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LEGAL INSTITUTIONS OF FARMLAND SUCCESSION: IMPLICATIONS FOR SUSTAINABLE FOOD SYSTEMS

Jamie Baxter

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LEGAL INSTITUTIONS OF FARMLAND SUCCESSION: IMPLICATIONS FOR SUSTAINABLE FOOD SYSTEMS

Jamie Baxter*

I. INTRODUCTION

The legal institutions relevant to *farmland succession*—defined as the transfer of property in and control over farmland—are increasingly important determinants of sustainable environmental outcomes on modern farms. The history of farmland succession has been written, by and large, through extra-legal processes of transfer and inheritance between generations of close family relations. This familiar “family farm” model, however, is rapidly being replaced by succession arrangements between non-relatives, often strangers, with entrant farmers from non-agricultural backgrounds. As a growing number of current farmers retire and seek creative ways to transfer control and ownership of their farms, the availability and content of property arrangements on farmlands acquire a new significance. The resulting “formalization” of farmland succession places greater demands on policy makers to craft farmland tenure options and supporting institutions that are suitable to a wider diversity of needs, particularly among small farmers, and to consider the impacts of these arrangements for sustainable food systems over the long term.

Environmental degradation of farmland resources and surrounding ecosystems in Ontario, Canada—the focus of this study—and elsewhere is by now a well-established trend.¹ This result, it seems, is aligned with the eroded perception that farmlands are no longer “natural” resources at all. As agricultural products are increasingly treated like any other mass-produced commodity, their sites of production are likewise distinguished from, and placed in opposition to, the natural environment. One feature of this dissociation between agriculture and the environment is that farmlands and food production are, as Wendell Berry describes, divorced from their historical contexts:²

To the extent that we participate in the industrial economy, we do not know the histories of our families or of our habits or of our meals. This is an economy, and in fact a culture, of the one-night stand. I had a good time,” says the industrial lover, “but don’t ask me my last name.” Just so, the industrial eater says to the svelte hog, “We’ll be together at breakfast. I don’t want to see you before then, and I won’t care to remember you afterwards.”

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1. For a particularly dramatic example, see GLEN C. FILSON, INTENSIVE AGRICULTURE AND SUSTAINABILITY: A FARMING SYSTEMS ANALYSIS 8 (2004) (noting the wide public attention attracted by the contaminated water tragedy in Walkerton, Ontario in 2000, where *e-coli* bacteria from an intensive beef operation seeped into the town water supply, injuring 2,000 people and killing seven).

2. Wendell Berry, *The Whole Horse: The Preservation of the Agrarian Mind*, in FATAL HARVEST: THE TRAGEDY OF INDUSTRIAL AGRICULTURE 7 (Andrew Kimbrell ed., 2002).

In part, the new social, economic and political realities of farm production are now being constructed through the legal institutions and instruments that determine paths of farmland succession. Berry reminds us that attention to the way that these processes have been carried out in the past, as well as the ways in which they are changing, can help to reconnect food production with positive environmental outcomes, including reduced reliance on harmful pesticides and other chemical inputs, improved soil, air and water quality management, increased biodiversity, and a reduced threat of farmland loss.

In this Essay, I argue that when farmland tenure for entrant farmers is made more secure, they will have better incentives to engage in practices and investments that produce these environmental benefits, and they will have improved capacity to achieve this through access to loan and credit markets. Part II of the Essay describes the modern socioeconomic context of farming in my case study of the province of Ontario in Canada and discusses the specific content of “environmental benefits” to which farmland tenure policies should be directed. Part III outlines briefly how farmland succession has evolved from the family farm model. Part IV develops an account of the legal institutions connecting farmland tenure security and positive environmental outcomes, which leads to an evaluation, in Part V, of environmental impacts of the various land tenure arrangements available to parties to succession agreements. Finally, in Part VI, some of institutional conditions surrounding land tenure at the municipal level are discussed.

II. ONTARIO SMALL FARMS & ENVIRONMENTAL IMPACTS

Most of Canadians’ food is now being produced on larger farms that are increasingly specialized in their mode of production. These large enterprises tend to embrace industrial, Fordist-type production models that deploy mechanical and chemical technologies, capture the logic of comparative advantage, and seek to maximize farm efficiencies—measured by the quantity of food produced per unit cost—by capturing economies of scale. Just 2% of domestic farms now produce 35% of the food consumed by Canadians.³ Much of this production is now located on very large farms: in 2011, more than 9,500 farms in Canada had \$1 million or more in gross farm receipts, a 31% change from five years earlier.⁴ In 2006, farms of this size accounted for more than 40% of the total receipts in that year but representing only 2.6% of the total farms in the country.⁵

At the farm level, these trends are realized in larger farms by land area, and in larger quantities of foodstuffs produced on each farm. In Ontario, the number of farms in the province dropped from 109,887 to 57,211 in the fifty years between

3. HUGH MAYNARD & JACQUES NAULT, *BIG FARMS, SMALL FARMS: STRATEGIES IN SUSTAINABLE AGRICULTURE TO FIT ALL SIZES 5* (Agricultural Institute of Canada Discussion Paper, 2005).

4. STATISTICS CAN, *SNAPSHOT OF CANADIAN AGRICULTURE: CHAPTER 1* (2012), available at <http://www.statcan.gc.ca/pub/95-640-x/2012002/01-eng.htm>.

5. STATISTICS CAN., *THE FINANCIAL PICTURE OF FARMS IN CANADA* (2009), available at <http://www.statcan.gc.ca/ca-ra2006/articles/finpicture-portrait-eng.htm>.

1966 and 2006.⁶ The average land area per farm increased over the same period from 162 to 233 acres. Perhaps most striking is the nearly exponential growth in output per farm. An average Ontario hog farm in 1966, for example, had a total animal stock of 46 hogs, compared to 971 hogs in 2006. Likewise, the average number of hens and chickens per farm has skyrocketed over the past half-century from 694 to 5,962 animals.⁷ These trends represent both an increase in the overall scale of production, as well as much greater specialization toward fewer food products being grown on each farm.

Consequently, small farms engaged in more diversified modes of production are disappearing from Canada's rural landscape, while those that still exist struggle to remain economically and socially viable. Sixty-four percent of Canada's smallest farms in 1996 suffered product sales of \$40,000 or less, were actually losing money, and posting an average loss of \$9,500.⁸ In 2005, approximately 71% of farms in Canada with receipts less than \$25,000 did not report enough on-farm income to cover their operating expenses.⁹ Even for those small farms making a profit, margins have remained very narrow. Driven by financial pressures, and in light of increasing land values from urban and suburban expansion, many small farms, especially those at the urban-rural boundaries, have sold their farmland and abandoned farming altogether.

Despite the difficult conditions under which small farms now operate, they hold significant promise for re-aligning modern food production with positive environmental outcomes, as discussed below. As such, it is important to recognize that small farms are themselves evolving as a result of changing producer values and capacities, and in response to shifting consumer demands. First, small farmers have been motivated to diversify their operations—both in terms of outputs and production models—to take advantage of “niche” food markets and to move into non-food areas such as agri-tourism and conservation services. Indeed, small farmers have been leaders in developing and re-discovering organic methods to provide for the growing market in foods produced without the use of chemical fertilizers and pesticides.¹⁰ Small farmers also tend to exhibit the flexibility that allows them to move into specialty foods markets, such as garlic and ginseng production.¹¹ In addition to food markets, small farmers have begun to expand into

6. STATISTICS CAN., A STATISTICAL PORTRAIT OF AGRICULTURE, CANADA AND PROVINCES: CENSUS YEARS 1921 TO 2006 (2009), available at <http://www.statcan.gc.ca/pub/95-632-x/2007000/t/4185570-eng.htm#35>.

7. *Id.* However, it is also important to note that a “hog” farm in 1966 would have been much more likely to also raise other animals.

8. NATURAL RESOURCES CAN., THE ATLAS OF CANADA – SMALL FARMS BY CENSUS DIVISION, 1996 (2009), available at <http://atlas.nrcan.gc.ca/site/english/maps/economic/agriculture/agriculture1996/smallfarmsbycd1996/1>.

