

## FEDERALISM AND FOREST MANAGEMENT

About 80% of the world's forests are in countries that have federal systems of government. This briefing reviews these forest-rich countries to identify how federalism can improve both forest management and governance, more broadly. The briefing draws mainly from a survey by Contreras-Hermosilla *et al.* (2008). After defining 'federalism' in the context of forest-governance, this briefing reviews results from around the world; identifies issues related to good forest-governance; and makes recommendations for countries evolving to more federalist-styles of political organization. In particular, this briefing examines the experience of Canada as an example of a federal system with strong, constitutionally protected, provincial control over forests, but where indigenous populations are making claims to vast areas of forests that currently have unresolved land title.

### What is federalism?

**Federalism is a form of political organization in which power in a country's government is officially divided between a central authority and territorial subdivisions**, (hereafter referred to as "provinces", but may also be referred to as states, counties, or some regional variation). There is no single "federal model" and most countries are in a state of almost constant transition, but generally the individual **provinces have their own legislature, judiciary, and executive institutions, and responsibility/authority, the balance of power, and the means to resolve disputes between the different levels of power is codified in the country's constitution**. Being so protected by the constitution, provincial-rights in a federal system cannot be altered by a single level of government. This separates federalism from other forms of decentralization where responsibility is given to provinces but may be taken back at the discretion of the central government.

### Division of power

Although difficult to identify in practice, **power (responsibility and authority) should be allocated to "the lowest possible level of government that can discharge a needed function effectively and efficiently"** (the *subsidiarity principle*; Contreras-Hermosilla *et al.* 2008). Generally, the federal government controls activities that require a "national concerted action", like international relations (*e.g.*, tackling climate change through reduced emissions from deforestation and forest degradation [REDD+]). The provinces regulate activities within their borders, including the action of lower levels of government, such as counties/municipalities, as well as private individuals/companies. In the case of natural resources, like forests, the provinces manage the resource, including setting and collecting tax and non-tax (royalties) revenues; the federal government only plays a role in cross-state actions (*e.g.*, control of forest fires, or pests, *etc.*).

### Federalism and success in achieving good governance of natural resources

In a study that compared the major forest-countries under federal systems (*i.e.*, Australia, Brazil, Canada, India, Malaysia, Nigeria, Russia, Switzerland and the U.S.A.) with countries that have undertaken major decentralization programs (*i.e.*, Bolivia, Indonesia, and Nepal), Contreras-Hermosilla *et al.* (2008) found that **the quality of forest governance was not dependent on the type of decentralization, rather in all cases good governance depended on "how well government officers and agencies operated within their institutional structures and rules."**

With respect to the strength of the federal system though, **provincial rights are generally stronger when sovereign states “assign authority and responsibility to a central government formed through a constitutional process”** as opposed to more traditional decentralization efforts that involved devolution from central to local-level governments (Contreras-Hermosilla *et al.* 2008).

#### **Issues for forests within federal system**

**Central-ownership = weak control.** In another review of forest-rich countries, Gregersen *et al.* (2004) found that where a majority of the forest land is owned (or at least claimed) by the federal government and managed by a central forest agency (*e.g.*, Nigeria and Russia), control of public forest lands was “very weak”. In contrast, **countries where a majority of forest lands are still public but under provincial-ownership** (*e.g.*, Canada and India) **“tend to have a better record of effectively controlling the public forest estate.** Thus, decentralized ownership of public lands appears an effective strategy at least in some cases.”

**Effective decentralization takes time.** Gregersen *et al.* (2004) also found that “in all cases, what now appear as effective and efficient decentralized systems took many years to achieve, with a number of adjustments to the many unforeseen events.” In part this was because, despite a reasonably good understanding of the objectives of decentralization, there were **less clear ideas of how to operationalize the decentralization process** in order to ensure a smooth transition.

**Sequencing.** Decentralization should not proceed arbitrarily, but according to a clear set of rules and conditions (Gregersen *et al.* 2004). Unfortunately, “shifts in responsibilities [generally] precede abilities to carry them out and precede shifts in resources or the authority for sub-national levels of government to generate adequate resources locally” (Contreras-Hermosilla *et al.* 2008). **A lack of technical and managerial capacity at the local level has proven to be a major bottleneck** in the decentralization process.

