure and reporting is a dollar that can't be spent on other labour union activities".[23]

The Bush reforms in 2003 required U.S. unions to itemize every expenditure over $5,000 and create a breakdown of money spent on different arbitrary categories of activities such as "representational activities", "political and/or lobbying activities", "union administration organizing activities", and so on.[24] These provisions sound familiar because they are essentially the same as those found in Bill C-377. Mr. Hiebert is attempting to transpose all of these U.S. provisions directly into Canadian law. The CFLR submits that a U.S.-style approach to labour relations policy is inconsistent with Canadian history, values and constitutional law.[25]

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21 "Labour Dept. Accused of Union Sabotage", Washington Post (December 11, 2007), quoting U.S. Senator Edward Kennedy

22 Scott Lilly, Beyond Justice: Bush Administration's Labor Department Abuses Labor Union Regulatory Authorities, Center for American Progress (December 2007) at p. 4

23 Lilly, supra, at p. 8.

24 These categories were included by the Bush Labor Department in the 'LM-2' reporting forms for unions. See Lilly, supra, p. 7.

25 The history of U.S. unionism is different from Canada's experience. Canadian law also embraced the "Rand formula", an approach to labour relations policy that was never adopted in the U.S. It is also worth pointing out that the U.S. LMRDA is in fact a labour relations statute, not a tax law, underscoring the argument previously made that Bill C-377 is in pith and substance about labour relations.

The CFLR also notes that the Government of Canada recently released its Red Tape Reduction Action Plan. The stated objective of the plan is to reduce regulations and "administrative burden costs" for businesses.[26] It is ironic that at the same time that the Government is cutting red tape for corporations, it is seriously entertaining a bill that will significantly increase red tape and administrative costs and burdens for unions. Given the many discriminatory and exceptional elements in Bill C-377, there can be little doubt that the proposed law is a thinly disguised anti-union measure.

Aside from imposing unnecessary costs on trade unions, Bill C-377 will also compel unions to provide extensive information to employers or consultants hired to oppose organizing drives. The detailed information can be used by employers to determine how much money a union has set aside for collective bargaining, how much was spent on strategic advice or services (including privileged legal advice) and why, and the amount of money set aside as a 'strike fund' for workers on strike or lock-out. This will necessarily provide an unfair advantage to employers in collective bargaining. The information will also be posted online so it is easily accessible to employers or anti-union consultants that want to use it to mislead workers and undermine or defeat organizing campaigns by workers seeking to form or join a union.

Bill C-377 does little or nothing to promote transparency or accountability to union members. Instead, it imposes significant and unnecessary costs on trade unions, making it more difficult to organize and engage in collective bargaining on behalf of their membership. It also forces unions to essentially hand over confidential and strategic information to employers and third parties. Finally, it deters individuals and businesses from dealing with trade unions for fear personal or commercial information will be published online. As the Supreme Court of Canada has held,

Government measures that substantially interfere with the ability of individuals to associate with a view to promoting work-related inter-

26 See http://www.tbs-sct.gc.ca/rtrap-parfa/rtrapr-rparfa-eng.asp

ests violate the guarantee of freedom of association under s. 2(d) of the *Charter*.[27]

The CFLR submits that Bill C-377 substantially interferes with the legitimate associational activities of workers and their unions, and therefore is a violation of s. 2(d) of the *Charter of Rights and Freedoms*.

CONCLUSION

The CFLR submits that Bill C-377 has nothing to do with taxation or tax policy, and everything to do with imposing costly burdens on unions and disclosing sensitive information to employers for strategic advantage. It also represents a significant invasion of privacy for union employees and suppliers, creating a deterrent for those who work for or with trade unions. In all of these respects, Bill C-377 is designed to interfere with the right of workers to form and join unions and engage in collective bargaining. Discriminatory treatment of unions as compared to other non-profit organizations under the *Income Tax Act* is unwarranted, mean-spirited and fails to meet the standard of basic fairness.

The Standing Committee should take note that provisions in Bill C-377 are nearly identical to measures adopted by U.S. legislators who are hostile to unions. The CFLR submits that the U.S. approach to labour relations policy is inconsistent with Canadian law, history, and values.

Finally, regardless of the Committee members' individual views about unions, it would be inappropriate for the Standing Committee to approve a private members bill that shamelessly encroaches on provincial jurisdiction under the *Constitution Act*, 1867. Regulation of internal union affairs is a matter of provincial responsibility, and has no place in federal tax legislation.

27 B.C. Health Services, supra, at para. 35.

The CFLR calls upon the Standing Committee to recognize that labour rights are human rights, and enjoy protection under both international and constitutional law. Unions serve a very important role in Canadian society, enhancing human dignity, liberty and autonomy by giving workers a degree of control over an important aspect of their lives, namely their work.[28] Moreover, few other private institutions in Canada are governed in such an open and democratic fashion. As the Supreme Court of Canada has observed, "the entire process of union representation carries the hallmark of democracy."[29] Bill C-377 is an unnecessary and unwanted American import that has no place in Canadian law.

28 B.C. Health Services, supra, at para. 82.

29 Lavigne v. Ontario Public Service Employees Union,[1991] 2 SCR 211 at 338