9. STATISTICS CAN., *supra* note 4.

10. *But see* L. Berlin, W. Lockeretz & R. Bell, *Purchasing Foods Produced on Organic, Small and Local Farms: A Mixed Method Analysis of New England Consumers*, 24 RENEWABLE AGRIC. & FOOD SYSTEMS 267, 267-8 (2009) (noting consumer preferences for organics as a rejection of industrialization, but observing that organic agriculture is itself perceived as becoming more industrialized).

11. NATURAL RESOURCES CAN., *supra* note 8.

non-food areas. Agri-tourism, including on-farm vacation experiences, bed and breakfasts, and farm tours, has demonstrated some promise for small farmers seeking to move away from more traditional forms of agricultural organization.

A second feature is that among small farms that remain financially viable, most provide only a secondary income source for farm owners. An increasing number of small farmers have jobs “off the farm.”¹² In 2005, more than half of farm operators on farms with between \$50,000 and \$100,000 in gross revenue were engaged in some form of work off-farm. For large farms with revenues over \$250,000, this number was less 30%.¹³ The social, economic, and intra-family dynamics of the choice to work off the farm for small farmers are increasingly recognized as complex. For example, Alasia et al. find that family, community and regional characteristics are more significant determinants of decisions to work off the farm for smaller farm-holders than for those on larger farms.¹⁴ Overall, it is clear that small farms on which individuals and families live and work as full-time farmers are an increasingly fading reality.

A. Policy Rationales and Outcomes

What is the basic policy rationale for supporting small-scale agricultural production in order to realize environmental benefits? The answer, in short, is that small farms tend to employ production methods and land management practices that improve soil, water, and air quality rather than depleting these valuable natural resources. These methods often include reduced pesticide use, fewer off-farm inputs such as synthetic fertilizers, and greater reliance on renewable forms of energy.¹⁵ While comprehensive empirical work on the relationship between small farms and the environment has been relatively sparse, a growing number of studies are now being undertaken to flesh out the details of this relationship. Tavernier and Tolomeo, for example, find a statistically significant relationship between farm size and deployment of “sustainable” agricultural methods.¹⁶ Small farm production is

12. Susan Machum, *The Persistence of Family Farming in the Wake of Agribusiness: A New Brunswick, Canada Case Study*, 36 J. COMP. FAM. STUD. 377, 379-380 (2005). See generally Edmund M. Tavernier et al, *The Role of Farm Ownership in Off-Farm Work Participation*, 26 AGRIC. & RESOURCE ECON. REV. 67 (1997) (discussing the determinants of farm owner decisions to work off-farm).

13. Alessandro Alasia & Ray D. Bollman, *Off-Farm Work by Farmers: The Importance of Rural Labour Markets*, 8 RURAL & SMALL TOWN CAN. ANALYSIS BULLETIN 1, 4 (2009).

14. Alessandro Alasia et al., *Off-Farm Labour Decision of Canadian Farm Operators: Urbanization Effects and Rural Labour Market Linkages*, 25 J. RURAL STUD. 12, 13 (2009) (interestingly, this study also found that the choice to work off the farm was not significantly impacted by proximity to urban centres); see also STATISTICS CAN., OFF-FARM LABOUR DECISIONS OF CANADIAN FARM OPERATORS IN 2001: THE ROLE OF OPERATOR, FARM, COMMUNITY AND REGIONAL DETERMINANTS (2007), available at <http://www.statcan.gc.ca/pub/21-601-m/21-601-m2007085-eng.pdf>.

15. Leo Horrigan, Robert S. Lawrence & Polly Walker, *How Sustainable Agriculture Can Address the Environmental and Human Health Harms of Industrial Agriculture*, 10 ENVTL. HEALTH PERSP. 445, 446 (2002).

16. Edmund M. Ravernier & Vic Tolomeo, *Farm Typology and Sustainable Agriculture: Does Size Matter?*, 24 J. SUSTAINABLE AGRIC. 33, 43 (2004).

also demonstrably more likely to increase biodiversity and to be compatible with conservation measures on sensitive non-agricultural land.

From a governance perspective, small farm production models also have the potential to integrate closely with community decision-making and localized social and economic networks toward promoting positive environmental outcomes at the community and regional levels. Local community integration (i) improves education and knowledge transfer between farmers, consumers, and other community members about environmentally positive practices and outcomes,¹⁷ (ii) facilitates the “embeddedness” of local food systems, which increases trust between producers and consumers,¹⁸ *inter alia* reducing the need for complex regulatory and labeling schemes (such as vegetables and meats officially labeled “organic”), and (iii) harmonizes farming practices and food supply with regional and municipal planning processes as part of “sustainable rural development” models now being widely employed.¹⁹ I briefly describe each of these governance dimensions below.

(i) *Education and Knowledge Transfer.* This aspect of community-level integration has at least three elements. First, cooperative farmer marketing programs help to educate consumers about eating seasonally and about on-farm practices. As part of a long-term study of local food systems through the Sustainable Agriculture Research and Education Program (SAREP) in California, Gail Feenstra has identified important stakeholders in these processes including municipal governments, school boards and other learning institutions, waste management officials, community advocacy groups, entrepreneurs, and local food policy councils.²⁰ Second, farmer-to-farmer knowledge transfer can help to develop farming practices that lead to improved environmental outcomes (on both large and small farms) and are matched to local climate and ecological conditions. Third, where the preferences of community members strongly prioritize environmental benefits—which is often the case when individuals experience the direct impacts of farming operations in their local communities—these preferences will be translated more readily to small farmers within that community, compared to larger operations that focus on national or international markets. Similarly, on-farm practices will be easier to monitor directly by local consumers, producing more rapid conformity to environmental preferences and policies.

(ii) *Embeddedness and Trust.* According to Clare Hinrichs,

[d]irect agricultural markets, based on face-to-face links between producers and

17. Gail Feenstra, *Creating Space for Sustainable Food Systems: Lessons from the Field*, 19 AGRIC. & HUMAN VALUES 99, 101 (2002).

18. C. Clare Hinrichs, *Embeddedness and Local Food Systems: Notes on Two Types of Direct Agricultural Market*, 16 J. RURAL STUD. 295, 296 (2000); see also Colin Sage, *Social Embeddedness and Relations of Regard: Alternative ‘Good Food’ Networks in South-West Ireland*, 19 J. RURAL STUD. 47, 47 (2003); Michael Winter, *Embeddedness, the New Food Economy and Defensive Localism*, 19 J. RURAL STUD. 23, 24 (2003).

19. Patrizia Pugliese, *Organic Farming and Sustainable Rural Development: A Multifaceted and Promising Convergence*, 41 SOCIOLOGIA RURALIS 112, 112-113 (2001).

20. Feenstra, *supra* note 17.

consumers, present an apparent counterpoint to large scale, more industrialized systems of food production and distribution If relations between producers and consumers are distant and anonymous in more global food systems, in local, direct markets, they are immediate, personal and enacted in shared space.²¹

Hinrichs and others have deployed the concept of “embeddedness” to represent the ways that agricultural markets operate within complex social networks. A dominant feature of these networks is their dependence on and promotion of trust between producers and consumers—replicating, in part, the kinds of dynamics that have been central to informal farm succession arrangements in the past (see Part V, below, for a detailed discussion). The buildup of this intra-community trust fills the role that many complex and often confusing nationally or internationally regulated labeling schemes play in conveying information to consumers about environmentally relevant production practices. Examples include labels such as “organic,” “natural,” and “pesticide free.” Where consumers can access farmers directly to obtain information about production practices and where a relationship of trust exists, the necessity for these labels dissipates markedly. In turn, consumer responses put positive and constructive pressure on farmers to improve environmental outcomes.

(iii) *Sustainable Rural Development*. Sustainable development—that is, development defined at the intersection of economic growth, improvement of social conditions and social justice, and conservation of natural resources and values²²—has become a popular concept for rural communities and policy makers. Patrizia Pugliese has identified a “convergence” between rural sustainable development policies and those that support small farm production, with farmers themselves becoming key actors in democratic governance and decision-making.²³ Small farms can therefore be seen as part and parcel of policy initiatives and planning processes in rural communities that aspire to environmentally positive outcomes on a broad scale.

