

**SUPREME COURT OF CANADA**

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| **Citation:** Canada (Attorney General) *v.* Confédération des syndicats nationaux, 2014 SCC 49, [2014] 2 S.C.R. 477 | **Date:** 20140717  **Docket:** 35124 |

Between:

Attorney General of Canada

Appellant

and

Confédération des syndicats nationaux and

Fédération des travailleurs et travailleuses du Québec

Respondents

**Official English Translation**

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 46) | LeBel and Wagner JJ. (McLachlin C.J. and Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring) |

canada (a.g.) *v.* csn, 2014 SCC 49, [2014] 2 S.C.R. 477

Attorney General of Canada Appellant

v.

Confédération des syndicats nationaux and

Fédération des travailleurs et travailleuses du Québec Respondents

**Indexed as:** Canada **(**Attorney General) ***v.*** Confédération des syndicats nationaux

2014 SCC 49

File No.: 35124.

2014: January 20; 2014: July 17.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for quebec

*Civil procedure — Motion to dismiss — Stare decisis — Action to have certain statutory provisions relating to employment insurance declared unconstitutional — Motion to dismiss on basis that issues being raised had already been decided by Supreme Court of Canada in earlier decision — Whether motion to institute proceedings is correct in law even if alleged facts are assumed to be true — Code of Civil Procedure, CQLR, c. C-25, art. 165(4).*

In 1998 and 1999, some unions went to court to strike down certain provisions of the *Employment Insurance Act*, S.C. 1996, c. 23, in particular those relating to the premium-setting mechanism, which had made it possible to accumulate surpluses totalling several billion dollars. In their view, the government was reallocating these surpluses to its general expenses, which constituted a misappropriation of monies that were supposed to be earmarked for employment insurance. In 2008, in *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, [2008] 3 S.C.R. 511 (“*CSN v. Canada*”), the Court declared that the measures adopted in the *Employment Insurance Act* were valid and constitutional, with the exception of those that applied in 2002, 2003 and 2005, and it suspended the effect of the declaration of invalidity for 12 months to enable Parliament to rectify the situation. In 2010, Parliament enacted the *Jobs and Economic Growth Act*, S.C. 2010, c. 12, which closed the Employment Insurance Account and created a new Employment Insurance Operating Account, retroactive to January 1, 2009. The Act did not specify that the balance of the Employment Insurance Account, which at that point amounted to over $57 billion, was to be transferred to the new Employment Insurance Operating Account. The CSN and the FTQ (the “unions”) then filed a motion to institute proceedings in order to have certain provisions of the *Jobs and Economic Growth Act* declared unconstitutional. The Attorney General of Canada submitted that the issues raised by the unions had already been decided by the Court in *CSN v. Canada* and moved to dismiss the action under art. 165(4) of the *Code of Civil Procedure*, CQLR, c. C-25. The motion to dismiss was granted by the Quebec Superior Court, but the Court of Appeal set aside that decision. It found that the action was concerned with the effects of the act of eliminating the balance in the Employment Insurance Account and the resulting accounting entries, an issue that had not been disposed of in *CSN v. Canada*.

*Held*: The appeal should be allowed.

Before granting a motion to dismiss on the basis that an authoritative decision has already resolved the issue before him or her, the judge must be satisfied in light of the record and the alleged facts that the precedent relied on by the applicant concerns the entire dispute that it should normally resolve, and that it provides a complete, certain and final solution to the dispute.

In this case, the unions’ action is bound to fail. The action’s underlying premise is that a balance in the Employment Insurance Account is a debt owed by the Consolidated Revenue Fund to that account. In the unions’ view, the premiums paid in the context of the employment insurance program are constitutionally valid only if they are properly accounted for. However, *CSN v. Canada* settled the law in this regard, and it deprives the motion to institute proceedings of any legal basis. In that case, the Court held that the amounts collected as contributions to the employment insurance program form part of the government’s revenues and can be used for purposes other than paying benefits. Although the connection between the program and the premiums is a factor that can be considered in determining the nature of the levies, it is wrong to say that the validity of these levies depends on the existence of that connection. Furthermore, no debt of the Consolidated Revenue Fund to the Employment Insurance Account ever existed, since the government cannot be indebted to itself. Because the action has no reasonable chance of success, art. 165(4) of the *Code of Civil Procedure* applied and it was appropriate to dismiss the action at this preliminary stage.