“Federal systems formed by independent states have in general been more fortunate in terms of getting the balance right, mainly because they could do it when they decided what powers, responsibilities and resources the newly formed central government should have... Unitary governments are reluctant, for example, to decentralize the rights to and control over resources to sub-national governments” (Contreras-Hermosilla *et al.* 2008). **The transition to decentralization appears to be most easy in federal countries**, which may be because the greater autonomy in federal countries at the local level meant that **provinces already had the capacity for management** at the time of decentralization.

**Regulatory proliferation** (where both the federal government and the provinces have their own laws and rules regarding forest management) **increases the risk of complex or even contradictory legislation, introducing legal confusion to the forest-sector.**

**Coordination.** Effective governance **requires harmonization** between political, fiscal, and administrative units and among the different levels of government. But coordination is also important **within government because the forestry agency is generally just one of a number of administrators of forest lands.** Moreover, decentralization in the forest sector should not be isolated from a general forestry strategy, such as a National Forest Program (Gregersen *et al.* 2004).

**Independence of all levels of government to raise and retain revenue**, otherwise there is no real autonomy.

**Public participation & accountability.** Where there is a lack of accountability, “**local autocratic leaders can enhance their power, they can rig elections and intimidate opposition**, creating a one-party state at the provincial level, even if the national system remains vigorously competitive [e.g., Nigeria]...[b]ut this far from inevitable” (Diamond 2004). Contreras-Hermosilla *et al.* (2008) found it important to formalize a process in which the private sector contributes to government decision-making (e.g., rules for lobbying).

Evidence suggests that **decentralization increases corruption**, particularly when linked to fiscal windfalls from natural resources that can be seized by local elites (e.g., oil and municipalities in Brazil; mining/forestry and kabupatens in Indonesia). In the case of weak federal countries with provincial control of forests, corrupt local officials have allowed forests to be “captured by well organized private interests...[and] locals officials have the forest resource in a highly unsustainable fashion without perhaps intending to do so...[and] even in cases where adequate authority existed on paper, [a] lack of managerial capacity has resulted in major corruption and illegal activity” (Contreras-Hermosilla *et al.* 2008).

**Carrots & sticks.** “Decentralized forest management should be based not only on controls but also incentives; rules that cannot be enforced should not be made” (Gregersen *et al.* 2004).

**A reluctance to legally recognize traditional indigenous and customary rights** “has created severe governance problems as local populations vigorously resist regulations they consider as eminently unfair and conflicting with their traditional practices” (Contreras-Hermosilla *et al.* 2008).

**Local capacity for negotiation, monitoring and evaluation** should be strengthened (Gregersen *et al.* 2004).

**Central governments are constrained during international negotiations** when provinces have exclusive regulatory over specific sectors. For example, national governments will have difficulties negotiating a climate change treaty, if the provinces have control over forests unless, Hudson (2012) argues, there is: 1) a **national constitutional primacy over forest management to establish a minimum-standards** framework within which subnational governments must meet but may otherwise operate with discretion, including setting even higher standards; and so the levels of government 2) **voluntarily and cooperatively sharing authority**; but the central government ensures 3) **adequate enforcement**. This “type of Fail-safe Federalism facilitated by national constitutional primacy strikes a balance between centralized planning and minimum standards at the federal level and decentralized implementation, harnessing of local information and expertise, and other benefits at the subnational level” (Hudson 2012). But **without trust (based on history), this sharing may be difficult to achieve.**

## Recommendations

Contreras-Hermosilla *et al.* (2008) recognized five **external factors necessary for a functioning federal system**:

- Political **stability**;
- An adequate **decision-making and regulatory framework**;
- Civil society and government that have **respect for the rule of law**:
  - Including **full respect for legal and traditional property rights**;
- An effective **voice for citizens** in choosing transparent and accountable governments, and a

role for these citizens to influence government decisions and monitoring their implementation; and,

- Effective **inter-sectoral and inter-governmental linkages**.

Given these pre-requisites, good governance in a decentralized federal system further requires:

- **Responsibilities—and the requisite authority—assigned to the lowest level of government** capable of fulfilling the duty;
- **Each level of government provided with adequate resources** so institutions can function effectively; and,
- Sufficient **participation** of civil society and the private sector.

