

FARMLAND PROTECTION

The Role of the Federal Government

November, 2018

POLICY BRIEF

SUMMARY

- This policy brief explores possible roles of the federal government in farmland protection.
- Land use planning is, primarily, the responsibility of provincial governments under s. 92 of the *Constitution Act, 1867*. In turn, provincial governments enable/constrain what municipal governments can and must do.
- The federal government stated recently,
 - “It is essential to protect Canada’s farmland and to ensure its productive agricultural use, so that this key national resource can continue to support the sector’s future growth and sustainability.”
 - “[T]he federal government has a role to play in supporting the provinces and agricultural stakeholders in the protection of farmland and promoting its agricultural use...”¹
- Aside from the above statements, current federal policy does not refer to the importance of protecting Canada’s agricultural land as a resource for the sector. This omission is a critical gap in federal policy.
- Based on our review, we conclude that there are constitutionally-valid and politically-acceptable options for the federal government to assert its national interest in protecting farmland.

RECOMMENDATIONS

The following roles for supporting farmland protection are options the federal government should consider.

- **Co-operative federalism**

A commitment from the federal government to enter into bilateral or multilateral federal-provincial agreements on the protection of agricultural land with a commitment to financial support, annual monitoring, and reporting on progress. Such an agreement could be part of the Canadian Agricultural Partnership (CAP). The agreements could include guidelines for farmland protection.
- **Integrated federal policy**

A federal statement of national interest in protecting farmland could be issued as part of a broader federal agri-food policy. The anticipated National Food Policy is an example of a policy that could accommodate a statement on farmland protection. As part of a broader agri-food policy, an integrated statement would be recognized and could be supported by more departments and agencies within the federal government, and, therefore, raise the level of awareness of the statement and have more influence over other federal decisions.
- **Stand-alone federal policy**

The federal government could adopt a policy that is not tied legislatively to other policies. The statement could express a national interest in protecting farmland and require decisions about the use of all federal Crown land to be consistent with provincial and local legislative frameworks for protecting farmland.

ABOUT THE AUTHORS. David J. Connell, PhD RPP, is an Associate Professor, Ecosystem Science and Management, University of Northern British Columbia. He is leading a national research program on farmland protection. Deborah Curran is an Associate Professor, Faculty of Law and School of Environmental Studies, and Acting Executive Director, Environmental Law Centre, University of Victoria. Rebeca Macias Gimenez is a PhD Candidate, Faculty of Law, University of Victoria. For more information about the national research program on farmland protection, visit www.aglup.org.

INTRODUCTION

► Farmland is an indispensable resource.

Protecting farmland is increasingly important as Canada adapts to shifting domestic and global drivers, including urbanization, climatic disruptions to global food supplies, and growing demand for domestic food and farmland amenities.

► The continued loss of farmland, especially prime farmland, is a critical concern.

In spite of legislation to protect farmland by provincial and municipal governments, Canada is losing farmland, especially some of its most productive farmland. See text box, right.

► Most of Canada's provinces have only moderate to weak legislative frameworks.⁷ Only Québec, British Columbia, and Ontario have strong or somewhat strong legislative frameworks to protect farmland.

Less than 8% of Canada's best farmland is well protected by provincial legislation,⁸ which leaves most of this farmland highly exposed to non-farm development.

For some provinces that have adopted land use policies to protect farmland, their commitments are undermined by not integrating public priorities with lower jurisdictions and by failing to minimize uncertainty by using ambiguous language. The outcome is a patchwork of inconsistent levels of protection between local and provincial governments and among local governments, as evident, for example, in BC⁹.

► The federal government's omission to recognize farmland as an indispensable resource that needs to be protected is a critical gap in current federal policy.

The Canadian Agricultural Policy (CAP) does not refer to the importance of protecting Canada's agricultural land base as a resource for the sector. Nor was farmland protection included in the framework to guide the development of the pending National Food Policy (NFP).

► Integrating public priorities for protecting farmland across *all* levels of government – from federal to provincial to local – is a key to protecting farmland.

A stronger, direct role of the federal government will help to establish farmland protection as a public priority across all levels of government and to improve consistency of policy across all levels of government. As a protected national asset, the federal government can help to ensure that farmland is available to support the sustainable growth of the agricultural sector and to improve food security for all Canadians.

