The Constitutional Invalidity of Bill C-377

Presentation to Senate Committee on Legal and Constitutional Affairs

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I am pleased to have the opportunity to share my views with the Committee regarding the constitutional validity of Bill C-377. My area of expertise is constitutional law, including the division of legislative powers in the *Constitution Act, 1867*. I will focus my comments on the question of whether Bill C-377 is a valid exercise of Parliament's legislative powers.

The constitutional validity of the Bill is a different question from whether the changes it proposes are desirable from a policy point of view. My comments address the former issue, not the latter.

The realm of permissible changes to statutory law is constrained by the supreme law, the constitution. Any law that is inconsistent with the constitution is, to the extent of that inconsistency, of no force and effect pursuant to s.52(1) of the *Constitution Act, 1982*. Therefore, however desirable promoting transparency and accountability for labour organizations may be from a policy point of view, Canadian legislatures can pursue that goal lawfully only in a manner that falls within their legislative jurisdiction.

Let me summarize my conclusions at the outset, and then I will proceed to discuss in more detail why they are supported by constitutional principles and a close study of Bill C-377 and related provisions of the *Income Tax Act*.

The dominant characteristic, or "pith and substance", of Bill C-377 is to promote transparency and accountability of labour organizations through the imposition of extensive financial disclosure obligations. This is a matter that falls within provincial jurisdiction to pass laws in relation to "property and civil rights" pursuant to s.92(13) of the *Constitution Act, 1867*.

While the *Income Tax Act* [*ITA*] as a whole is a valid exercise of Parliament's jurisdiction to make laws for "the raising of money by any mode or system of taxation" pursuant to s.91(3) of the *Constitution Act, 1867*, the amendment to the *ITA* proposed by Bill C-377 do not have a sufficiently strong connection to the other provisions of the Act to be upheld pursuant to the "ancillary powers" doctrine. In fact, the new provision, s.149.01, proposed by Bill C-377 has no connection to the administration of the provisions of the Act that permit members of trade unions to deduct union dues from their employment income (s.8(1) of the *ITA*) and that exempt labour organizations from having to pay income tax (s.149(1)(k) of the *ITA*).

For these reasons, I am confident that if Bill C-377 is enacted, Parliament will have acted illegally and unconstitutionally. Bill C-377 will be declared unconstitutional and of no force and effect by the courts.

A close study of Bill C-377 and the provisions of the *ITA* dealing with trade union dues and labour organizations, coupled with a consideration of two doctrines of constitutional law, lead inexorably to this conclusion. The two constitutional doctrines are the pith and substance doctrine ("le principe du caractère véritable") and the ancillary powers doctrine ("la doctrine des pouvoirs accessoires"). I will discuss each in turn.

Pith and Substance Doctrine ("le principe du caractère véritable")

To be validly enacted, the dominant characteristic, or pith and substance, of a federal law must be a subject matter allocated to Parliament's jurisdiction by the *Constitution Act, 1867*.

To determine the pith and substance of a law, the courts examine its purpose and its legal effects. Once the courts have determined the dominant characteristic of a law through an examination of its purposes and effects, they then allocate it to a head of power in the *Constitution Act, 1867*. If a federal law is in relation to a subject matter that falls within Parliament's jurisdiction, it is valid or *intra vires*; if a federal law is in relation to a subject matter that falls within provincial legislatures' exclusive jurisdiction, it is invalid or *ultra vires*.

The power to pass laws regulating labour relations is predominantly provincial pursuant to s.92(13) of the *Constitution Act, 1867*.[1] Federal jurisdiction over labour relations is an exception to the general rule of provincial jurisdiction. Parliament has jurisdiction over labour relations in the federal public sector and at federally regulated workplaces, such as banks, airlines or telecommunication companies.[2]

Jurisdiction over labour relations, including collective bargaining, and the regulation of financial disclosure obligations of labour organizations that are related to the collective bargaining process, is thus divided between the provincial legislatures and Parliament. Indeed, financial reporting requirements for trade unions already exist in most jurisdictions in Canada. At the federal level, s.110(1) of the *Canada Labour Code* requires every trade union to provide **"**forthwith on the request of any of its members… free of charge, with a copy of a financial statement of its affairs to the end of the last fiscal year."[3] Most provinces have similar provisions in their labour relations legislation.[4]

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[1] A long line of case law dating back to *Toronto Electric Commissioners v Snider*, [1925] AC 396 supports this position. See for example *Bell Canada v Quebec*, [1988] 1 SCR 749 at para 19: "labour relations and working conditions fall within the exclusive jurisdiction of the provincial legislatures".