**Where these exist, decentralized federal systems may enjoy effective forest management, and governance more broadly.**

### **Federalism and provincial forest control in Canada<sup>1</sup>**

An example of such a system is Canada.

From confederation in 1867, **provincial governments have the sole constitutional authority** to legislate, regulate, conserve and **manage all forests not owned by the federal government**; that is, of Canada's 416 million ha of forest (about half of its land area), provinces regulate the 77% in provincial ownership plus the 7% privately owned, and the federal government only maintains constitutional authority to regulate the remaining 16% (including aboriginal reserves, military bases, national parks, *etc.*; Hudson 2012<sup>2</sup>).

There is strong coordination among levels of government, for example, the Canadian Council of Forest Ministers is focused on making more effective and efficient linkages between federal and provincial governments. There is also a National Forest Strategy. But **the federal government has never imposed this (or any) forest strategy on the provinces**, nor even international agreements aimed at forest management (Hudson 2012). Not surprisingly, provincial differences in legislation and in regulatory mechanisms are significant.

**The provinces relationship with the federal government has fluctuated** between the extremes of centralization and decentralization in response to a variety of political, economic and social circumstances. Originally, unification of the various colonies was desired, particularly by commercial interests, as a means of facilitating rapid economic growth, territorial expansion and military defence (XXX). But a strong sense of provincial identity, especially in Québec where people of French heritage are a majority, meant that most of the colonies were unwilling to give all authority to an English/Ontario-dominated central government. Federalism was a necessary compromise. In many ways, Canada is a 'negotiated country'.

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<sup>1</sup> This section draws mainly from: Thompson. 2013. Resource Rights.

<http://www.thecanadianencyclopedia.ca/en/article/resource-rights/> ; and Cullen. 1992.

<sup>2</sup> Other references divide ownership: 71% provincial; 23% federal; 6% private (Gregersen et al). Note that much of all the public land is under unresolved claim by First Nations indigenous peoples, especially in the province of British Columbia where the British made no treaties during colonization

At confederation, the provinces retained ownership and control over natural resources. All the new provinces retained ownership when they joined Canada, except when the prairie provinces joined confederation (Manitoba in 1870 and Alberta & Saskatchewan in 1905) and the federal government retained all ‘ungranted waste lands’. But this federal power did not last long; they were reversed<sup>3</sup> in 1930 by a Constitution Act of the UK Parliament, giving the three prairie provinces the same legal status as the other provinces.

Judicial interpretation has further reinforced decentralization. One of the reasons that the courts have had a big impact to weaken federal powers is that the Canadian constitution does not have a “supremacy clause” that would allow federal law to trump provincial law in the case of inconsistent laws. In this breach, **Canada’s courts have sought to “preserve the operation of provincial laws if at all possible”** (Cullen 1992).<sup>4</sup>

A further shift of power towards the provincial governments came in 1960, with the growing importance of provincial natural resources (particularly the oil and gas boom in western Canada). Growing regionalism left the provinces with considerable scope to develop (and protect) their own economies (and identities)...the provinces also enjoy a significant, provincially-based, revenue raising capacity” (Cullen 1992). In many practical ways, as opposed to a strict constitutional requirement, the federal government has been forced to devolve power to the provinces. But this informality has come at the cost of turf-battles (and blame-shifting) between the federal and provincial governments, with much decision-making behind closed doors. This lack of public participation and accountability is seen as a considerable “democratic deficit”.

**Some provinces have tried to mitigate this deficit by devising strong accountability mechanism. One example is the Forest Practices Board of British Columbia**, which is a government agency but answerable to the Premier of British Columbia, not the provincial forest service. The Forest Practices Board investigates the sector (including random audits of logging operators across the province) and issues public reports on how well industry and government are meeting the intent of British Columbia’s forest practices legislation. While not an enforcement agency, “its recommendation have led directly to improved forest practices such as stronger government decision-making processes and better communication among forestry professionals to manage risks to the environment.

“Although other jurisdictions have forest watchdog bodies, British Columbia may be the only one with **an arms-length relationship from government, and a mandate to hold both government and the forest industry publicly accountable** for forestry practices. It chooses which operation to audit, and its reports and findings are published without government revisions or comments.