In addition to direct environmental impacts and indirect impacts through local governance, a final policy rationale to support small farms is that, because of their low profit margins, small farms are also highly vulnerable to residential and business development pressures, such that their precarious social and economic position is likely to contribute to irreversible farmland loss. Ontario currently contains 52% of Canada’s most productive (“Class 1”) farmland and led all other provinces in gross farm receipts in 2010.²⁴ However, Ontario is also the country’s most populated province, with high population densities in the large urban centres in the south of the province. As the result of persistent urban sprawl, this farmland

21. Hinrichs, *supra* note 18, at 295.

22. Pugliese, *supra* note 19, at 113.

23. *Id.* at 117.

24. Wayne Caldwell & Steward Hilts, *Farmland Preservation: Innovative Approaches in Ontario* 60 J. SOIL & WATER CONSERVATION 66, 67 (2005); STATISTICS CAN., FARM AND FARM OPERATOR DATA (2012), available at <http://www29.statcan.gc.ca/ceag-web/eng/> (Ontario farm receipts in 2010 totaled \$11,890,835,395; Alberta was close behind with total farm receipts of \$11,436,180,505 in the same year).

base is being steadily eroded and replaced by housing developments and other suburban and peri-urban, non-farm uses. These pressures at the urban-rural interface have resulted in the creation of tens of thousands new non-farm residential lots in the last several decades.²⁵ While recent provincial initiatives such as the “Greenbelt Plan”²⁶ and the “Places to Grow Act”²⁷ have begun to enforce regulatory controls that attempt to contain development pressures, it is unlikely that the problem of farmland loss can be addressed comprehensively without supporting the overall viability of farms themselves, particularly those small farms at the margin.

Two caveats regarding a focus on small farms, and the resulting small farm/large farm distinction, are required. The growing concentration of Canada’s food production on large, industrially-oriented farms, and the comparative environmental benefits realized from the ways that small farms produce food, have tended to suggest, to some, an inevitable and irreconcilable clash between these two divergent modes of food production. Support for small farms has been matched with strategies to dismantle the existing industrial agricultural establishment—through regulatory change, standard setting, and a transformation in consumer preferences—and to fill in the resulting gaps with production from small farm enterprises. I suggest, from a pragmatic standpoint, that the role of small farms in providing positive environmental outcomes is considerably more complex than this trajectory implies. There are at least two main reasons why the small farm/big farm dichotomy is an oversimplification. First, small farms have traditionally been a main repository for knowledge about environmentally positive practices and have served as sites of experimentation and learning about new techniques, methods, and technologies to improve environmental and food safety outcomes. In support of this role, small farms tend to be more closely connected to their local communities and serve as ideal places to build awareness about the environmental impacts of food production. This learning and awareness-building capacity has the potential to spillover into larger-scale agricultural practices, both through farmer-to-farmer learning and through public/consumer demand for changing practices. This approach suggests that forging connections between small and large farm operators can lead to better environmental outcomes on both types of operations.

Second, as discussed above, the agricultural sector as a whole is currently facing the threat of farmland loss from suburban and rural estate development. While small farms are more vulnerable to farmland loss, given their weaker financial position, even large farms are often unable to resist strong pressures in favour of development—especially those in very close proximity to rapidly expanding urban areas. In addition, the loss of small parcels of farmland can have a pervasive cumulative effect on rural communities and the rural landscape, creating social and political tensions between divergent interests and distracting

25. Caldwell & Hilts, *supra* note 24.

26. Greenbelt Act, S.O. 2005, c. 1 (Can.); *see also* ONT. MINISTRY OF MUNICIPAL AFFAIRS & HOUS., GREENBELT PLAN (28 Feb. 2005), available at <http://www.mah.gov.on.ca/Asset1277.aspx>.

27. S.O. 2005, c. 13 (Can.).

away from comprehensive policies to encourage positive environmental outcomes. From this standpoint, both small and large farms face many similar challenges, meaning that policy responses supporting small farm production are not necessarily antithetical to significant changes in the relationship between large farm enterprises and the environment as well.

III. FARM SUCCESSION

Farmland succession encompasses the devolution of property in and control over the farm operation. At the heart of this process lies a transfer of rights or a change in the social roles between parties to the succession. Pottery and Lobley observe that “the processes of succession and inheritance which give rise to, and are the product of, certain lifecycle events may define critical transitions when farm business restructuring, expansion and retrenchment is most likely to take place.”²⁸ Important features of these transition processes—features of growing significance in recent years—are changes in the land tenure arrangements that underlie ownership of and control over the farm operation. Institutional reforms that address the tenure insecurity inherent in these transitional periods can lead to positive environmental outcomes on small farms by (i) supporting farmland conservation in the face of development pressures, (ii) prioritizing specific environmental objectives, and (iii) increasing the economic viability of small farm enterprises overall.

The sociological and demographic context of farm succession has changed rapidly over the last few decades. The traditional model of farm succession turned on a gradual transition from older to relatively young generations within a nuclear or extended family. Newer models of succession, by contrast, occur between unrelated individuals or groups and require an increasing degree of “legalization” to structure complex succession arrangements. Two trends illustrate the dramatic shift in the way farm succession is taking place. One trend is that the majority of the aging population of farm operators lacks a family successor. In 2006, 43% of current farm operators in Ontario were fifty-five years or older.²⁹ The average age of operators in the province was 52.6, up from 49.4 only a decade earlier.³⁰ As of 2007, in Canada as a whole, 35% of farm operators were expected to retire in the next fifteen years, representing a total of 74,000 farms across the country.³¹ Three-quarters of these farms are one-generation farms, in which there is no operator of a younger generation to take over the farm. As the current farming population grows older, this trend results in an increasing demand for “alternative” succession

28. Clive Potter & Matt Lobley, *The Farm Family Life Cycle, Succession Paths and Environmental Change in Britain's Countryside*, 47 J. AGRIC. ECON. 172, 185 (1996).

29. STATISTICS CAN., CHARACTERISTICS OF FARM OPERATORS, CANADA AND PROVINCES: CENSUS YEARS 1991 TO 2006 (2009), available at <http://www.statcan.gc.ca/pub/95-632-x/2007000/t/4185586-eng.htm#35>.

30. *Id.*

31. Lois James, Director, Renewal Division, Agriculture and Agri-Food Canada, A Canadian Perspective on Intergenerational Farm Transfers and Succession Planning, Presentation to International Farm Succession Conference in Ottawa, Ontario (Aug. 6-8, 2007).

arrangements that move away from the single operator-to-operator transfers. The increasing complexity of these succession arrangements, in turn, places creative pressure on the development of flexible land tenure.

A second trend is that farmland is increasingly expensive, prohibiting entry into the agricultural sector by new farmers, even on small farms. Cressman notes that “[t]he present generation of farmers have [*sic*] taken their profits and reinvested them back into their businesses and in the process have driven up asset values. These high asset values, while desirable in the eyes of the present generation, are also going to cause the succession issues to be more complicated and challenging than at any point in modern history.”³²

The increasing complexity of succession arrangements as the result of these two trends implicates land tenure arrangements in at least three ways. First, retiring farmers who are unwilling to sell the farm outright—perhaps because they want to ensure that the farmland is protected from development and/or environmental degradation, or because they want to remain living on the farm—need to be able to continue generating an income from the farm operation. Whereas in the past farm families residing on the farm were composed of two or more generations, this is increasingly infeasible where younger generations are declining to be the primary successors. Second, and in relation to the first implication, the increasing proliferation of non-family succession arrangements invariably leads to the legalization and formalization of these arrangements. Informal arrangements between family members are being or will need to be replaced by legal institutions that lay out the specifics of these increasingly complex arrangements. Third, and finally, high land values that prohibit the outright purchase of farms by new, non-family farmers are increasing the cause of demand for land tenure arrangements that allow for incremental succession and shared farm management—perhaps between more than one new farmer. Whereas traditional models of farm succession were premised on the assumption of unilateral control by a single operator or family, financial realities for new farmers as well as the retirement demands of current farmers are likely to drive the way that modern small farms are operated toward models that incorporate multiple owners and land users.³³

The result of this complexity, motivated by the trends discussed above, is the increased risk of tenure insecurity that threatens environmental outcomes on small

32. Richard J. Cressman, *Farm Family Succession in the 21st Century* (July 2000) (unpublished MBA Thesis, University of Guelph Faculty of Agricultural Economics and Business), available at <http://www.cressman.net/thesis.html> (“The price of farmland has also spiraled upwards. The acre of land that could be purchased for \$800 in 1971 was selling for over \$5000 per acre in 1999. It is noteworthy that both machinery costs and land costs have increased approximately 600% in the past three decades [to 2000]”).

