

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

**Submission to the Honourable Senators reviewing Private
Member's Bill C-377 An Act to amend the Income Tax Act
(requirements for labour organizations)**

Federation of Law Societies of Canada

Ottawa, September 25, 2014

I. INTRODUCTION

1. The Federation of Law Societies of Canada (the “Federation”) is the national coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. Our member law societies are charged with the responsibility of regulating Canada’s 100,000 lawyers and 4,000 Quebec notaries in the public interest. The Federation is a leading voice on a wide range of issues of national and international importance involving justice and regulatory matters critical to the protection of the public. The Federation appreciates the opportunity to contribute to the Senate’s review of Private Member’s Bill C-377, An Act to Amend the Income Tax Act (requirements for labour organizations) (“Bill C-377” or “the Bill”).

II. SUBMISSION HIGHLIGHTS

2. Bill C-377, introduced by Russ Hiebert, Member of Parliament for South Surrey – White Rock – Cloverdale (CPC), would impose a series of financial reporting obligations on labour organizations, including obligations that would require labour organizations to disclose information protected by solicitor-client privilege.
3. All information shared between clients and legal professionals in connection with legal advice is privileged. The Courts have held that solicitor-client privilege must be as close to absolute as possible to ensure that clients may communicate openly with their legal counsel to obtain proper legal advice. This is a fundamental principle of the Rule of Law and helps to ensure both public confidence in our legal system and its proper operation.
4. Bill C-377 fails to adequately ensure protection of information covered by solicitor-client privilege. Although the Bill contains protection for solicitor-client privileged information in certain sections, it continues to include provisions that would impose a positive obligation on labour organizations to disclose information that may be covered by solicitor-client privilege.

III. OVERVIEW OF KEY PROVISIONS

5. Section 1 of the Bill would amend the *Income Tax Act* to add a provision (section 149.01) that would impose on labour organizations an obligation to file an annual public information return that would include a financial statement containing, amongst

other information, detailed information on all disbursements over \$5,000. The information required to be disclosed, “the name of the payer and payee and setting out for each of those transactions and disbursements *its purpose and description* and the specific amount that has been paid or received, or that is to be paid or received” [emphasis added] would clearly include information protected by solicitor-client privilege (see section 149.01(3) (b)). The Bill would impose identical reporting obligations for disbursements related to labour relations, organizing and collective bargaining activities, (section 149.01 (3)(b)(ix), (xv) and (xvi)). Information in each of these categories might also include information protected by solicitor-client privilege.

6. The current form of the Bill excludes information protected by solicitor-client privilege from the reporting obligations for disbursements for legal activities (section 149.01 (3)(b)(xix)). In addition, Bill C-377 protects solicitor-client privileged information from the reporting requirements for disbursements related to activities “other than those that are primarily carried on for members of the labour organization or labour trust” (section 149.01(3)(b)(xix.1)). There is, however no explicit protection for solicitor-client privilege in relation to the other reporting requirements set out in the Bill.
7. Bill C-377 would also impose a requirement that all information disclosed in the public information report filed by a labour organization be made public by the Minister of Finance (149.01(4)).
8. Lastly, Bill C-377 would amend section 239 of the *Income Tax Act* to provide that every labour organization or labour trust that contravenes section 149.01 is guilty of an offence and liable on summary conviction to a fine of \$1,000 for each day that it fails to comply with that section.

IV. IMPACT ON SOLICITOR-CLIENT PRIVILEGE

9. Neither the requirement for labour organizations to disclose solicitor-client privileged information to the Minister of Finance nor the forced public disclosure of this protected information mandated by Bill C-377 accord with the manner, required by law and affirmed by the courts, in which solicitor-client privileged information must be treated.