KEY FACTS ABOUT LOSS OF FARMLAND IN CANADA

- Only 7% of Canada's land base is used for agriculture²
- Only 5% of its most productive land is free from severe constraints to crop production³
- By 2001, about one-half of Canada's urbanized land use was located on dependable* agricultural land⁴
- From 2000 to 2011,⁵ the settled area on dependable agricultural land increased by 19%
- From 2001 to 2011⁶, the farm area located on dependable agricultural land declined by 969,802 hectares

* Dependable agricultural land includes Class 1, 2, and 3, based on the Canada Land Inventory classification system

CONSTITUTIONAL FRAMEWORK¹⁰

The *Constitution Act, 1867* allocates legal powers among levels of government. Section 91 covers matters of federal jurisdiction and section 92 covers matters of provincial jurisdiction. Generally, the federal government's focus relates to matters of national importance that affect interprovincial or international trade (including marketing), setting standards for or permit the use of substances in Canada, or to other specific constitutional heads of power (e.g., fisheries). Provincial law relates to property rights broadly, giving provinces constitutional authority over agricultural land use planning through their land title or deed system, local government regulation of private land and land use planning, and special initiatives to protect agricultural land. Provincial law and policy also relate to environmental management (such as manure management), and water. Somewhat uniquely, the federal and provincial government have shared jurisdiction for agriculture under section 95. This shared jurisdiction acknowledges provincial authority to make laws for agriculture as long as they do not conflict with federal laws; this section also grants the federal government the power to make laws in relation to agriculture in "all or any of the Provinces" that will be effective as long as they are not in conflict with other federal laws. Only the federal government has jurisdiction over matters not specifically listed in sections 91 and 92.

The constitutional and regulatory frameworks allow for federal-provincial co-ordination through provisions contained in ss. 91 and 95 of the *Constitution Act, 1867*, and for federal laws that authorise the creation of policy frameworks with interaction between federal, provincial, and territorial governments. Within this context of co-operative federalism, the federal government has taken an important role in creating policy frameworks, based on the *Agricultural and Rural Development Act*, which provides for the rehabilitation and development of rural areas in Canada. This Act, for example, has enabled provincial programs for agricultural land stewardship. This Act also covers the current Canadian Agricultural Partnership (CAP) (and the previous Growing Forward agreements), which is an agreement between federal, provincial, and territorial governments to define specific objectives, measures, and mechanisms for agriculture and agricultural lands development. The Act focusses primarily on actions to design projects for more efficient use and economic development of rural lands, development and conservation of water supplies for agricultural or other rural purposes, soil improvement, and the conservation of rural lands. The Act also allows for the federal government to act directly, or in co-operation with provinces, through programs of research and investigation. While this federal act enables provincial partnerships with the federal government, there is no direct federal action on farmland protection. Provincial laws and policies on land and land use planning have taken precedent and are not generally bound by federal jurisdiction. However, more precise agreements and federal legislation could help protect agricultural lands, avoid compromising food production, and prevent loss of ecosystem services.

Although interpretation of the constitutional division of powers between federal and provincial governments may appear to represent an obstacle for direct federal action on the protection of agricultural lands, mainly due to section 92, which assigns jurisdiction over property rights in each province and matters of merely local and private interest to the provinces, it is possible to assert federal authority over farmland as a matter of national concern. Importantly, the power established through section 95 is not necessarily based

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CONSTITUTIONAL FRAMEWORK (continued)

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on the notion of “local” versus “national,” but on a fully concurrent power.¹¹ This one constitutional provision could be read broadly to allow federal jurisdiction specifically on the protection of agricultural lands, although this possibility does not find precedent in the common law system.

In addition to direct jurisdiction for agriculture under section 95, Parliament, with the advice and consent of the Senate and House of Commons, may make laws for the “Peace, Order, and good Government of Canada” (POGG) in relation to any matter assigned under the jurisdiction of the provinces, which would include agriculture and agricultural lands. POGG is the Parliament’s power to legislate about issues that do not come within a provincial head of power; therefore, it is a residual power. On the one hand, one could argue that this federal power does not apply to matters of agricultural lands because issues of property rights and merely local interest are under provincial jurisdiction, as established in section 92. This argument takes the view that agricultural land matters fit squarely into provincial powers. However, certain aspects of agriculture, particularly related to land protection and as a local infrastructure for significant international trade in Canada, might not be of local interest only, having effects beyond the borders of one province, or might reveal an urgent nature. Considering the threats to agricultural lands and broader concerns beyond provincial boundaries, the problem can be framed as a matter of national interest.¹²