33. *Id.* (“The reason these issues are so important today is because we are being faced with a paradigm shift in how the next generation of farmers will need to view the ownership of assets. The thinking that ‘this is mine’ and ‘I am the boss’ will need to give way to ‘this is ours’ and ‘how can we manage this together’. This is a monumental shift in thinking if one considers that for the past 300 years North American agriculture has operated under the ‘I and my’ paradigm vs. the ‘we and ours’ paradigm.”).

farms. The next section, Part IV, examines the theoretical framework connecting increased tenure security and improved environmental outcomes. I then move on in Part V to apply these theoretical insights and discuss implications for institutional reforms surrounding farmland succession relevant to small farms in Ontario.

IV. LEGAL INSTITUTIONS

Researchers, policy makers and activists now widely acknowledge that “institutions matter” for a range of human objectives.³⁴ Institutions—both formal rule-based frameworks and non-formal social norm-based frameworks—circumscribe decision-making processes for individuals and within groups. By and large, institutions determine the constraints attached to human activities (economic, social, political), and therefore contribute to the relative benefits of those activities across a range of personal and community valuations. The primary institutional arrangements discussed in this essay are the land tenure regimes that determine how property in farmlands can be structured through periods of succession.

A focus on institutions draws attention away from narrow behavioral and market price models that limit analyses to the link between individual decision-making and outcomes. This conceptual shift is welcome in the area of farmland succession, where research—primarily in Britain and mainland Europe—has relied heavily on micro-economic models to try to understand farmers’ behavior in decisions that link land use with environmental impacts.³⁵ Potter and Loblely have recognized that the shift toward institutional perspectives has begun to create a more sophisticated basis for policy development.³⁶

True, there is general agreement that it is to the decisions of farmers that researchers must look in order to explain why [environmental] change is taking place. But this can be interpreted with varying degrees of sophistication, ranging from studies which merely connect an episode or trend to the management decision which produced it, to those which seek to uncover the policy and other influences which shape, constrain and enable decision making itself. Explanations have co-evolved with the policy debate surrounding agriculture and the environment as interest has shifted away from a narrow concern with immediate causes to underlying processes.

Andrew Green has made the broader point in respect of the role of individuals and institutions to address environmental change at the national and international levels.³⁷

34. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

35. Lorne Söderkvist Kristensen, Claudine Thenail & Søren Pilgaard Kristensen, *Landscape Changes in Agrarian Landscapes in the 1990s: The Interaction Between Farmers and the Farmed Landscape. A Case Study from Jutland, Denmark*, 71 J. ENVTL. MGMT. 231, 231 (2004).

36. Potter & Loblely, *supra* note 28, at 173.

37. Andrew Green, *Bringing Institutions and Individuals into a Climate Policy for Canada*, in A GLOBALLY INTEGRATED CLIMATE POLICY FOR CANADA 248 (Steven Bernstein et al. eds. 2008).

Institutions create the framework within which individuals make choices and instruments operate. Each country has different institutions which determine what instruments may be chosen and how they are chosen. Not that these institutions are necessarily immutable. Some, such as constitutions, are hard to change. Others, such as administrative law arrangements for determining how decisions are made, can be changed much more readily. Failure to account for institutions, including whether or not they can be readily changed, will obstruct the development of effective policies.

Green's observations hint at two general and theoretical observations about institutions initially relevant for the analysis applied later in this paper. One is that successful institutions are contingent on context. A land tenure regime that leads to improved soil conservation and watershed protection under one array of political, economic, social, geographic, and historical markers, for example, may lead to different outcomes, or be less effective in reaching the same outcomes, under a different array of contextual factors. A key lesson from this type of context contingent approach will be that local policy making around farmland succession is likely to be more sensitive to relevant contextual factors and ancillary institutions compared to national or provincial schemes. A focus on the municipal level is therefore appropriate—although land tenure and planning often intersect importantly with provincial initiatives and policy directions.

A second general insight about institutions is that they are dynamic and path-dependent. On one hand, some institutional arrangements, given the right conditions, may themselves evolve over time in the direction of supporting positive environmental outcomes in response to demand pressures. For example, increased demand for organic produce may drive farmers to adopt organic practices and develop land tenure arrangements—based on private contracts—to support this transformation. On the other hand, some institutions will exhibit varying degrees of rigidity and resistance to change, as a result of existing conditions that determine the relative costs of abandoning the status quo.³⁸ Even as demand for organic food rises, the policy environment of high agricultural subsidies that support many non-organic industrial-model farms provides little incentive for producers, either individually or as a group, to agitate for significant institutional changes, despite the growing financial crisis being faced by farmers in some sectors. This “path dependence” of institutions is also evident in non-formal arrangements, which are often regulated by and the result of deep-seated community norms. The resistance of these non-formal arrangements to change is likely to be significant for farmland succession, as discussed below. Overall, institutional path dependence provides a central rationale, in some cases, for concerted action on behalf of governments to engage in institutional design.³⁹

38. DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 1 (2005).

39. Policy makers should be aware, however, that some commentators have noted that institutional change is often difficult to predict and that research in this area must continue to evolve if it is to serve as a basis for practice policy design. See generally Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, Legal Studies Research Series, No. 09-04, U. TORONTO L.J. 1 (April 2009).

A. Tenure Security

Tenure security for small farmers can be defined as the level of *predictability* they enjoy in realizing and enforcing their property rights to use to land and to reap the valued benefits of that use—or, conversely, as the level of risk faced by farmers that those rights will not be realized or enforced. This definition implicates both the precision with which property rights can be specified ahead of time, as well as the overall confidence of the owner-operator in the institutional architecture responsible for administering the tenure regime and enforcing predicted outcomes.

How then is improved tenure security relevant to promoting positive environmental outcomes on small farms? Tenure security is linked to these outcomes in at least two ways.⁴⁰ First, increased tenure security improves incentives by the farmer to invest in environmentally sound practices over the long term, by increasing the likelihood that those practices will realize the expected environmental benefits.⁴¹ This rationale is especially important for those investments that require a long time to generate the expected benefits. For example, sustainable energy initiatives on small farms, such as wind or solar power supplies, require large up-front capital expenditures for environmental benefits (reduced emissions) that are only realized over a number of years. Likewise, organic farming operations rely heavily on the cultivation of high quality soils, which can only be achieved by intensive soil management practices such as composting and cover-cropping. These processes are cumulative over periods of years and decades. Farmers' ability to realize the "pay-off" of investing in these initiatives will therefore be determined by the security of their (expected) property rights over the long-run.

Second, new farmers requiring access to credit from financial institutions or other sources will need to ensure that their property rights are clearly defined. The ability to collateralize farmland through mortgages and the like has, in the past, been a key ingredient in providing new farmers with access to land itself and to needed start-up capital. More importantly, access to capital resources will be a prerequisite for new farmers to undertake the kinds of long-term investments in environmental resources described above. As increased land prices have limited the ability of new farmers to access credit markets and have driven more complex succession arrangements such as farmland sharing, financial institutions may perceive this complexity as contributing to an increased risk of defaulting on debt. Secure tenure arrangements that clearly delineate the rights of all parties will help to mitigate this uncertainty and help to lower the cost of borrowing for new farmers.

