

Subsidiarity

‘Subsidiarity’ is a jurisdictional principle regarding the distribution of competence between federal and sub-federal levels of government. The leading statement of this principle is Article 5 of the Treaty Establishing the European Community (Official Journal C 340), which states that "In areas that do not fall within its exclusive competence, the Community shall take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". Although the principle of ‘subsidiarity’ is not found in the text of the Constitution Act, 1867, several commentators have been attracted to the principle because it appears to provide a principled and rational basis for allocating jurisdiction between the provincial and federal governments. It recognizes both the importance of provincial autonomy and the functional superiority, in certain circumstances, of federal jurisdiction.

Applied to Canada, the principle of ‘subsidiarity’ would imagine the federation as a scheme for mutual advantage, whereby the federal government only acts when the provinces cannot further their own interests through individual action. In this connection, there is a clear similarity between the principle of subsidiarity and the "provincial inability test" relied on by the Supreme Court of Canada to delineate the scope of federal jurisdiction under the national dimensions branch of the peace, order and good government power (see *R. v. Crown Zellerbach Canada*, [1988] 1 S.C.R. 401) and the general regulation of trade branch of the trade and commerce power (*General Motors Canada v. City National Leasing*, [1989] 1 S.C.R. 641). However, as a legal principle, a great deal turns on the identification of those circumstances in which provinces are unable to act. The debate here would be whether inability refers to a real constitutional inability on the part of provincial governments, or rather the functional criterion of the comparative institutional advantage of the federal government.

Sources:

- P. W. Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 *National Journal of Constitutional Law* 341.