**Cases Cited**

**Considered:** *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, [2008] 3 S.C.R. 511; **referred to:** *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131; *Groupe d’assurance Hartford/Monitor Insurance Group v. Plomberie P.M. Inc.*, [1984] R.D.J. 17; *Groupe Jeunesse Inc. v. Loto-Québec*, 2004 CanLII 9766; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Morier v. Rivard*, [1985] 2 S.C.R. 716; *Bohémier v. Barreau du Québec*, 2012 QCCA 308 (CanLII); *Ville de Hampstead v. Jardins Tuileries Ltée*, [1992] R.D.J. 163; *Cheung v. Borsellino*, 2005 QCCA 865 (CanLII); *Association provinciale des constructeurs d’habitations du Québec inc. v. Société d’habitation et de développement de Montréal*, 2011 QCCA 1033 (CanLII); *Entreprises Pelletier & Garon (Toitures inc.) v. Agropur Coopérative*, 2010 QCCA 244, [2010] R.D.I. 24; *R. v. Québec (Société des alcools)*, 1998 CanLII 13129; *Saint-Eustache (Ville de) v. Régie intermunicipale Argenteuil Deux-Montagnes*, 2011 QCCA 227 (CanLII); *Westmount (City) v. Rossy*, 2012 SCC 30, [2012] 2 S.C.R. 136; *Oznaga v. Société d’exploitation des loteries et courses du Québec*, [1981] 2 S.C.R. 113; *Gillet v. Arthur*, [2005] R.J.Q. 42; *Racine v. Harvey*, 2005 QCCA 879 (CanLII); *Canada (Procureur général) v. Imperial Tobacco Ltd.*, 2012 QCCA 2034, [2012] R.J.Q. 2046, leave to appeal refused, [2013] 2 S.C.R. ix; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

**Statutes and Regulations Cited**

*Code of Civil Procedure*, CQLR, c. C-25, art. 165.

*Employment Insurance Act*, S.C. 1996, c. 23, ss. 66, 66.1, 66.3.

*Jobs and Economic Growth Act*, S.C. 2010, c. 12, ss. 2185 *et seq.*

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Reid, Hubert, et Claire Carrier. *Code de procédure civile du Québec: jurisprudence et doctrine*, 30e éd. Montréal: Wilson & Lafleur, 2014.

APPEAL from a judgment of the Quebec Court of Appeal (Morissette, Fournier and St-Pierre JJ.A.), 2012 QCCA 1822, [2012] AZ-50901334, [2012] J.Q. no 9717 (QL), 2012 CarswellQue 10069, setting aside a decision of Perrault J., 2012 QCCS 128, [2012] AZ-50823420, [2012] J.Q. no 341 (QL), 2012 CarswellQue 261. Appeal allowed.

René LeBlanc and Pierre Salois, for the appellant.

Guy Martin, for the respondent Confédération des syndicats nationaux.

Jean-Guy Ouellet, for the respondent Fédération des travailleurs et travailleuses du Québec.