40. See Michael R. Carter & Pedro Olinto, *Getting Institutions "Right" for Whom? Credit Constraints and the Impact of Property Rights on the Quantity and Composition of Investment*, 85 AM. J. AGRIC. ECON. 173, 174 (2003).

41. DANIEL WATCHER, *LAND TENURE AND SUSTAINABLE MANAGEMENT OF AGRICULTURAL SOILS* 2, Development and Environment Reports No. 15, Centre for Development and Environment, University of Berne (1996).

V. TENURE OPTIONS FOR SMALL FARM SUCCESSION

In this section, I canvass the menu of land tenure options available to new farmers who want to access farmland and to exiting farmers seeking viable succession options. I evaluate each of these options according to their implications for the tenure security of the relevant parties and connect these security impacts to their environmental consequences.

Three broad categories of land tenure are discussed below. First, I investigate the pervasiveness of non-formal tenure arrangements on farmland and consider the prospects of social norms frameworks for providing sufficient security of tenure. Second, I explore the prospects for non-ownership tenure agreements to result in positive environmental outcomes. There is a widespread concern—in the theoretical and empirical literature—that non-ownership agreements such as leases, at least short-term ones, can significantly undermine tenure security compared to sole ownership, making the lessee and lessor less likely to make the investments in physical improvements, capital and technologies that are required to realize environmental benefits on small farms. If the rationale of this “tenancy hypothesis” holds, then the realm of secure tenure options for new farmers is significantly narrowed. As we will see, however, the general relationship between non-ownership agreements and tenure insecurity varies considerably according to the length of the agreement, the form of rental remuneration (cash price of share crop), specific terms stipulating environmental practices, the proportionate investment contributions of the parties, and available purchase options or rights of first refusal. Land tenancy arrangements, when carefully crafted, have a good possibility of providing sufficient tenure security, while supplying needed flexibility for development long-term relationships between the parties. Third, I examine the role of land trusts and conservation agreements, as a part of either sale or leasing forms of succession. These tenure options represent a relatively new forms of succession tools that involve third-party owners/monitors to enforce specific rights and obligations associated directly with a piece of farmland. Their growing popularity in recent years requires an exploration of their costs and benefits vis-à-vis other succession models.

A. Non-formal Tenure

Before evaluating the potential environmental impacts of formal tenure arrangements on farmland—including leases and covenants—it is useful to understand the role played by non-formal institutions in providing tenure security in succession scenarios. In the field of international development, the call for the formalization of land titling systems and property relations, particularly in developing country contexts, has been motivated by arguments that national or sub-national governments are optimally positioned to provide for the predictable definition and enforcement of property rights on a broad scale.⁴² By legalizing land

42. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 161 (2000).

rights under a centralized administrative system, formalists argue, tenure security is increased as a result of increased enforcement capacity and increased standardization that makes previously disparate, localized tenure systems cognizable to a wider population of potential users, investors, and creditors. In turn, formalization is understood to promote positive environmental outcomes where tenure security is improved, on the basis of the rationales discussed in Part IV, above. Some recent critical assessments, however, have called into question the generic logic of legalizing non-formal tenure arrangements, particularly where formal institutions would be mismatched to local conditions, understandings, and norms concerning the use and governance of land.⁴³ The focus in any given context, these critics say, should be on whether the relevant institutional arrangements actually increase tenure security for rights holders and users.

Despite the fact that the traditional “family farm” model is rapidly receding as the default process for farm succession, the strong inter-personal relationships that underpin this process are both practically significant, at least where rural communities remain relatively tight-knit, and also stand as an important reminder that non-formal institutions always persist as a pervasive backdrop to more formalized arrangements. Tenure relationships that share characteristics of farm family ties—mutual trust, close proximity, repeated interactions, and reputational considerations that motivate social signaling—are likely to remain central considerations in farmland succession.

Admittedly, there is little doubt that, at least in the Canadian context, any long-term succession arrangement that seeks the transfer of control and ownership over a farm will be based on formal, legally recognized and enforceable property rights. But because succession processes can take place over a long period of time, non-formal tenure arrangements may be particularly significant in the early stages of farm succession. For example, where entrant farmers want to utilize land on a trial basis—perhaps to experiment with a diversified farm use previously unexplored by the existing landowner—non-formal arrangements may provide for sufficient security of tenure over the short term, while minimizing the transactions costs of more formal agreements. This step-wise approach mirrors the traditional family succession model, where family successors carve out distinct enterprises on the farm without making these formally separate from the family business.

Concerns about the potentially corrosive effects of “formalizing” these types of non-formal arrangements—for example, by stipulating contractual norms in a written lease agreement—presuppose relatively small, close-knit communities. One concern is that formal legal agreements are indicators of mistrust between the parties, based on the perception that where community and inter-personal ties are strong, legal contracts are unnecessary. The requirement of trust and fair dealing in these relationships is based on the prospect of repeat interactions with community members over time. Allen and Lueck note that in many rural areas

[f]armers are part of a small ‘community’ of people who have known each other

43. See Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT’L L. 397, 413-14 (2008).

most of their lives. People would be quickly aware of anyone who cheated another and would avoid future dealings with that person. For both a landowner and a farmer there is a long-term interest in maintaining a relationship.⁴⁴

As a result of the potential for repeated interactions between these community members, non-formal arrangements become self-enforcing for individuals who care about their future position in the social community.

Linked to this possibility for repeated interactions are the general reputational effects that are particularly significant in small communities. Social pressures that stress certain attitudes and behaviors for farmers may risk being undermined by a move toward formalization. In a study of farm leasing relationships, Cole and Johnston find that tenants were keenly aware of community norms that required them to farm leased lands as if they were their own.⁴⁵ These social pressures/norms defied the formal, legal interpretation of temporary leasing agreements, creating a certain perceptual tenure security that led to better soil conservation practices.

It is, however, important to distinguish between community norms that structure tenure security, on the one hand, by improving certainty about the definition and consequences of property rights, and norms that support positive environmental outcomes directly, such as norms of conservation and land stewardship, on the other. It is the former category of non-formal institutional arrangements that risk being undermined, in some situations, by the over-legalization of tenure relationships. The status and effect of the latter category, by contrast, is increasingly indeterminate in modern farming communities. Whereas many traditionalist farmers extol values inherent in the small farm ethic that speak directly to norms of conservation and land stewardship, the widespread industrialization of agriculture has perhaps led to the erosion of these values, particularly where the use of off-farm inputs such as synthetic fertilizer and pesticides has decreased reliance on and attention to the integrity of ecological systems.

B. Lease Agreements

New farmer entrants in farmland succession will frequently be confronted by financial constraints that prohibit full ownership of farmland. Perhaps the most common way for new farmers to gain access to land is to enter into some form of a leasing agreement, likely as a preliminary step in a succession arrangement toward future purchase of the farm. A primary benefit of short and medium term leases is that they provide an opportunity for new farmers and existing landowners to build a working relationship as the foundation for more permanent arrangements.

44. Douglas W. Allen & Dean Lueck, *The 'Back Forty' on a Handshake: Specific Assets, Reputation, and the Structure of Farmland Contracts*, 8 J.L. ECON. & ORG. 366, 369-70 (1992); see also DOUGLAS W. ALLEN & DEAN LUECK, *THE NATURE OF THE FARM: CONTRACTS, RISK, AND ORGANIZATION IN AGRICULTURE* (2002).

45. J.D. Cole & B. Johnson, *Soil Conservation Practices on Leased Land: A Two-State Study*, 57 J. SOIL & WATER CONSERVATION 100, 102 (2002).

A significant problem with farmland leases, however, is that they may provide insufficiently secure tenure to produce environmental benefits and actually increase incentives toward the environmental degradation of the leased lands. This possibility, known as the “tenancy hypothesis” has been widely debated in the economic literature. Motivated by the increasing demand for rented farmland to satisfy the growing scale of agricultural production and the observed negative impacts of larger-scale farm operations on soil erosion and fertility, agricultural economists began to explore the impact of farmland ownership structure on these environmental outcomes. The idea emerged that since tenant farmers are less likely to realize the long-term production benefits of investing in intensive soil-management practices, leased lands would experience high levels of soil erosion compared to land that farmers owned themselves. Drawing general insights from the logic of the tenancy hypothesis would imply that lease agreements may have negative tenure security effects for farm succession plans, leading to poor water and soil quality management, decreased investment in permanent technologies leading to environmental benefits, and decreased willingness to engage in conservation practices on environmentally sensitive areas of the farm.⁴⁶ The tenancy hypothesis has particularly serious implications for organic farming operations that rely on intensive soil fertility management over relatively long periods of time.