[2] *Bell Canada*, *ibid* at para 20.

[3] *Canada Labour Code*, RSC 1985, c.L-2, s.110(1). The financial statement must "contain information in sufficient detail to disclose accurately the financial condition and operations of the trade union" (s.110(2)). If a trade union member believes that the union has not complied with its disclosure obligation, he or she may file a complaint with the Canada Industrial Relations Board, and the Board may order further disclosure "in such form and with such particulars as the Board may determine" (s.110(3)).

[4] See, eg, Ontario's *Labour Relations Act, 1995*, SO 1995, c.1, Sch. A, s.92, which is very similar in content to s.110 of the *Canada Labour Code* .

Section 110 of the *Canada Labour Code*, like other provisions of the Code, applies only at federally regulated workplaces.[5] If it applied to all labour organizations across the country, it would be unconstitutional. Similar provisions in provincial labour laws apply only in provincially regulated sectors. Provincial labour laws are limited in the degree to which they can constitutionally apply to federally regulated workplaces.[6]

From the point of view of labour law, the flaw in Bill C-377 is that it does not respect the constitutional division of legislative powers in relation to trade unions. Parliament has jurisdiction to pass laws imposing financial disclosure obligations, as an aspect of the collective bargaining process, on federal public sector unions and on private sector unions in federally regulated sectors of the economy. Parliament does not have jurisdiction to pass laws that are in pith and substance in relation to trade unions or labour organizations outside these federally regulated sectors. If Parliament considers the disclosure obligations imposed on trade unions to be deficient, the constitutionally proper course would be to amend s.110 of the *Canada Labour Code* – and federal legislation governing labour relations in the federal public sector – accordingly, and to urge provincial legislatures to do the same.

If Parliament's limited jurisdiction to pass laws in relation to labour relations is insufficient to provide a legal basis for the enactment of Bill C-377, what about Parliament's taxation power in s.91(3) of the *Constitution Act, 1867*? Parliament may impose financial disclosure obligations on organizations that fall within provincial jurisdiction, such as charities and amateur athletic organizations, pursuant to its power to make laws in relation to "the raising of money by any mode or system of taxation" in s.91(3). To be a valid exercise of this power, the law in question must have as its dominant characteristic, or pith and substance, the raising of money by any mode or system of taxation (or, as discussed further below, the financial disclosure obligations must be closely integrated with the income tax purposes of other provisions of the *Income Tax Act*, and thus valid pursuant to the ancillary powers doctrine).

In the debates regarding the constitutional validity of Bill C-377, two competing characterizations of its pith and substance have been presented. The pith and substance doctrine thus requires us to focus on determining which of these two characterizations is correct: is Bill C-377, in its dominant characteristic, in relation to labour organizations, a matter that falls within exclusive provincial jurisdiction pursuant to s.92(13) of the *Constitution Act, 1867*, and therefore *ultra vires*? or is it in relation to income tax, a matter that falls within Parliament's jurisdiction pursuant to s.91(3) of the *Constitution Act, 1867*, and therefore *intra vires*?

The summary note in Bill C-377 states that its purpose is to require labour organizations to provide financial information for public disclosure. The Bill would accomplish this purpose by adding a new provision, s.149.01, to the *Income Tax Act*. The legal effect of s.149.01 is to place detailed disclosure obligations on labour organizations, subject to a financial penalty of $1,000 per day for non-compliance to a maximum of $25,000. This is Bill C-377's only legal purpose

[5] See s.4 of the *Canada Labour Code*: "This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."
[6] *Bell Canada, supra* note 1.

and effect. No tax consequences follow from a failure to comply with the financial disclosure obligations set out in the bill.