English version of the judgment of the Court delivered by

1. LeBel and Wagner JJ. — Judicial resources must be husbanded to ensure that the courts function properly and that litigants have access to a justice system that meets the highest possible standards. With this in mind, lawmakers have given the courts tools to be used, even at a preliminary stage, to put an end to actions that are bound to fail. In Quebec, for example, art. 165 of the *Code of Civil Procedure*, CQLR, c. C-25 (“*C.C.P.*”), is one of the mechanisms devised to further this objective. The courts must be cautious in exercising this power, however. Although the proper administration of justice requires that the courts’ resources not be expended on actions that are bound to fail, the cardinal principle of access to justice requires that the power be used sparingly, where it is clear that an action has no reasonable chance of success.
2. For the reasons that follow, it is in our opinion clear that the action of the respondents, the Confédération des syndicats nationaux and the Fédération des travailleurs et travailleuses du Québec (referred to collectively as the “unions”), is bound to fail. The application of the doctrine of *stare decisis* is fatal to it: this Court’s 2008 decision in *Confédération des syndicats nationaux* *v.* *Canada (Attorney General)*, 2008 SCC 68, [2008] 3 S.C.R. 511 (“*CSN v. Canada*”), settled the law on the legal issues this action raises. That decision therefore deprives the unions’ motion to institute proceedings of any legal basis. Since the action has no reasonable chance of success, art. 165(4) of the *Code of Civil Procedure* applied in the case at bar and it was appropriate to dismiss the action at this preliminary stage.
3. Background
4. In 1996, the federal government carried out a major reform of the employment insurance program when it enacted the *Employment Insurance Act*, S.C. 1996, c. 23 (“*1996 Act*”). One of the main components of the reform concerned the mechanism for setting the premiums payable by workers and employers who contributed to the program, and thus the method of financing the program.
5. Faced with periodic deficits in the program and fearing the effects of an economic downturn on the Consolidated Revenue Fund, Parliament sought, in adopting this reform, to create a reserve to enhance the program’s stability while avoiding significant fluctuations in premiums. The reform quickly paid off, as there was a surplus of several billion dollars in the Employment Insurance Account on January 1, 2009.
6. In 1998 and 1999, respectively, the Syndicat national des employés de l’aluminium d’Arvida and the Confédération des syndicats nationaux went to court to strike down certain provisions of the *1996 Act*, arguing, *inter alia*, that the premium-setting mechanism was unconstitutional because the annual surpluses in the account were being reallocated by the government to its general expenses, including budget deficit reduction. In their view, this was a misappropriation pure and simple of monies that were supposed to be earmarked for employment insurance.
7. In its decision of December 11, 2008, this Court declared that the measures adopted in the *1996 Act* were valid and constitutional, with the exception of those that applied in 2002, 2003 and 2005. The Court held that the premium-setting mechanism for those years was unconstitutional because it enabled the Governor in Council to impose a tax without a clear delegation of taxing authority (*CSN v. Canada*, at paras. 72 *et seq.*).
8. For 2002, 2003 and 2005, premium rates had been set by the Governor in Council under ss. 66.1 and 66.3 of the *1996 Act*. These sections made it possible to disregard the criteria set out in s. 66, which governed the exercise of the power to set rates. Because they were silent regarding the connection between premiums and benefits, they could not be viewed as imposing a regulatory charge within the meaning of *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, and *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131. Nor did they contain a delegation of taxing authority by Parliament to the Governor in Council. The Court accepted that, for the years in question, the improper exercise by the Governor in Council of the power conferred on Parliament was a technical defect, and it suspended the effect of the declaration of invalidity of ss. 66.1 and 66.3 for 12 months to enable Parliament to rectify the situation.
9. On July 12, 2010, Parliament enacted the *Jobs and Economic Growth Act*, S.C. 2010, c. 12 (“*2010 Act*”), which provided, among other things, for closure of the Employment Insurance Account and the creation of a new account, called the Employment Insurance Operating Account, retroactive to January 1, 2009 (ss. 2185 *et seq.*).