A matter of “national concern” is not based on its level of importance, as matters of provincial jurisdiction are equally important for the country; it is an issue of geographical significance in which provinces are considered incapable of dealing with such matters because it affects more than one province. A matter of national concern would also have to be distinct or singular from matters under provincial powers. Therefore, any matter not qualified under a specific subject class in the distribution of powers under sections 91 or 92 of the *Constitution Act, 1867*, or characterised as a national concern or emergency, could trigger federal POGG powers set out in section 91. For the protection of agricultural lands, applying federal POGG powers requires framing the issue as a distinct and single matter within the larger realm of agriculture, food production, and environmental security; that is, as a matter of national concern in terms of land quality and quantity that a single province would be unable to address comprehensively or as a matter of national emergency in the context of climatic conditions due to climate change.

In sum, section 95 of the *Constitution Act, 1867* allows for federal regulation of agriculture, which, if considered in light of the federal authority for the POGG, could provide authority for taking direct action on agricultural land protection as a matter of national interest. The tendency of farmland loss and the threats to the extension and quality of agricultural lands have indicated to be issues of national interest, particularly in terms of food and environmental security. Therefore, these issues might be subject to a direct comprehensive federal approach.

FARMLAND PROTECTION: Role of the federal government

POSSIBLE ROLES OF THE FEDERAL GOVERNMENT

POSSIBLE ROLE	LEGISLATIVE BASIS FOR ROLE
<p>No direct role <i>Status quo</i></p> <p>The general position taken by the federal government is that land use planning is a matter of provincial jurisdiction. In this context, there is no role for the federal government in AgLUP. The typical response from the federal government is, “That is not our jurisdiction.”</p>	<p>Section 95 of the <i>Constitution Act, 1867</i> allocates jurisdiction for agriculture to both the federal and provincial governments. Under s. 92, provincial law relates to property rights broadly, giving provinces authority over agricultural land use planning through their land title or deed system, local government regulation of private land and land use planning, and special initiatives to protect agricultural land.</p>
<p>Stand-alone federal statement <i>No direct ties to other policies</i></p> <p>The federal government could issue an aspirational statement that is not tied legislatively to other policies or agreements. The statement could express a national interest in protecting farmland and encourage all levels of government to incorporate farmland protection in their policies and statutory land use plans.</p>	<p>In the absence of having constitutional authority over land use planning (property rights), the federal government can choose to issue an aspirational statement, but it would not be legally binding and cannot be enforced.</p>
<p>Integrated federal statement <i>Aspirational policy statement with ties to other policies</i></p> <p>The federal government could issue an aspirational policy statement in conjunction with, but not legislatively bound by, other policies or agreements. The statement could express a national interest in protecting farmland and encourage all levels of government to incorporate farmland protection in their statutory land use plans.</p>	<p>In the absence of having constitutional authority over land use planning (property rights), the federal government can choose to issue an aspirational statement, but it would not be legally binding and cannot be enforced.</p>
<p>Stand-alone federal policy <i>No direct ties to other policies</i></p> <p>The federal government could adopt an enforceable policy that applies to federally-owned lands. The statement could express a national interest in protecting farmland.</p>	<p>The federal government has the power to adopt policy that applies to its own operations and lands.</p>
<p>Integrated federal policy <i>Included as statement in other agri-food policy</i></p> <p>A federal statement of national interest in protecting farmland could be issued as part of a broader agri-food policy. The anticipated National Food Policy is an example of such a policy. As part of a broader agri-food policy, an integrated statement could be recognized and supported by more departments and agencies, and, therefore, possibly have more influence.</p>	<p>The authority for the broader agri-food policy would be covered under section 91 or 95. The statement about farmland protection would not be legally binding and cannot be enforced directly.</p>
<p>Co-operative federalism <i>Provinces bound by agreement</i></p> <p>A commitment from the federal government to enter into bilateral or multilateral federal-provincial agreements on the protection of agricultural land with a commitment to annual monitoring and reporting on progress. The agreements could include land use guidelines for protecting farmland. The agreements could include a commitment to meeting bi-annually with provincial agricultural ministers to identify and act on strategies and actions for farmland protection.</p>	<p>Within the context of co-operative federalism, the <i>Agricultural and Rural Development Act</i> provides for the rehabilitation and development of rural areas in Canada, which has enabled provincial programs for agricultural land stewardship, including the Canadian Agricultural Partnership and previous Growing Forward programs.</p>
<p>Federal legislation <i>Provinces bound by law</i></p> <p>Adopt federal legislation enabling the development of bilateral or multilateral federal-provincial agreements to protect agricultural land. The law could require provincial governments, within a set period (e.g., three years) to demonstrate how their legislative frameworks for AgLUP conform to these standards.</p>	<p>Parliament, with the advice and consent of the Senate and House of Commons, may make laws for the “Peace, Order, and good Government of Canada” (POGG) in relation to any matter assigned under the jurisdiction of the provinces, which provides authority for taking direct action on farmland protection as a matter of national interest.</p>

