

Supreme Court Strikes Down Portions of Employment Insurance Act

The Supreme Court of Canada (S.C.C.) has ruled that two sections of the *Employment Insurance Act* in force in 2001, 2002, and 2005, respectively, are unconstitutional.^[1] In *Confédération des syndicats nationaux v. Canada (Attorney General)* the Court held that insurance premiums were collected unlawfully.^[2] The federal government was given one year to rectify the situation.

A Québec union had complained of two matters. First, the federal government had no business putting employment insurance premiums into its general (consolidated revenue) accounts. At the time of the complaint the insurance fund had a positive balance of \$40 billion. The federal government used those funds to create new employment programs and to reduce its overall spending deficits. The union felt that the premiums should only be used to pay workers upon becoming unemployed, as that was what the program was designed to address. Second, the union complained that the rates at which the premiums were being set had been delegated to the federal cabinet (where there was no public debate as to how much they should be), as opposed to being set by Parliament in legislation (where the amount of the rates could be debated in public).^[3]

The S.C.C. dismissed the first part of the union's argument. It affirmed previous court decisions that Parliament had the sole ability to create and set tax rates.^[4] It noted that in prior years the fund had run into deficits, which Parliament had topped up using general revenues (thereby ensuring workers' access to payments when they were unemployed). There was nothing wrong with the government doing the reverse.^[5]

The S.C.C. accepted a part of the union's second argument. Section 53 of the *Constitution Act, 1867*, reads:

"Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons."^[6]

In enacting sections 66.1 and 66.3 of the *Employment Insurance Act*, Parliament assigned the ability to set premium rates to both the Employment Insurance Commission and to cabinet without describing the relationship between the two. In practice the Employment Insurance Commission recommended new rates to cabinet, but cabinet set the rates. The S.C.C. noted that: "At the time Parliament

delegated the power to collect employment insurance premiums to the Commission and the Governor General in Council [federal cabinet], the legislation contained no statement either that its purpose was to collect a tax or that Parliament's taxing authority was being delegated to the Governor General in Council."^[7]

Previous case law decided by the S.C.C. allows governments to delegate specific taxing powers to specific taxing authorities. For example, provincial governments could allow local school boards to levy school taxes for the specific purpose of funding school systems, where the "structure of the tax, the tax base, and the principles for its imposition" were clearly defined.^[8] However sections 66.1 and 66.3 of the *Employment Insurance Act* did not mention any of the three requirements above. Hence the sections did not comply with the Constitution, and were voided by the Court.

^[1]*Employment Insurance Act*, S.C. 1996, c. 23, sections 66.1 and 66.3.

^[2]*Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68.<http://www.canlii.ca/en/ca/scc/doc/2008/2008scc68/2008scc68.html>.

^[3]*Ibid.* at paras. 1 - 7.

^[4]*Ibid.* at paras. 16 - 39.

^[5]*Ibid.* at paras. 40 -56.

^[6]*The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, section 53.<http://www.canlii.ca/en/ca/const/const1867.html#legislative>.

^[7]*Supra* note 2 at para 93.

^[8] *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, (2001), 196 D.L.R. (4th) 577, (2001), 144 O.A.C. 1, 2001 SCC 15 (CanLII). para 75.<http://www.canlii.org/en/ca/scc/doc/2001/2001scc15/2001scc15.html>.