10. It is common ground that the *2010 Act* did not specify that the balance of the Employment Insurance Account, which at that point amounted to over $57 billion, was to be transferred to the new Employment Insurance Operating Account. This, then, is the context in which the litigation began.
11. Judicial History
12. In April 2011, the unions filed a motion to institute proceedings in order to have certain provisions of the *2010 Act* declared unconstitutional.
13. The Attorney General of Canada submitted that the issues raised by the unions had already been decided by this Court in *CSN v. Canada*, and accordingly moved to dismiss the action under art. 165(4) *C.C.P.* on the basis that it was unfounded in law.
    1. Superior Court, 2012 QCCS 128 (CanLII), Perrault J.
14. The motion to dismiss was initially granted by the Quebec Superior Court. Perrault J. rejected the unions’ arguments to the effect that the impugned provisions were constitutionally invalid because they broke the necessary connection between the premiums being collected and the employment insurance program. She pointed out that this Court had held in *CSN v. Canada* that the monies from the program belonged to the government and not to the contributors. Moreover, the connection relied on by the unions was relevant only for the purpose of establishing the legal nature of the premiums, not for that of determining whether they were being used in a lawful manner. The premiums constituted either a regulatory charge or a payroll tax. The accumulated surpluses formed part of the government’s revenues, did not have to be used solely for the employment insurance program and were not a debt owed to the program by the Consolidated Revenue Fund. Perrault J. concluded that the questions of law raised by the unions had already been disposed of by this Court in 2008. Their action was accordingly unfounded in law and had to be dismissed, even at this preliminary stage.
    1. Court of Appeal, 2012 QCCA 1822 (CanLII), Morissette, Fournier and St-Pierre JJ.A.
15. The Quebec Court of Appeal set aside the motion judge’s decision, finding that the action was concerned more with [translation] “the effects of the act of eliminating the balance and the resulting accounting entries” that flowed from the 2010 legislative amendment than with the use of the surpluses that had accumulated in the account (para. 51). The issue now before the court had not been disposed of by this Court in its 2008 decision, since the legislation in question had not yet been enacted. Moreover, most of the relevant facts were subsequent to that decision. In this context, if the motion judge had assumed those facts to be true, as she should have, she would have dismissed the motion to dismiss and allowed the parties to argue the issues raised by the unions on the merits. The Court of Appeal also noted the unions’ allegation that the Consolidated Revenue Fund was indebted to the Employment Insurance Account and stressed that this was one of the facts the trial judge had to assume to be true.
16. Issue
17. In this Court, the issue continues to be how to dispose of the appellant’s motion to dismiss.
18. Analysis
    1. Article 165(4) of the Code of Civil Procedure
       1. Function and Scope of Article 165(4) *C.C.P.*
19. The appellant’s preliminary motion was based on art. 165(4) *C.C.P.*  The primary function of that provision, which establishes a contemporary version of the former procedure known as the “inscription in law”, is to avoid a trial where an action has no basis in law, even if the facts in support of it are admitted (*Groupe d’assurance Hartford/Monitor Insurance Group* *v. Plomberie P.M. Inc.*, [1984] R.D.J. 17 (C.A.); *Groupe Jeunesse Inc.* *v. Loto-Québec*, 2004 CanLII 9766 (Que. C.A.), at para. 6).
20. Thus, the application of art. 165(4) *C.C.P.* favours the sound and effective management of judicial resources. In the words of McLachlin C.J., the power of the courts to dismiss actions at a preliminary stage “is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial” (*R. v.* *Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 19; see also *Morier v. Rivard*, [1985] 2 S.C.R. 716, at pp. 745-46).
21. Dismissing an action at a preliminary stage can have very serious consequences, however. The courts must therefore be cautious in exercising this power. As a result, an action will not be dismissed at this point in the proceedings unless it is plain and obvious that it lacks a basis in law (*Bohémier* *v. Barreau du Québec*, 2012 QCCA 308 (CanLII), at para. 17; *Ville de Hampstead v.* *Jardins Tuileries Ltée*, [1992] R.D.J. 163 (C.A.); *Cheung* *v.* *Borsellino*, 2005 QCCA 865 (CanLII); *Association provinciale des constructeurs d’habitations du Québec inc.* *v.* *Société d’habitation et de développement de Montréal*, 2011 QCCA 1033 (CanLII)).