Empirical support for the tenancy hypothesis over nearly three decades has been largely mixed. In an early cross-sectional study of farms in the United States, Lee found no statistically significant relationship between ownership structure and soil conservation practices.⁴⁷ Localized studies employing similar survey techniques, however, argued that there were demonstrably reduced soil conservation measures and grassland restoration employed on leased lands.⁴⁸ More recent quantitative studies have tended to confirm the tenancy hypothesis using surveys of tillage practices and the application of micronutrients to develop long-term soil quality.⁴⁹ Carolan confirms the general thrust of these statistical analyses in a qualitative study of tenant farmers in Iowa, where interviewees expressed

46. For a survey of the literature on the “tenancy hypothesis” in the context of possible factors for the adoption of conservation practices on farms, see Duncan Knowler & Ben Bradshaw, *Farmers’ Adoption of Conservation Agriculture: A Review and Synthesis of Recent Research*, 32 FOOD POL’Y 25 (2007).

47. Linda Lee, *The Impact of Land Ownership Factors on Soil Conservation*, 62 AM. J. AGR. ECON. 1070, 1075 (1980).

48. See David E. Ervin, *Soil Erosion Control on Owner-operated and Rented Cropland*, 37 J. SOIL & WATER CONSERVATION 285, 287 (1982) (utilizing data from a single county in Missouri); Evan D.G. Fraser, *Land Tenure and Agricultural Management: Soil Conservation on Rented and Owned Fields in Southwest British Columbia*, 21 AGRIC. & HUMAN VALUES 73, 77 (2004).

49. See Meredith J. Soule, Ababayehu Tegene, & Keith D. Wiebe, *Land Tenure and the Adoption of Conservation Practices*, 82 AM. J. AGRIC. ECON. 993 (2000) (conducting a study of corn producers across the United States); Sami Myyrä, Elise Ketoja, Markku Yli-Halla, & Kyösti Pietola, *Land Improvements Under Land Tenure Insecurity: the Case of pH and Phosphate in Finland*, 81 LAND ECON. 557, 567 (2005) (demonstrating that tenure insecurity may decrease long-term land improvements through liming and phosphorus fertilization, under the European Union’s Common Agricultural Policy, which encourages short-term cash lease contracts).

concerns that tenure insecurity diminished the possibilities to engage in practices supportive of positive environmental outcomes.⁵⁰ Other authors, however, have declined to acknowledge any true consensus on the existence of or motivating factors behind the potential link between farm lease arrangements and diminished environmental quality.⁵¹

A recent study of the “tenancy hypothesis” in the context of farmland succession suggests that the disagreement in the literature can be addressed by disaggregating the factors leading to potential insecurity for tenant farmers.⁵² These factors include the length of the lease term, the form of rental remuneration (cash or crop share), verbal versus written agreements, and the precise definition of environmental obligations in the lease itself. In general, written long-term leases (generally five years or longer) based on crop share arrangements are more likely to ensure the highest level of tenure security available to lessee farmers. The impact of specific environmental obligations on tenure security, however, remains largely ambiguous. This latter set of issues is addressed in the discussion of conservation covenants, below.

Long-term leases tend to increase the chances that the tenant farmer will be able to realize the benefits of sound environmental practices in the future, although this will largely be determined by the specific practices employed. For activities such as preventing soil erosion and water pollution, shorter-term lease periods provide sufficient security to realize immediate benefits. Intensive soil fertility management, support for increased biodiversity, and investment in non-movable clean energy infrastructure, on the other hand, will likely require longer-term leases of many years or even decades.⁵³ In addition to impacting the use of physical techniques and technologies, longer-term leases may also be required for tenant farmers to make significant human capital investments in good environmental practices. Even within a relatively small area or region, the biotic characteristics of farmland can vary considerably. Where acquired environmental knowledge is highly specific to certain farm areas, long-term leases can be key to establishing incentives for farmers to make these human capital investments.

In light of these foregoing considerations, lease arrangements can include provisions that dramatically increase the tenure security of tenant farmers, even for shorter-term agreements. Leases that contain an option for the tenant farmer to purchase all or part of the land at some specified time or on termination of the lease will supply an extra layer of security for these farmers and enables both the lessee and lessor to carry out full realization of the farmland succession process. These provisions can take the form of either a right of first refusal—providing the tenant farmer an option to match third party offers to purchase—or of a straightforward option to purchase at a fixed price and some pre-determined future date or time

50. Michael S. Carolan, *Barriers to the Adoption of Sustainable Agriculture on Rented Land: An Examination of Contesting Social Fields*, 70 RURAL SOC. 387, 398 (2005).

51. Knowler & Bradshaw, *supra* note 46, at 37.

52. Bob Parsons & Kathryn Ruhf, “Land Tenure, Environmental Conservation and Stewardship” (2009) FarmLASTS Project: Farm Land Access, Succession, Tenure and Stewardship [forthcoming].

53. Soule, Tegene, & Wiebe, *supra* note 49, at 993.

period.⁵⁴

Whether farmland owners receive cash payments in exchange for rented land or, alternatively, enter into crop-sharing agreements is also likely to be a factor in determining the environmental outcomes of farmland leases. Crop share arrangements replace cash rent with an agreement to share the proceeds of sale from actual production on the land. These types of agreements are often entered into as a risk-sharing mechanism to mitigate the adverse effects of crop yields and market prices. Empirical work by Allen and Lueck,⁵⁵ along with formal modeling by Dubois,⁵⁶ has demonstrated that crop share agreements can increase the likelihood that tenant farmers will preserve topsoil and invest in better land-management practice compared to cash-rent contracts. The reason is that sharecroppers only receive a portion of the income from a given crop yield, which translates into reduced incentives for these tenants to exploit inputs paid for entirely by the landowner, such as soil quality and other environmental services. Sharecropping can also have direct impacts on the tenure security of tenant farmers by causing the landowner to become more involved in the farming practices being employed, increasing the stability of the landlord-tenant relationship for the future by increasing trust.⁵⁷ These strong relationships may further facilitate a full-scale succession arrangement between the parties.

A final concern about land leases is that they provide little protection against farmland loss. In rural areas subject to strong pressures for residential development of farmlands, lease arrangements, regardless of their term length and other substantive content, will offer little tenure security for tenant farmers. The continued availability of farmland for these tenants will be largely contingent on the goodwill of the landowner to resist the financial and other incentives created by these development pressures. In cases where the farmland owner has strong personal incentives to keep their land in productive agricultural use, this goodwill may be sufficient. But in these situations, land owners and tenant farms will likely want to consider additional legal agreements that guarantee farmland protection over the long-run. Conservation covenants and land trusts, discussed next, when combined with leasing arrangements have a good potential for preserving farmlands while providing the institutional framework to support environmentally-positive farming practices.

Overall, it appears that some forms of lease arrangements are likely to provide a relatively high level of tenure security for tenant farms as the foundation for a succession arrangements aimed at the gradual transfer of farmland over several years. Those leases that contemplate a long rental term, include a right of purchase, provide for share-cropping as a way to involve the land owner and build

54. R.W. Gamble, *Factsheet: Land Lease Arrangements*, ONT. MINISTRY AGRIC. FOOD & RURAL AFF. (Oct. 2001), <http://www.omafr.gov.on.ca/english/busdev/facts/01-065.htm>.

55. Douglas Allen & Dean Lueck, *Contract Choice in Modern Agriculture: Cash Rent Versus Crop Share*, 35 J.L. & ECON. 397, 409-10 (1992).

56. See Pierre Dubois, *Moral Hazard, Land Fertility and Share Cropping in a Rural Area of the Philippines*, 68 J. DEV. ECON. 35, 56-57 (2001).