FARMLAND PROTECTION: Role of the federal government

KEY CONSIDERATIONS

► Stand-alone statement of national interest.

Typically, the federal position on farmland protection is that land use planning is the responsibility of provincial governments and municipalities. In contrast, in March, 2018, the Standing Senate Committee on Agriculture and Forestry issued its report on the acquisition of farmland in Canada and its potential impact on the farming sector. The report referred to the loss of farmland and included a recommendation for the federal and provincial governments to work together to protect farmland (see text box, right). In response, the Minister of Agriculture and Agri-Food Canada issued a statement about the need to protect Canada's farmland and about the federal government having a role to play (see quotations above). In effect, the federal government has already issued a stand-alone, aspirational statement that expresses a national interest in protecting farmland (the second option among our list of possible roles).

A Growing Concern: How to Keep Farmland in the Hands of Canadian Farmers.

A report of the Standing Senate Committee on Agriculture and Forestry.¹³

RECOMMENDATION 5:

The Committee recommends that the federal and provincial governments work together to protect and promote the use of land for agricultural purposes.

► An interest in protecting farmland versus agricultural land use planning.

It is important to recognize a national interest in protecting farmland as different from protecting farmland through agricultural land use planning. That is, one can separate an interest in protecting farmland (the “what”) from *how* one protects farmland (agricultural land use planning). This difference is significant in relation to the Constitutional framework because agricultural land use planning is primarily the responsibility of provinces and municipalities. The federal government has more latitude to express concern about the loss of farmland and recognize the need to protect farmland as a foundation for the agri-food sector; it has only a limited, and likely to be contested, avenue under POGG to intervene legislatively in the provincial jurisdiction of land use planning.

► Validity and viability of options.

The validity and viability of each option should be considered. Constitutional validity is a primary consideration. In general terms, validity also concerns a role for the federal government that is well-grounded, logical, and justifiable. Political viability is another primary consideration, with regard for the role to be accepted politically and for the capability of producing positive outcomes. Inevitably, there are tradeoffs between validity and viability. As one moves through the set of options as listed, each option can be seen as more difficult to accept politically. For example, the ‘no direct role’ option is likely to be the most politically acceptable yet have the least positive outcomes. On the other hand, federal legislation is likely to be the least acceptable politically, yet has potential for a high level of positive outcomes.

► Farmland protection versus farmland preservation.

For clarity, the “protection” of farmland should be distinguished from its “preservation.” In this brief, farmland protection refers to public land use policy through legislative means at all levels of government (laws, bylaws, regulations) to govern the right to use property, including the restriction of rights for agricultural uses. Preservation of farmland is a broader term that encompasses programs that maintain the productivity of agricultural land, such as soil conservation and other environmental practices. This term also includes tools available to private land owners, such as land trusts and easements, that restrict the use of agricultural land.

RECOMMENDATIONS

We present the following roles for supporting farmland protection as options the federal government should strongly consider. The aim would be to provide national leadership that builds provincial collaborations to better protect farmland as an indispensable resource for the sustainable growth of the agricultural and food sectors and for improved food security for all Canadians. The roles are complementary; each option can be adopted independently or as part of a combined effort.

► CO-OPERATIVE FEDERALISM

The federal government enters into bilateral or multilateral federal-provincial agreements on the protection of agricultural land with a commitment to annual monitoring and reporting on progress. Such an agreement could be a part of CAP. Ideally, the agreements would include guidelines for protecting farmland and a commitment to meeting bi-annually with provincial agricultural ministers to identify and act on strategies and actions.

Constitutional validity

Federal-provincial co-ordination is permitted under provisions contained in ss. 91 and 95 of the *Constitution Act, 1867*. The *Agricultural and Rural Development Act* provides for the rehabilitation and development of rural areas in Canada, and covers the CAP agreement.