22. In this regard, the Quebec Court of Appeal noted that, [translation] “given the serious consequences of dismissing an action without considering it on its merits, litigation should not be ended at an early stage on a motion to dismiss absent a situation that is plain and obvious” (*Entreprises Pelletier & Garon (Toitures inc.)* *v.* *Agropur Coopérative*, 2010 QCCA 244, [2010] R.D.I. 24, at para. 4 (emphasis added)).
23. This “plain and obvious” situation that opens the door to the dismissal of an action must be apparent from the allegations set out in the motion to institute proceedings and the exhibits filed in support of it (*Groupe Jeunesse Inc.*; *R. v. Québec (Société des alcools)*, 1998 CanLII 13129 (Que. C.A.); *Saint-Eustache (Ville de) v.* *Régie intermunicipale Argenteuil Deux-Montagnes*, 2011 QCCA 227 (CanLII)).
24. However, although the *facts alleged* in the motion must be assumed to be true (*Westmount (City)* *v.* *Rossy*, 2012 SCC 30, [2012] 2 S.C.R. 136, at para. 15; *Oznaga v.* *Société d’exploitation des loteries et courses du Québec*, [1981] 2 S.C.R. 113), the court is not bound by the *legal characterization* of those facts (*Gillet v.* *Arthur*, [2005] R.J.Q. 42 (C.A.), at para. 25; *Racine v.* *Harvey*, 2005 QCCA 879 (CanLII), at para. 10; *Société des alcools*; *Bohémier*, at para. 17).
25. As a result, a judge deciding whether an action should be dismissed must determine whether the allegations *of fact* set out in the motion to institute proceedings are [translation] “of such a nature as to open the door to the conclusions being sought” by the applicant (*Association provinciale des constructeurs d’habitations du Québec inc.*, at para. 14). In every case, the dismissal of the action will be appropriate only if all the facts to be considered are set out in the motion to institute proceedings and there is no question that the relevant legal rule applies to them (H. Reid and C. Carrier, *Code de procédure civile du Québec: jurisprudence et doctrine* (30th ed. 2014), at para. 165/200).
    * 1. Dismissal of an Action on the Basis of *Stare Decisis*
26. Judgments rendered under art. 165(4) *C.C.P.* often concern situations in which the right being claimed is clearly prescribed, the law prohibits recourse to the courts, or there is quite simply no legal relationship between the parties (see D. Ferland and B. Emery, *Précis de procédure civile du Québec* (4th ed. 2003), vol. 1, at pp. 286-87; H. Kélada, *Les préliminaires de défense en procédure civile* (2009), at pp. 214 *et seq.*). However, an action will sometimes be dismissed if it is clear that an authoritative decision has already resolved the issue or issues raised in the motion to institute proceedings. In the Attorney General of Canada’s view, that is in fact the case in this appeal.
27. He submits that this case concerns a situation in which a previous decision of this Court has settled the law on the main legal issues involved in the appeal. The appellant does not argue that this is a case of *res judicata* on the basis of which art. 165(1) could be invoked. Rather, his argument is that the law applicable to the fundamental issues that will determine the outcome of the appeal was settled by this Court in its 2008 decision in *CSN v. Canada* in exercising its power as the ultimate interpreter of constitutional and public law. An interpretation contrary to the one adopted by the Court in that case would have no legal basis in light of the case’s status as a precedent (*Canada (Procureur général) v. Imperial Tobacco Ltd.*, 2012 QCCA 2034, [2012] R.J.Q. 2046 (“*Canada v. Imperial Tobacco*”), at paras. 125-27, *per* Gascon J.A., leave to appeal refused, [2013] 2 S.C.R. ix; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 38 and 43-46, *per* McLachlin C.J.).
28. Of course, the doctrine of *stare decisis* is no longer completely inflexible. As the Court noted in *Bedford*, the precedential value of a judgment may be questioned “if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate” (para. 42). Where, on the other hand, the legal issue remains the same and arises in a similar context, the precedent still represents the law and must be followed by the courts (*Bedford*, at para. 46).
29. Although relatively uncommon in Quebec civil procedure, the mechanism for dismissing actions at a preliminary stage on the basis of *stare decisis* is similar to the *res judicata* exception (art. 165(1) *C.C.P.*). Under both of them, the legal issues raised by the applicant must already have been clearly resolved by the courts. However, unlike *res judicata*, *stare decisis* does not necessarily require that the dispute be between the same parties. What must be established is that the issue is the same and that the questions it raises have already been answered by a higher court whose judgment has the authority of *res judicata*.
30. In *Canada v. Imperial Tobacco*, Gascon J.A., as he then was, explained this as follows:

[translation] In this context, the manufacturers’ argument that this case is not *res judicata*, because *Imperial* was not decided by a court of competent civil law jurisdiction or because strict identity of parties, cause and object is not established, does not appear to me to be determinative. I see no need for further discussion of the distinctions the manufacturers raise with respect to these identities of parties, cause and object, which in their view refute the AGC’s *res judicata* argument. In my opinion, the appropriate principle to apply to resolve the issue is instead *stare decisis*.

The Superior Court should have held on the basis of *stare decisis* that it was bound by *Imperial*. The Supreme Court, by ruling as it did on the issue of the AGC’s immunity in relation to the course or principle of action challenged by the manufacturers, had in a sense barred the manufacturers’ actions in warranty by rendering them unfounded in law, even if the alleged facts were assumed to be true.

*Stare decisis* is a less stringent basis for an argument than *res judicata*, since it requires only a similar or analogous factual framework. *Stare decisis* is a principle “under which a court must follow earlier judicial decisions when the same points arise again in litigation” [*Black’s Law Dictionary* (9th ed. 2009), at p. 1537]. It applies, of course, to decisions of the Supreme Court, particularly in the area of public law as here, where the parties were involved in earlier litigation on the specific question at issue. [Emphasis added; paras. 125-27.]

1. This being said, before granting a motion to dismiss an action because it has no basis in law, the judge must also be satisfied in light of the record and the alleged facts that the precedent relied on by the applicant actually concerns *the entire dispute* that it should normally resolve, and that it provides a *complete, certain and final* solution to the dispute. In case of doubt, the judge may not grant the motion to dismiss, but must instead give the parties an opportunity to argue the issues on the merits.
   1. Application of the Law to the Facts
      1. True Nature of the Action
2. The appellant submits that the action in the case at bar must be dismissed on the basis of *stare decisis*. To rule on this argument, it will be necessary to identify the nature of the action that was the subject of the Court’s judgment in 2008 and determine how it relates to the allegations and the conclusions sought by the unions in their action brought in 2011.
3. In a case such as this, the judge sitting on the motion to dismiss can consider more than just form when reviewing the record in order to properly establish the essential nature of the action, which will enable him or her to reject arguments that are new only in how they are presented.
4. The constitutional questions the Court answered in its 2008 judgment were stated as follows:

1. Do ss. 66 to 66.3 and 72 of the *Employment Insur­ance Act*, S.C. 1996, c. 23, exceed, in whole, in part or through their combined effect, the unemploy­ment insurance power provided for in s. 91(2A) of the *Constitution Act, 1867*?

2. If the answer to question 1 is affirmative, do ss. 66 to 66.3 and 72 of the *Employment Insurance Act*, S.C. 1996, c. 23, exceed, in whole, in part or through their combined effect, the taxation power provided for in s. 91(3) of the *Constitution Act, 1867*?

3. If the answer to question 2 is negative, do ss. 66 to 66.3 and 72 of the *Employment Insurance Act*, S.C. 1996, c. 23, satisfy the requirements of s. 53 of the *Constitution Act, 1867*?

4. Do ss. 24, 25, 56 to 65.2, 73, 75, 77, 109(*c*) and 135(2) of the *Employment Insurance Act*, S.C. 1996, c. 23, exceed, in whole, in part or through their combined effect, the unemployment insur­ance power provided for in s. 91(2A) of the *Consti­tution Act, 1867*?

5. If the answer to question 4 is affirmative, are ss. 24, 25, 56 to 65.2, 73, 75, 77, 109(*c*) and 135(2) of the *Employment Insurance Act*, S.C. 1996, c. 23, validly based on the federal spending power?

(*CSN v. Canada*, at para. 17)

1. In the instant case, the unions are asking the courts for the following conclusions:

[translation] Declare that any change in the mechanism for setting premium rates may not disregard the sums collected and recorded in the Employment Insurance Account;

Declare that the balance in the Employment Insurance Account may not be erased and must be allocated to financing the program;

Declare that sections 2185 to 2187, 2189, 2190, 2193 to 2199, 2203, 2204(1) as it relates to subsections 66(1), 2204(2), 2207 and 2208 of the *Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures* are invalid;

(Motion to Institute Proceedings (“M.I.P.”), at p. 29; A.R., vol. I, at p. 55)

1. There is no question that the unions ultimately want the moneys recorded in the Employment Insurance Account to be allocated exclusively to the payment of benefits. In their view, the sums collected for the former program should be used solely to finance the new program. That is the unions’ objective in this case.
2. In considering the legal bases for the new action, we note that the unions’ underlying premise is that [translation] “a balance in the Employment Insurance Account . . . is a debt owed by the Consolidated Revenue Fund to the Employment Insurance Account” (M.I.P., at para. 90; A.R., vol. I, at p. 53).
3. The unions believe that the constitutional validity of the premiums depends on the transfer of that debt from the former Employment Insurance Account to the new Employment Insurance Operating Account. They argue that [translation] “[t]his debt cannot be erased . . . without bringing into question the constitutional validity of the sums that have been collected and recorded” (M.I.P., at para. 92; A.R., vol. I, at p. 54). In support of their argument, the unions quote the following passage from this Court’s reasons in *CSN v. Canada*:

However, it is clear that the Account does not constitute — as is the case of pension fund assets — a trust fund or patrimony by appropriation. It forms part of Canada’s government accounting, and premiums form part of the government’s revenues. The government’s use of it does not, therefore, constitute a misappropriation of employment insurance monies. Those monies were used like any other part of the revenues in the Consolidated Revenue Fund, and the appropriate accounts were kept. [Emphasis added; para. 74.]

