Delegation

Background

The constitutional distribution of powers (see division of powers) between the federal and provincial governments has, at times, made it difficult for either level of government to deal with certain issues. Inter-delegation — the delegation of federal power to the provinces or a provincial power to the federal government — was used in the 1930s and 40s as a solution to this problem.[1] In 1950 however, the Supreme Court of Canada found that such legislation was unconstitutional because it disturbs the distribution of powers in the *British North America Act*, now known as the *Constitution Act, 1867*.[2]

In 1960, the First Ministers reached a provisional agreement on a constitutional amendment to permit inter-delegation.[3] Under this amendment, Parliament would have been able to delegate its authority to make laws in any area of federal jurisdiction if at least four provinces agreed.[4] Conversely, four provinces could delegate legislative jurisdiction to Parliament over certain specified provincial matters.[5] But the 1960 plan was not implemented.[6] The agreement failed in 1964 when it was reintroduced at a First Ministers Conference because the government of Quebec reversed its position over other aspects of the proposed amendment.[7]

Inter-delegation: Delegating Legislative Authority Between Levels of Government

The constitutional position today remains as it was left in 1964. The delegation of federal legislative power to a province (or group of provinces) or of provincial legislative power to Parliament is unconstitutional.

Delegating Legislative Authority to Other Bodies

While delegation of powers between levels of government is constitutionally prohibited, there is no prohibition against delegating powers to a subordinate body. Parliament and the provincial legislatures may delegate lawmaking powers to entities such as the executive branch of government and bodies of their own creation, like administrative boards and tribunals.[8] Delegates must act within the limits of the authority delegated by Parliament or a provincial legislature.[9] Delegated power is subordinate and can be withdrawn.[10]

Parliament and provincial legislatures are able to delegate broad powers. For example, in 2021, the Supreme Court of Canada held in *References re Greenhouse Gas Pollution Pricing Act* that Parliament constitutionally delegated broad powers to the executive branch in the *Greenhouse Gas Pollution Pricing Act* (“*GGPPA*”).[11] The *GGPPA* exemplifies the breadth of powers that Parliament can delegate to the executive branch. The powers delegated by Parliament in the *GGPPA* include the power of the Governor in Council (i.e. the federal Cabinet) to determine whether provincial greenhouse gas pricing systems are sufficiently stringent.[12] Parliament also assigned the Minister of the Environment the power to designate a facility (upon request by the facility) as a “covered facility,” thus subjecting it to

the regulatory charges found in Part 2 of the *GGPPA*.[13] This decision affirms the legislature's power to make broad delegations of powers to the executive branch.

[1] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2019, release 1) at 14.3(a).

[2] See *Nova Scotia (AG) v Canada (AG)*, [1951] SCR 31, 1950 CanLII 26; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[3] James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communication Group, 1996) at 32.

[4] *Ibid* at 33.

[5] *Ibid.*

[6] *Ibid* at 34.

[7] *Ibid* at 34-35.

[8] Hogg, *supra* note 1 at 14.1(a).

[9] *Ibid* at 14.3(a).

[10] *Ibid.*

[11] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 83-88 ; *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 .

[12] *GGPPA Reference*, *supra* note 11 at para 27.

[13] *GGPPA*, *supra* note 11 at s 172.