In his statements before this Committee, and before the House of Commons and other parliamentary committees, the sponsor of the Bill, Mr. Russ Hiebert, has emphasized that the purpose of Bill C-377 is to enhance transparency and accountability of labour organizations. As Mr. Hiebert put it succinctly in his appearance before this Committee on 22 April 2015, "the purpose of the bill is to gauge the effectiveness, accountability and health of [labour] organizations". Indeed, much of the discussion of Bill C-377 in Parliament has been focused on considering whether existing legal disclosure obligations placed on trade unions by the *Canada Labour Code* and provincial labour legislation are adequate. Supporters of the bill have taken the view that existing disclosure laws are inadequate; opponents have taken the opposite view.

In contrast, Mr. Hiebert and other supporters of the bill have not discussed Bill C-377 from a taxation point of view. No case has been made that the provisions of Bill C-377 will enhance the administration and enforcement of existing provisions of the *Income Tax Act*. No difficulties with the administration of the tax exempt status of labour organizations, or the deductibility of union dues, have been identified or discussed. Apart from the addition of s.149.01 to the *ITA*, immediately following s.149, the provision of the Act that exempts a series of organizations, including labour organizations, from income tax, Bill C-377 has no connection to the raising of revenue by any mode of taxation. In a pith and substance analysis, form does not determine substance. We must focus on the actual purpose and legal effects of the law at issue.

Given that the text of Bill C-377, and its legislative history, strongly support the view that its purpose and legal effect is to enhance the transparency and accountability of all labour organizations, rather than to assist in the administration of the *ITA*, it follows that it is in pith and substance in relation to a matter that falls within exclusive provincial jurisdiction pursuant to s.92(13) of the Constitution Act, 1867, and therefore is *ultra vires*. The true subject matter of Bill C-377, the imposition of financial disclosure obligations on labour organizations for the purposes of promoting transparency and accountability, is simply not within Parliament's jurisdiction.

An analogy has frequently been made in the debates on Bill C-377 between its objectives and the objectives of the *First Nations Financial Transparency Act*.[7] They do share a common concern with transparency and accountability. But from a constitutional point of view, the *Indian Act* bands subject to the *FNFTA* and the labour organizations subject to Bill C-377 are in very different positions. Parliament has jurisdiction to regulate Aboriginal governments pursuant to s.91(24) of the *Constitution Act, 1867*. Unlike band governments, "labour organizations" do not fall within a federal head of power. Their regulation falls primarily within provincial jurisdiction pursuant to s.92(13) of the *Constitution Act, 1867*.

Even though the new s.149.01 proposed by Bill C-377 is *ultra vires* when considered on its own, isolated from other provisions of the *ITA*, that is not the end of the matter. The *ITA* is a valid exercise of Parliament's power, pursuant to s.91(3) of the *Constitution Act, 1867*, to pass laws in relation to "the raising of money by any mode or system of taxation". Can s.149.01 be saved by virtue of its connection to the rest of the *ITA*? This depends on a consideration of the

[7] S.C. 2013, c.7.

ancillary powers doctrine. This doctrine requires that we closely examine Bill C-377 and the related provisions of the *ITA* dealing with labour organizations, to determine whether there is a sufficiently close connection between the proposed s.149.01 and other provisions of the Act.

Ancillary Powers Doctrine ("La doctrine des pouvoirs accessoires")

According to this doctrine, even if a particular legislative provision when considered in isolation falls outside a legislature's power, it can be upheld as valid if it constitutes an integral part of a broader legislative scheme that is within the legislature's power. The doctrine, in other words, in the name of practical necessity, throws a constitutional lifeline to a provision that would otherwise be *ultra vires*. Chief Justice McLachlin put it as follows in *Quebec v Lacombe*, a leading recent decision considering the ancillary powers doctrine:

> The ancillary powers doctrine permits one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme. In pith and substance, provisions enacted pursuant to the ancillary powers doctrine fall outside the enumerated powers of their enacting body… Consequently, the invocation of ancillary powers runs contrary to the notion that Parliament and the legislatures have sole authority to legislate within the jurisdiction allocated to them by the *Constitution Act, 1867*. *Because of this, the availability of ancillary powers is limited to situations in which the intrusion on the powers of the other level of government is justified by the important role that the extrajurisdictional provision plays in a valid legislative scheme. The relation cannot be insubstantial*…[8] [emphasis added]