1. According to the unions, the reason why the Court held that the sums collected as premiums had been neither stolen nor misappropriated by the government was that they had been properly recorded in the Employment Insurance Account (M.I.P., at para. 89; A.R., vol. I, at p. 52). In short, the premiums paid in the context of the program are constitutionally valid only if they are properly accounted for. According to this argument, without such an accounting link, the use of premiums for any other purposes would constitute a misappropriation of monies collected to finance the employment insurance program and would therefore be unconstitutional.
2. As the unions see it, this issue was not settled by the Court in 2008. The appellant sees things quite differently, however. The Employment Insurance Account was merely an accounting tool that contained no property or loans, and it was indebted to no one. All transactions — the payment of premiums or of benefits — were conducted through the Consolidated Revenue Fund, which means that the Employment Insurance Account was neither a trust fund nor a patrimony by appropriation.
   * 1. Is the Action Bound to Fail?
3. As we mentioned above, to decide whether the action should be dismissed under art. 165(4) *C.C.P.*, this Court must determine whether it is bound to fail even if the alleged facts are true. Given that the appellant is relying on *stare decisis*, we must therefore determine whether the Court’s decision in *CSN v. Canada* resolves the entire dispute and provides a complete, certain and final solution to the unions’ action in this case.
4. In our opinion, the precedent relied on by the appellant does in fact do so. As a result, art. 165(4) *C.C.P.* applies, and the action could be dismissed in the interest of the proper administration of justice, even at a preliminary stage.
5. We reiterate, first, that in the unions’ view, [translation] “a balance in the Employment Insurance Account . . . is a debt owed by the Consolidated Revenue Fund to the Employment Insurance Account” (M.I.P., at para. 90; A.R., vol. I, at p. 53). The success of their action is directly dependent on the validity of this argument, which is its cornerstone, as the Quebec Court of Appeal in fact recognized. However, the Court of Appeal made a critical error in its analysis with respect to this argument by treating the allegation that the Consolidated Revenue Fund was indebted to the Employment Insurance Account as a fact that had to be assumed true for the purposes of the motion to dismiss, whereas it was really a legal characterization of the facts.
6. To determine whether the Consolidated Revenue Fund was indebted to the Employment Insurance Account, it is necessary to analyze the nature of the Fund and the Account, as well as the relationship between them. In other words, a conclusion that the former was indebted to the latter presupposes a particular legal characterization of their relationship. In sum, this Court must determine whether, from a legal standpoint, the Consolidated Revenue Fund was indebted to the Employment Insurance Account and, ultimately, whether the unions’ basic legal argument is valid.
7. In this respect, we are of the opinion that the Court’s decision in *CSN v. Canada* is of no assistance to the unions. On the contrary, it deprives their action of any reasonable chance of success. In that case, the Court stated that the Employment Insurance Account “does not constitute — as is the case of pension fund assets — a trust fund or patrimony by appropriation. It forms part of Canada’s government accounting, and premiums form part of the government’s revenues” (para. 74 (emphasis added)). As government revenues, the amounts collected as contributions to the employment insurance program can therefore be used for purposes other than paying benefits.
8. In fact, no debt of the Consolidated Revenue Fund to the Employment Insurance Account ever existed. Like any legal or natural person, the government cannot be indebted to itself. It follows that any argument based on the existence of such a debt is bound to fail. The enactment of the *2010 Act* did not alter this factual and legal situation.
9. Moreover, in *CSN v. Canada*, the Court held that the connection between the program and the premiums is a factor that can be considered in determining the *nature* of the levies. But it is wrong to say that the *validity* of these levies depends on the existence of that connection. As we stated in that case, the government can, lawfully, use employees’ premiums for purposes other than financing the employment insurance program.
10. Accordingly, even if we accept the unions’ argument that the connection between premiums and the employment insurance program was broken by the decision not to transfer the balance from the former account to the new one, this does not mean that the validity of the levies was compromised.
11. Conclusion
12. In our opinion, it is clear that the unions’ action has no reasonable chance of success. On the basis of *stare decisis*, it is apparent that their main argument that the Consolidated Revenue Fund was indebted to the Employment Insurance Account is unfounded, and this conclusion dictates the outcome of the case. As a result, this Court’s decision in *CSN v. Canada* provides a complete, certain and final solution to the entire dispute that the unions are trying to revive. Their action was therefore properly dismissed by Perrault J. under art. 165(4) *C.C.P.*
13. For these reasons, we would allow the appeal and restore the motion judge’s judgment, with costs throughout.

*Appeal allowed with costs throughout.*

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