57. Soule, Tegene, & Wiebe, *supra* note 49, at 993.

mutual trust, protect against farmland loss and respect the social norms that have historically structured non-formal leasing arrangements have the best chance of realizing positive environmental outcomes.

C. Land Trusts and Conservation Easements

Land trusts are nonprofit organizations that secure farmland tenure by holding property rights to land, by monitoring the subsequent uses of that land, and by enforcing specific obligations to protect the land base itself and to engage in certain environmental practices. These organizations can acquire full ownership rights to farmland by purchasing the land outright, or they can hold a partial interest in the form of a special conservation agreement over the land, with title remaining vested in a private owner.⁵⁸ As a means to combine private contractual agreements with quasi-public oversight, land trusts provide for a unique form of farmland succession with generally strong environmental protections.

Land trusts have been employed widely in Western Canada and in the United States, and have more recently garnered growing attention in Ontario.⁵⁹ While land trusts have historically focused on land conservation for a range of natural areas such as grasslands, wetlands, and wooded areas, organizations aimed specifically at protecting farmlands for continued agricultural use are beginning to emerge as part of the institutional landscape.⁶⁰ A main choice for current farmland owners looking forward to succession is whether to transfer full title in their farm to a land trust or to grant a conservation easement or covenant—collectively referred to as “conservation agreements”—for all or part of the farmland property. If the landowner chooses the latter route, a second set of choices, often involving the succeeding farmer, will be in regard to the specific content of the conservation agreements itself. Before discussing these options in relation to tenure security for the succession parties, I first provide a brief outline of conservation agreements as a tool for promoting positive environmental protections on farmlands.

Mainly in response to concerns about rapid urbanization and the development of natural spaces at the urban fringes beginning in the mid-1970s, conservation agreements rooted in common law property doctrines began to receive some attention in Canada. Around this time, municipalities started to contemplate the public purchase or expropriation of environmentally significant areas, for reasons of aesthetic quality, ecological integrity, and/or general planning purposes. These options, however, posed significant financial and political barriers. Conservation easements attracted some interest as an economically viable alternative. These

58. Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 484 (2004).

59. Melissa Watkins, Steward Hilts, & Emily Brockie, *Protecting Southern Ontario's Farmland: Challenges and Opportunities*; CENTRE FOR LAND & WATER STEWARDSHIP, U. GUELPH, ONT. (2003), <http://www.ontariofarmlandtrust.ca/sites/default/files/protectingfarmland.pdf>.

60. *Caledon Farm Sets Precedent for Land Preservation*, ONT. FARMLAND TRUST, (2009), available at <http://www.ontariofarmlandtrust.ca/node/107> (reporting that in August 2009, the Ontario Farmland Trust secured its first agricultural conservation agreements on a small acreage near the town of Caledon, north of the Toronto metropolitan area).

municipalities recognized that purchasing conservation agreements to protect environmental features of lands, while leaving the fee title vested in private hands, was considerably less expensive, provided tax advantages, avoided direct maintenance costs, and ensured long-term protection of these natural spaces.⁶¹ Conservation agreements, either in the form of a restrictive covenant or an easement, are specific conditions about what may or may not be done with a piece of land. These conditions are registered directly on title to the land, and survive the transfer of that title between private owners. In spite of their practical utility, however, the legal interpretation and enforcement of conservation agreements was somewhat precariously grounded in common law property doctrine. The common law of easements and covenants developed with a focus on grants of affirmative rights to carry out specific activities, such as rights of entry or rights to fish or hunt.⁶² Conservation agreements, by comparison, normally disallow certain activities on the land. So-called “negative” easements and covenants have been recognized very sparingly by the common law, and are frequently unenforceable against successors in title.⁶³ These issues of common law interpretation therefore acted as a significant bar to employing conservation agreements as instruments for environmental protection, and very infrequently with respect to farmlands and agricultural uses.

The common law barriers to enforcing conservation agreements were largely overcome by enactment of the provincial Conservation Land Act⁶⁴ (the CLA) in 1990. Section 3 of the CLA provides for an owner of land to grant a conservation agreement to a conservation body specified under the Act for a specific list of purposes related to conservation.⁶⁵ The CLA was amended in 2005 to include the right to grant an easement “for the conservation, preservation or protection of the land for agricultural purposes.”⁶⁶ Under the CLA, conservation agreements run with title to the land and are enforceable against successors to the title in perpetuity. A wide range of nonprofit organizations are eligible under the CLA to act as conservation bodies, including the federal, Ontario, or municipal

61. Samuel Silverstone, *Open Space Preservation Through Conservation Easements*, 12 OSGOODE HALL L.J. 105, 106-7 (1974).

62. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J., 2, 12 (1989); see also *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited et al.* (2002) 58 O.R. (3d) 481 (Can. Ont. C.A.) (discussing the common law of positive and negative easements in Ontario).

63. Dana & Ramsey, *supra* note 62, at 15 (conservation covenants at common law have also been subject to interpretation as restrictive covenants, the enforceability of which has also traditionally been highly uncertain).

64. Conservation Land Act, R.S.O. 1990, c. 28 (Can.). The CLA specifically addresses common law bars related to appurtenant land and negative easements or covenants. *Id.* § 3(4) (“The easement or covenant is valid whether or not the conservation body or assignee owns appurtenant land or land capable of being accommodated or benefited by the easement or covenant and regardless of whether the easement or covenant is positive or negative in nature.”). Note that while the CLA is relevant to both easements and covenants, for simplicity I use the general term “conservation agreement” to encompass both.

65. *Id.* § 3(2).

66. *Id.* § 3(2)(d).

governments, conservation authorities, Indian Act bands, registered charities and their trustees, and any additional bodies proscribed under the regulations.⁶⁷ This broad definition of “conservation bodies” has paved the way for independent nonprofit organizations to adopt primary roles in holding, monitoring, and enforcing conservation agreements, as well as in facilitating their creation and providing educational resources to rural communities and potential grantors. The CLA also provides for mandatory assignment of an easement or covenant to the provincial Minister of Natural Resources in the event that a conservation body ceases to exist or becomes ineligible under the Act.

Given the new availability of conservation agreements as instruments for farmland succession, landowners can elect either to grant a conservation agreement to a land trust and subsequently transfer the title to a succeeding farmer—which may also involve leasing the farmland in the short or medium term—or to transfer the fee simple directly to the land trust, which will subsequently administer leasing arrangements with new farmers.

1. Fee Purchase by a Land Trust

The latter option offers some benefits by mitigating uncertainty about future farmland transfers for tenant farmers and making the ownership arrangement less vulnerable to legal challenges. But, overall, this option has some severe restrictions more adequately addressed through the use of farm conservation agreements. The potential environmental benefits of transferring fee title in farmland to a land trust are twofold. First, when a land trust acquires title to farmland, that land is likely removed from private land markets entirely, at least for the short and medium term. Tenant farmers who enter into leasing relationships with land trusts on these lands may therefore see their tenure security increased where their rental arrangements are viewed as more stable and more likely to be renewed. Second, since farm conservation agreements are relatively new statutory instruments—and given the somewhat difficult history of easements and covenants at common law—they remain vulnerable to as yet untested in the Courts and may be subject to an unknown set of legal challenges. Where tenant farmers regard their tenure security as undermined by this uncertainty about the content and enforceability of conservation agreements, full ownership by a land trust may be preferable. Both of these factors may induce tenant farmers to invest in agricultural practices that lead to improved environmental outcome.

On the other side of the ledger full title transfers present significant drawbacks. The most obvious downside of this route is that it almost certainly cuts off any opportunity for tenant farms to actually acquire an ownership interest in the land at some point in the future. Farmland “succession” therefore stops at acquisition of title by the land trust. While tenant farmers may experience some increased tenure security under this scenario compared to leases with private landowners, removing the possibility of acquiring any ownership interest likely provides significant disincentives for these farmers to invest in environmentally-positive practices.

67. *Id.* § 3(1).