“By law, **the board must audit government and industry forestry practices**, and it must **deal with complaints from the public** regarding forest practices and government enforcement. In addition, it may appeal enforcement decisions and penalties imposed by government, seek review of government decisions to approve plans for forestry operations, and carry out special investigations”

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<sup>3</sup> Although most of the agricultural land had already been allocated, the provinces also inherited ownership of underlying mineral rights. Note: the federal government still claims ownership of offshore resources (although hotly contested by Newfoundland) and of natural resources in the three northern territories.

<sup>4</sup> Most Canadian provinces have relatively stable tax bases as they may levy income tax, royalties on natural resources, as well as direct, retail sales taxes.



(Contreras-Hermosilla *et al.* 2008).

### **Indigenous land claims and federalism**

One challenge of federalism has been in the government's ability to address aboriginal issues across Canada. (Aboriginal is a collective term for the three officially recognized indigenous peoples: the Inuit of the high north, First Nations elsewhere, and the Métis [a group with a unique culture, descendant from the union between colonial-era European settlers and First Nations people].)

The federal government has failed to resolve outstanding, especially in British Columbia where the British did not make treaties with the various First Nations groups during colonization. The fact that the ten provinces control most of their forests, has for example, left the federal government unable to create or expand aboriginal reserves without the consent of the provincial government(s).

However, in the past, federal governments have tried to abrogate their responsibilities. In 1968, the Trudeau Liberal government tried "to abandon the fiduciary responsibility towards Aboriginal peoples and, at the same time, delegate programs and social services to provincial governments" (Uribe 2004). **Aboriginal groups** opposed this treatment and **demand constitutional amendments to recognize self-government and a third (Aboriginal) level of government.** These demands are yet to be fulfilled.<sup>5</sup>

Although the constitution does not yet recognize self-government, **the 1982 Constitution recognizes treaty rights** (which were generally signed during the period of colonization prior to the 20<sup>th</sup> century) and it **recognizes customary practices**, such as food harvesting within specific territories, as well as **assertions of Aboriginal title to their traditional lands.**

In order to assert claims over land title, the courts have found that "claimants must demonstrate that the right was integral to their distinctive Indigenous societies and exercised at the time of first contact with Europeans. While these may be now exercised in a modern way, practices that arose from European influences are not protected" (Bell & Hendersen 2016). So trapping fur-bearing animals to create ceremonial garments, for example, remains protected, but the commercial fur trade—seen as the product of European contact—is not. Further, the Supreme Court found that claimants had to show exclusive occupation of the territory as of the time the British Crown asserted sovereignty. In pursuit of claims, **the Court has allowed oral histories as evidence proving historic use and occupation.**

"No Aboriginal right, even though constitutionally protected, is absolute in Canadian law." Like all title to land, **Aboriginal title carries exclusive right to use and occupy the land**, "but that right may be infringed upon by the government for purposes such as economic development, power generation, or the protection of the environment or endangered species. Infringement of Aboriginal rights or title must be justified by non-Indigenous governments on the basis of a legitimate government purpose and recognition of the constitutional protection of the rights being affected. There may also be a requirement for prior consultation with the Indigenous peoples concerned and

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<sup>5</sup> In 1992 these amendments were included in a constitutional reform package (known as the Charlottetown Accord) and put to a national referendum, which failed to pass 55% to 45%. The failure was mainly due to opposition in Québec that the amendments did not do enough to protect the province, and in West that opposed recognition as a "distinct society" for Québec. Former Prime Minister Trudeau also opposed the Accord as the "effective disintegration of the Federal government."

compensation in some circumstances” (Bell & Hendersen 2016). In the case of forest resources, the courts have held the right to “proper administrative and consultation requirements are met, while permitting resource exploitation and development to continue in the overall public interest.”

The most recent Supreme Court decision has gone the farther, “taking an expansive view of Aboriginal title”. While it is clearly the Courts intention that a negotiated settlement be found between Aboriginal groups and the government over specific land claims, “the Supreme Court charted a new course relative to future resource development and the process of consulting with Indigenous groups in areas of Canada that have not been ceded by historic treaties, suggesting that **the [government] must do more than fulfill a duty to consent**”: **the government must either obtain consent, giving the Aboriginal group an effective veto, or meet legal requirements to justify infringing on the Aboriginal rights.**

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