

Heenan Blaikie

Of Counsel

The Right Honourable Pierre Elliott Trudeau, P.C., C.C., C.H., Q.C., FRSC (1984 - 2000)
The Right Honourable Jean Chrétien, P.C., C.C., O.M., Q.C., Ad. E.
The Honourable Donald J. Johnston, P.C., O.C., Q.C.
Donald R. Munroe, Q.C.
Pierre Marc Johnson, G.O.Q., FRSC
The Honourable Michel Bastarache, C.C.
The Honourable René Dussault, O.C., O.Q., FRSC, Ad. E.
Peter M. Blaikie, Q.C.
André Bureau, O.C., O.Q.

June 02, 2013

Mr. Terrance Oakey
1 Rideau Street, Suite 700
Ottawa, ON K1N 8S7

Attention: Mr. Terrance Oakey

Dear Mr. Oakey:

Re: Constitutionality of Bill C-377

In this opinion, I consider the validity of Bill C-377 in light of the division of powers under the *Constitution Act, 1867*, as well as the *Canadian Charter of Rights and Freedoms* (“*Charter*”). I conclude that, if Bill C-377 is enacted into law, it would likely be upheld by the courts as a valid enactment of Federal Parliament’s power over taxation under section 91(3) of the *Constitution Act, 1867*. Moreover, I conclude that Bill C-377 is consistent with the *Charter* and that, in any case, any infringement would likely be justified as a reasonable limit under section 1 of the *Charter*.

Michel Bastarache

T 613.236.3488
F 1866 411 2699
mbastarache@heenan.ca

55 Metcalfe Street
Suite 300
Ottawa, Ontario
Canada K1P 6L5

heenanblaikie.com

Division of powers

On a division of powers analysis, the first step is to identify the “pith and substance” of the legislation, that is, the “matter” to which the law essentially relates. The objective of the analysis is to determine whether what the law is essentially about falls under one of the constitutional heads of power assigned to the level of government that enacted it (i.e., either the federal or the provincial government).¹

Bill C-377 adds a new section to the *Income Tax Act*, section 149.01. The section mandates and regulates the filing of financial information by labour organizations with the Minister of National Revenue for public disclosure. According to testimony before Parliament, it appears that the purpose of Bill C-377 is to provide transparency and public accountability with respect to tax benefits afforded to labour organizations.

¹ *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para 26.

Labour organizations are exempt from taxation under section 149 of the *Income Tax Act* and the dues received by labour organizations may be deducted from a taxpayer's income under section 8 of the *Act*. In exchange for these benefits, it appears, the new section would make public certain financial operations of these organizations.

Insofar as the new provisions address matters of fiscal transparency or fiscal integrity, they can properly be characterized as falling under Parliament's power to make laws in relation to "the raising of money by any mode or system of taxation" under 91(3) of the *Constitution Act, 1867*. The fact that the section only imposes disclosure requirements on labour organizations, as opposed to other organizations associated with tax benefits under the *Income Tax Act*, does not change the characterization of the law. In several cases, provincial laws were upheld as valid notwithstanding that they singled out federal undertakings.² As long as the pith and substance or matter of Bill C-377 is related to taxation, the law is a valid enactment of Parliament's powers. Moreover, the fact that labour relations are not a head of power assigned exclusively to the provinces under the *Constitution*³ supports the view that Bill C-377 does not intrude on provincial powers.

Further, while not determinative of the constitutional analysis, it is instructive that other provisions of the *Income Tax Act*, such as subsection 149.1(15), impose disclosure obligations on specific organizations, such as registered charities and registered Canadian amateur athletic organizations.

Even if section 149.01 was found to intrude on provinces powers, this would not be the end of the constitutional analysis. Section 149.01 would be part of the *Income Tax Act*, a valid legislative scheme. According to the ancillary powers doctrine, as long as section 149.01 is sufficiently integrated within the federal scheme, it will be upheld as a valid enactment of federal powers.⁴ The degree of integration required depends on the seriousness of the encroachment on the powers of the other head of government.⁵

As noted, labour relations is not a federal power. Though the provinces have a presumptive interest in labour relations by virtue of their power over property and civil rights under section 92(13) of the *Constitution Act, 1867*, there is still a federal presence in the area.⁶ Moreover, section 149.01 merely provides for disclosure of financial information by labour organizations; it does not attempt to regulate the activities of such

² *Van Buren Bridge Co. v. Madawaska* (1958) 15 D.L.R. (2d) 763; *Abitibi Power and Paper Co. v. Montreal Trust Co* [1943] A.C. 536; *Société Asbestos v. Société nationale de l'amiante* (1981) 128 D.L.R. (3d) 405 (Que. C.A.). See Peter Hogg, *Constitutional Law in Canada, 5th Edition Supplemented* at 15-11.

³ *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 at para 11.

⁴ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at paras 58-59.

⁵ *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 at para 42.

⁶ *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 at para 11.

organizations or affect how their money is spent. In light of both of these factors, in my opinion Bill C-377 does not constitute a serious encroachment on provincial powers.

According to the Supreme Court, where the encroachment on the power of the other head of government is minor, the test the impugned portion of the law must satisfy in order to be valid is the “rational functional test”. As long as the impugned portion of the law is rationally and functionally connected to a valid federal legislative scheme, it will be upheld as a valid enactment of federal powers.⁷ Here, section 149.01 is aimed at increasing transparency and public accountability with respect to tax benefits provided in other sections of the *Income Tax Act*. In my opinion, a court would view this connection as sufficient to validate the section under the ancillary powers doctrine.

Conformity with Charter

I end this opinion with a few comments regarding any possible inconsistency between Bill C-377 and the *Charter*.

While requiring disclosure of individuals’ political beliefs and political activities may raise concerns related to privacy interests under the *Charter*, Bill C-377 does not appear to require such information. It is important to remember that, if a statutory provision is capable of an interpretation that is constitutional and one that is not, courts will choose the construction that conforms with the *Charter*.⁸

Bill C-377 provides for the disclosure of statements of disbursements to “officers, directors and trustees to employees with compensation over 100000\$” as well as “reasonable estimate” of the percentage of time dedicated by such persons to political and lobbying activities (149.01(3)(b)(vii)(vii.1)). The provision could be interpreted as requiring either generalized disclosure of aggregate amounts of time dedicated to political activities or particularized disclosure of the time spent by individual persons on such activities. In my opinion, according to the interpretive presumption of constitutionality, a reviewing court would interpret this provision in a way that avoids any interference with privacy interests and, notably, would likely only require generalized disclosure.

Finally, in my opinion, because section 149.01 does not attempt to regulate the activities of labour organizations or determine how they spend their money, it is unlikely that a court would find that it limits freedom of association under section 2(d) of the *Charter*. Moreover, because the legislation serves the important goals of transparency and accountability with respect to tax benefits, any infringement would likely be justified under section 1 of the *Charter*.

⁷ *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 at paras 41-45.

⁸ *R v. Ruzic*, 2001 SCC 24 at para 26.

Yours very truly,

Heenan Blaikie LLP

"Michel Bastarache"

Michel Bastarache

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