The required degree of integration between the encroaching provision (like s.149.01 in Bill C-377) and the valid legislative scheme (the *ITA* as a whole) increases in proportion to the seriousness of the encroachment.[9] The courts require that the provision be, at least, rationally and functionally connected to the purpose of the legislative scheme that it purportedly furthers.[10] It is not enough that the challenged provision supplement the legislative scheme; it must actively further it.[11] As the Chief Justice put it,

> One might also ask whether the intruding measure "fills a gap" in the legislative scheme, or whether it serves some other purpose related to the scheme, such as avoiding inconsistent application or uncertainty. Regardless of the precise wording of the test, the basic purpose of this inquiry is to determine whether the impugned measure not only supplements, but complements, the legislative scheme; it is not enough that the measure be merely supplemental…[12]

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[8] *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 35.
[9] *Ibid* at para 42.
[10] *Ibid* at para 45.
[11] *Ibid*.
[12] *Ibid* at para 48. See also the *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457 at para 138: "..the ancillary provisions must themselves perform a function that complements the other provisions in the scheme, and they cannot have been tacked on merely as a matter of convenience."

If this test is not met, the impugned provision will be severed from the Act and declared *ultra vires*, of no force and effect.[13]

The key question that we must focus on, therefore, is: do the financial disclosure provisions proposed by Bill C-377 play an important and substantial role in furthering the objectives of the *ITA*? Are they rationally and functionally connected in the sense that they advance the taxation goals of the *ITA*?

In my opinion, the connection between the disclosure requirements of Bill C-377 and the objectives of the *ITA* as expressed in its existing provisions is too tenuous to meet this test. The ancillary powers doctrine therefore will not rescue the provisions of Bill C-377.

I reach this conclusion for the following reasons:

- Bill C-377 does not in any way address the tax status of labour organizations or tax consequences of the activities of or membership in labour organizations.

- Bill C-377 does not make any connections to the existing tax treatment of labour organization activities or union dues.

- The disclosure obligations in Bill C-377 are enforced through fines, not through the imposition of tax liability or the removal of an income tax deduction or other benefit.

- The existing provisions of the *ITA* do not impose any conditions or restrictions on the tax exempt status of labour organizations. Section 149(1)(k) of the Act simply provides that "no tax is payable" by a "labour organization". In other words, so long as an organization is a labour organization, it is tax exempt. Bill C-377 is not directed at establishing whether organizations qualify as labour organizations, and therefore has no connection to the tax exempt status of labour organizations provided by s.149(1)(k).

[13] This was the result in *Lacombe*, where the Chief Justice found that a municipal by-law in relation to aerodromes was found to lack a sufficiently close connection to the larger scheme of municipal by-laws in relation to land use. *Ibid* at paras 49-58. Since she found "no redeeming connection" between the impugned by-law and the larger valid scheme of regulation, the impugned by-law "cannot be habilitated by invoking ancillary powers." *Ibid* at para 58. See also *MacDonald v Vapor Canada Ltd*, [1977] 2 SCR 134, in which s.7(e) of the *Trade-marks Act*, a prohibition on unfair business practices, was declared *ultra vires* on the grounds that it regulated provincial matters. It could not be saved by the ancillary powers doctrine because it lacked a sufficient connection with the enforcement of trade-marks in the rest of the legislative scheme. Chief Justice Laskin noted that the inclusion of s.7(e) in the *Trade-marks Act* could not "stamp it with validity"; what was required was an examination of "the context and association in which it is fixed as complementary provision serving to reinforce other admittedly valid provisions." (at p.159). He concluded that s.7(e) was a "detached provision that cannot survive alone unconnected to a general regulatory scheme". (p.165)

- The only condition imposed on the deduction of trade union dues from employment income in s.8(1)(i) of the Act is that, pursuant to s.8(5)(c), those dues must be "directly related to the ordinary operating expenses" of the union. Bill C-377 is not directed to defining and determining what are "ordinary operating expenses" of trade unions, nor is it directed to determining when trade union dues are "directly related" to such expenses. Therefore, Bill C-377 has no connection to the deductibility of union dues provided by s.8(1)(i) of the Act.

For these reasons, borrowing the Chief Justice's words in *Lacombe*,[14] "no redeeming connection" exists between s.149.01 and the larger valid scheme of regulation in the *ITA*. It follows that Bill C-377 "cannot be habilitated by invoking ancillary powers."