Political viability

As a co-operative agreement, this option need not be seen strictly by provincial governments as an infringement from above. As demonstrated by the CAP and prior Growing Forward agreements, specific interests and needs of each province can be accommodated through bilateral agreements. Importantly, the ability to tie federal funding to a bilateral agreement would be appealing to provincial governments while still allowing each provincial government to choose the extent to which they want to direct policy, how to direct policy, and allocate resources to protecting farmland through agricultural land use planning.

► INTEGRATED FEDERAL POLICY

The federal government adopts a statement of national interest in protecting farmland as part of a broader agri-food policy, such as the pending National Food Policy.

Constitutional validity

The authority for the broader agri-food policy would be covered under sections 91 or 95. The statement about farmland protection would not be legally binding on provinces and cannot be enforced directly.

Political viability

As a matter of national policy, this option would not have direct implications for provincial governments. As such, this option is not likely to be opposed by provincial governments. However, it is important that the statement be restricted to protecting farmland as a national interest, and not step into the jurisdictional realm of agricultural land use planning. That is, the federal government should be careful to not address *how* farmland should be protected. As part of a broader agri-food policy, an integrated statement could be recognized and supported by more departments and agencies within the federal government, raise national awareness, and, therefore, have more influence as a matter of national interest.

FARMLAND PROTECTION: Role of the federal government

► STAND-ALONE FEDERAL POLICY

The federal government adopts a policy that expresses a national interest in protecting farmland and requires all land use decisions for federal Crown land to be consistent with provincial and local legislative frameworks for protecting farmland. For example, in British Columbia and Québec, the federal government would formally submit applications for approval to the provincial agricultural land commissions for approval (not just as a courtesy) in accordance with the respective provincial legislative framework.

Constitutional validity

Section 91 of the *Constitution Act, 1867* covers matters of federal jurisdiction, under which the federal government has the power to adopt policy that applies to its own operations and federally-owned lands.

Political viability

As a matter of national policy, this option is not likely to be opposed by provincial governments. More likely, this option would be received positively by both provincial and local governments. This policy would help to integrate public interests in protecting farmland across all jurisdictions.

NOTES

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3. Hoffman, N., G. Filoso, and M. Schofield, 2005. *Rural and Small Town Canada Analysis Bulletin* Vol. 6, No. 1. Ottawa: Statistics Canada, Catalogue no. 21-006-XIE, p. 4. On-line: <http://www.statcan.gc.ca/pub/21-006-x/21-006-x2005001-eng.pdf>
4. Ibid, p. 1.
5. Statistics Canada, 2013. Human Activity and the Environment Measuring ecosystem goods and services in Canada. Environment Accounts and Statistics Division. Catalogue no. 16-201-X, p. 13. On-line: <http://www.statcan.gc.ca/pub/16-201-x/16-201-x2013000-eng.pdf>
6. Statistics Canada, 2014, p. 26.
7. At the time of the analysis, New Brunswick, Nova Scotia, and PEI were developing new legislation that, if approved, would improve the strength of their framework.
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9. Connell, David J. 2018. *Farmland Protection: Strengthening BC's Legislation*. Prince George, BC: University of Northern British Columbia. <http://blogs.unbc.ca/agplanning/files/2018/02/AgLUP-BC-Policy-Brief-401.pdf>
10. The review of the Constitutional framework is based on the following document: "The Federal Role for Agricultural Land Use Planning and Farmlands Protection in Canada" by Rebeca Macias Gimenez and Deborah Curran. Note that this document is under development and not available to the public at this time.
11. Abel, A.S. 1968. "What Peace, Power and Good Government?" 7 *Western Ontario Law Review* 1, p. 9.
12. Fox, M.F. 1988. "Canada's Agricultural and Forest Land," *Canadian Public Policy* 14:3 University of Toronto, pp. 226-281.
13. Standing Senate Committee on Agriculture and Forestry (2018). *A Growing Concern: How to Keep Farmland in the Hands of Canadian Farmers*. Senate of Canada: Ottawa, ON. <https://sencanada.ca/en/committees/report/53194/42-1>

ACKNOWLEDGEMENTS

Funding for the project was provided by a SSHRC Insight Grant (#435-2013-1726) and Agriculture and Agri-Food Canada's Agricultural Policy Research Fund.

Suggested citation: Connell, David J., Deborah Curran, and Rebeca Macias Gimenez (2018). *Farmland Protection: The Role of the Federal Government*. Policy brief. University of Northern British Columbia: Prince George, BC.