10. The Supreme Court of Canada has described solicitor-client privilege as “a principle of fundamental justice and a civil right of supreme importance in Canadian law” that “must remain as close to absolute as possible if it is to retain relevance.”¹ These statements from the Supreme Court reflect the fact that our system of justice relies on full and frank communication between clients and their legal representatives. Without it, legal counsel would be unable to protect or advance the legal rights of their clients. As the Supreme Court held in *Blood Tribe*² “[i]t is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised.”
11. The principle of solicitor-client privilege ensures that the legal system can properly function by providing clients with the assurance that the information they share with their legal counsel will not be disclosed without their consent or be used against them. In this way, the candour that must exist between legal counsel and their clients is safeguarded.
12. The Supreme Court has also held that infringements on solicitor-client privilege become more serious when privileged information may be made public.³
13. It is clear that information disclosed under Bill C – 377 will be made publicly available. Russ Hiebert, the Private Member sponsoring Bill C-377, has indicated that the purpose of the proposed legislation is to increase the transparency and public accountability of trade unions, as such organizations benefit from a provision in the *Income Tax Act* that treats union dues as tax deductible.
14. In the existing provisions of the *Income Tax Act* the Parliament of Canada has recognized the value of solicitor-client privilege. Section 231.7, for example, empowers a judge to order a person to provide access to information or documents sought by the Minister of Finance, but specifically exempts information and documents protected by solicitor-client privilege. Recognition of the privilege is also contained in section 232 (2) providing a defence for a lawyer for refusing to comply with a requirement to provide information or documents where the information or

¹ *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61 (CanLII).

² *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII).

³ *Ibid.*

documents are privileged. The obligations on trade unions to disclose privileged information mandated by Bill C-377 are inconsistent with this recognition.

15. In its decision in *Lavallee*⁴, the Supreme Court held that any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary is unreasonable. The Federation submits that Bill C-377 would infringe upon solicitor-client privilege in a way and to an extent that is not justified by the stated goals of the draft legislation, is contrary to the societal values protected by the privilege, and as such is unreasonable.
16. It is not sufficient to argue that solicitor-client privilege is protected by the common law. Bill C-377 would make contravention of the reporting requirements an offence punishable by fines of up to \$25,000. In light of these potential penalties, it is essential that the scope of the reporting obligations and the exceptions to them be clear and easy to understand by those bound by the proposed legislation. In the absence of a clear exemption for all information protected by solicitor-client privilege there is a significant risk of disclosure of privileged information.
17. The Bill before the Senate includes provisions explicitly excluding from the disclosure obligations solicitor-client privileged information related to legal or trust activities. These provisions reflect a clear parliamentary intent to prevent the disclosure of information protected by solicitor-client privilege, but the scope of the protection is too narrow. Information on disbursements for legal advice on a variety of other types of activities enumerated in the Bill, such as collective bargaining or labour relations activities, could include information protected by the privilege. It is important that the Senate remedy drafting ambiguities by explicitly exempting all information protected by solicitor-client privilege from the disclosure obligations.
18. In the submission of the Federation, the goal of transparency and public accountability could be accomplished without infringing upon solicitor-client privilege at all. In this regard, it is worth noting that the existing reporting requirements in the *Income Tax Act* for charities are considerably less extensive and do not include a requirement to provide the detailed information on funds spent on legal activities that would be required of labour unions by Bill C-377. Registered charities are simply

⁴ *Lavallee, supra*, note 1.

required to report the “total expenditure on professional and consulting fees.”⁵

V. RECOMMENDATION

19. In our respectful submission it is necessary to clearly and unambiguously exempt information protected by solicitor-client privilege from all of the disclosure obligations contained in the Bill. This could be accomplished by amending Bill C-377 to add the following provision to section 1 of the Bill:

149.01 (3.1) Nothing in sections 149.01 (2) or (3) shall require the disclosure of information protected by solicitor-client privilege.

20. On behalf of our member law societies, the Federation therefore asks that Bill C-377 be amended as set out above.

VI. CONCLUSION

21. The Federation is available to assist with the Senate’s review of Bill C-377 at any time. We hope these submissions are helpful.

⁵ See the Registered Charity Information Return, <http://www.cra-arc.gc.ca/E/pbg/tf/t3010-1/t3010-1-10e.pdf>