An analogy has been made in the debates regarding Bill C-377 between its provisions and the disclosure obligations imposed by the *ITA* on charitable organizations and amateur athletic associations. The analogy is superficially attractive. However, on closer examination of the provisions of the *ITA*, it proves specious. The disclosure obligations imposed on charitable organizations and amateur athletic associations are closely tied to their tax status and the tax treatment of donations to them. Therefore, in my view, those disclosure obligations are in pith and substance in relation to taxation or, if not, can be upheld pursuant to the ancillary powers doctrine. The same cannot be said of the disclosure obligations imposed on labour organizations by Bill C-377.

Let's take a closer look at the provisions of the *ITA* to see why this is so. Like labour organizations pursuant to s.149(1)(k), "registered charities" and "registered Canadian amateur athletic associations" are tax exempt pursuant to s.149(1)(f) and s.149(1)(g) respectively. The first important difference to note between labour organizations and charities/athletic associations is the requirement of registration; no such requirement exists for labour organizations.

Further, s.149.1(1) of the Act contains detailed definitions of "charitable foundations", "charitable organizations" and "Canadian amateur athletic associations". The effect of these definitions is to impose a series of conditions on the tax exempt status of these organizations, and their capacity to issue tax receipts for donations. For example, to qualify as an exempt athletic organization, an organization must have the promotion of amateur athletics as its "exclusive purpose and exclusive function" and it must devote "all of its resources to that purpose and function". Registered charities are subject to a number of rules, including a similar requirement that all of their resources be devoted to charitable activities.

The *ITA* empowers the Minister to deny registration to, or revoke the registration of, charities or athletic associations that do not meet these requirements. Pursuant to s.168, the Minister may revoke the registration of a charity or amateur athletic association if it "ceases to comply with the requirements of this Act for its registration" (s.168(1)(b)) or if it "fails to file an information return as and when required under this Act or a regulation" (s.168(1)(c)).

In contrast to charities and athletic organizations, the *ITA* does not require labour organizations to register. Nor does it impose restrictions or conditions with which labour

[14] Quoted in note 13, *supra*.

organizations must comply to qualify as tax exempt. Bill C-377 will introduce a remarkably expansive definition of labour organizations ("includes" an organization "formed for purposes which include the regulation of relations between employers and employees"), but, unlike the definitions of charities and amateur athletic associations in s.149.1, this definition does not contain any restrictive conditions or requirements. Moreover, failure to comply with the disclosure requirements set out in Bill C-377 will not have any impact on the tax exempt status of labour organizations or on the ability of employees to deduct union dues. There is no equivalent for labour organizations of the power of the Minister in s.168 to revoke the registration of charities and athletic associations.

Therefore, the analogy to disclosure obligations placed by the *ITA* on registered charities and registered athletic associations is fundamentally flawed from a constitutional point of view. Unlike the disclosure obligations imposed on charities and athletic associations, the disclosure obligations imposed by Bill C-377 have no connection to the tax treatment of labour organizations or union dues.

To be clear, Parliament may impose disclosure obligations on labour organizations or other organizations that fall within exclusive provincial jurisdiction through the *Income Tax Act*, but only if those disclosure obligations are meaningfully connected to the tax status of those organizations, or to the tax treatment of transactions involving those organizations. Since Bill C-377 does not meet this test, it is beyond Parliament's jurisdiction and will be declared invalid, of no force and effect, by the courts.

Of course, it may turn out that I am wrong. While the view I have expressed here is shared by other constitutional scholars who have submitted briefs on Bill C-377 (including Professor Robin Elliott of the University of British Columbia and Professor Henri Brun of Université Laval), the contrary position has been presented to this Committee by a highly respected and accomplished jurist, former Supreme Court of Canada Justice Michel Bastarache.

None of us can predict court decisions with 100% certainty. But at the moment it appears that the consensus view of constitutional experts runs contrary to Mr. Bastarache's opinion. This means that passage of the bill is a high risk enterprise: the courts are likely to declare it to be of no force and effect. When this degree of constitutional uncertainty hangs over a bill that would impose millions of dollars in costs on labour organizations and the Canada Revenue Agency, and when no apparent urgency leans in favour of its immediate enactment, it would be terribly unwise for Parliament to proceed with passage of the bill before first seeking an opinion on its constitutionality from the Supreme Court of Canada.