Moreover, from a public policy perspective, it is likely to be undesirable for small nonprofit organizations to be administering a growing quantity of farmland. The administrative costs of this option will invariably grow over time, and may prove to lack the flexibility to negotiate rental agreements that are sufficiently adaptable to specific pieces of farmland toward the best-possible environmental outcomes. Finally, the financial cost of acquiring full title is likely to be prohibitive for most if not all land trusts, particularly where land values are very high as the result of residential development pressures.

2. *Farm Conservation Agreements*

Farm conservation agreements offer a viable alternative to the transfer of fee title to land trusts. A central motivation for incorporating conservation agreements into farmland succession plans is to reduce the market value of the farm, making it more affordable for purchase by a succeeding farmer. In addition to the direct environmental benefits of these agreements realized by ensuring that succeeding farmers adhere to good environmental practices and conservation goals, outgoing farmland owners accrue significant financial benefits from granting an easement or covenant to a conservation body. Where the current landowner donates a conservation agreement, he or she receives tax advantages in the form of charitable receipts for the value of the agreement, as well as a potential capital gains exemption.⁶⁸ While these tax benefits are unlikely to wholly offset the drop in market value of the farm from granting a conservation agreement—particularly where the development value of the land was high prior to the agreement—it is assumed that in many cases these tax benefits, when combined with the environmental benefits valued by the outgoing farmland owner, will provide sufficient incentive to grant the agreement. A recent study of the economic viability of farmland conservation agreements in Ontario has demonstrated that this assumption holds under a number of plausible succession scenarios.⁶⁹ In a limited number of cases, land trusts or other conservation bodies may have sufficient resources available to purchase conservation agreements from landowners at or near the market price.

Conservation agreements likely offer an optimal level of tenure security for succeeding farmers and provide financial flexibility sufficient for many farmers, eventually, to acquire a full or partial ownership interest in the farmland. As with the full purchase of farmland by a land trust, a primary benefit of conservation agreements is that they ensure that farmland will not be sold for non-agricultural purposes in the future. Tenant farmers therefore gain significant tenure security against the threat of farmland loss. Conservation agreements also create the opportunity for succeeding farmers to acquire an ownership interest in the farmland at a reduced price, increasing the incentive to invest in positive environmental practices immediately by improving the likelihood that these farmers will be able to

68. Pat Learmonth & Susan Willis Chan, *The Potential for Use of Farmland Conservation Agreements in Ontario*, KAWARTHA HERITAGE CONSERVANCY 11 (Feb. 2009).

69. *Id.*

realize environmental outcomes in the future. In addition, specific provisions are normally built into these agreements, including prohibited practices and obligations to protect certain ecological features or environmentally sensitive areas of the farmland. These provisions help to clarify the property rights of farmers using the land and create certainty in any additional contractual arrangements surrounding the encumbered title. Conservation agreements therefore have potential to create a two-fold effect on environmental outcomes, derived from (i) the specific obligations for conservation imposed in the terms of the agreement and (ii) the improve land tenure security that results from their use.

As the statutory CLA scheme for conservation agreements—particularly the 2005 amendments providing for farmland conservation—gains increasing attention and use, the comparative benefits of these instruments for succession arrangements are likely to grow. One potential drawback in the interim is that this statutory scheme has not yet been tested widely in the courts. As yet there is no body of case law to demonstrate under what circumstances, if any, conservation agreements might prove to be unenforceable. For now, farmers who are concerned about the enforceability of these agreements may perceive them to be relatively insecure. On the other hand, statutory conservation agreements provide a clear advantage over the complexity of common law easements and covenants.⁷⁰ As well, there have been no concerns raised in growing research literature on these statutory instruments that they will prove to be insecure. More pressing concerns for existing and succeeding farmers are the institutional preconditions for the successful monitoring and enforcement of conservation agreements, discussed in the next section, below.

VI. INSTITUTIONAL PRECONDITIONS

A. Municipal Land Use Plans and Zoning By-laws

Municipal land use planning policy across rural Ontario reveals deep tensions between the need to preserve farmlands, rural communities and livelihoods on the one hand, and farmers' demands for flexibility to meet changing markets and to adapt to new techniques and technologies on the other. The former concern manifests in strict land use and zoning designations that attempt to "lock in" the existing rural landscape and preserve it for future use, while the latter is represented by a growing number of farmers, particularly new entrants, seeking to organize agricultural production around non-traditional models that incorporate food production, rural tourism, habitat preservation, and outdoor recreation. This section considers how some of these planning policy areas and their resulting tensions impact on the tenure security of farmland succession arrangements. Issues canvassed include farmland severance regulations and on-farm residency by-laws. The need for municipal planners and politicians to get these institutions "right" is a precondition for new and existing farmers alike, as they provide the legal

70. See Arlene J. Kwasniak, *Conservation Easements: Pluses and Pitfalls, Generally and for Municipalities*, 46 ALTA L. REV. 651, 653-54 (2009).

foundation and long-term vision to support succession arrangements that produce positive environmental outcomes. Land use plans that determine the availability—and therefore the price—of small farms also serve a key “gateway” function for entrant farmers, often with limited access to capital, searching for low-cost options to enter the agricultural sector. Without the legal tools to create new spaces for small farms as existing ones are invariably lost to development pressures, there will be declining opportunities to realize the environmental benefits of these unique spaces.

Since new farmers have an interest both in flexible municipal planning arrangements and in preserving farmlands and rural communities, they will likely have a key role to play in resolving the tensions between these two objectives. As noted in Part III, above, small farmers oriented toward local community governance are well positioned to influence municipal policies through processes of knowledge transfer, market exchange within local social and economic networks, and participatory decision-making in broad-based sustainable rural development planning.

Severance Regulations. Rural municipalities increasingly struggle to control urban sprawl and prevent active farmland from being converted into non-agricultural rural residential lots. A key strategy in this struggle has been to limit rights to create new property lots on designated farmlands, as a means to prevent the gradual attenuation of agricultural spaces when landowners subdivide lands into may smaller residential lots (called “rural subdivisions”) or sever mid-size pieces of land to create rural estates. Sometimes, these land planning controls take the form of minimum lot sizes that, for example, prevent a single large farm from being divided into one or more smaller farms. Despite good intentions behind such planning regulations to prevent farmland loss, these arrangements can dramatically reduce the flexibility of existing and new farmers to design succession arrangements. While some of these planning controls may improve tenure security for succeeding farmers by protecting agricultural spaces and the surrounding character of the rural community as a whole, they also risk undermining the same by limiting the ability of these farmers to shape succession arrangements as they evolve over extended periods of time. For example, tenant farmers who invest in cultivating and improving soil nutrition and watershed quality on a specific land area within an existing farm, perhaps under a lease agreement, may be prevented from severing that land to create a new small farm at some point in the future. This scenario might exacerbate some of the negative implications of the “tenancy hypothesis” for environmental outcomes discussed in Part V, above. From an existing farmer’s perspective, lot severance controls might also prevent them from creating a small adjacent lot where they can retire from farming while maintaining a connection to the farm and enjoying the benefits of a rural lifestyle. Significantly, these types of planning controls are generally asymmetric, allowing for large farming operations to consolidate smaller acreages for additional cropping and pasture land. The result is a one-way bias toward the growth of large farms at the expense of smaller ones.

A plausible policy response to these challenges is for municipal planning

departments to tailor their regulations more closely to the types of land uses that attach to land subdivisions. Experiences in Huron County—located in Southwestern Ontario close to the cities of London and Kitchener-Waterloo—provide a good model. Here, the county’s official land use plan created a scheme of specific exceptions for residential land severances, for both retiring farmers and for sons or daughters of existing farmers who assist on the farm.⁷¹ Land severances, with their own special conditions and regulations attached, were allowed for individual in these groups. Clearly, this model would need to be updated to match the changing nature of farm succession, by allowing non-family entrant farmers to take advantage of the planning exceptions.

On-farm Residency Rules. Municipal rules that restrict the number of residences on the same farm can heavily impact on the viability of succession arrangements. In order to prevent the spread of *de facto* rural subdivisions with multiple permanent or mobile housing units, municipal jurisdictions frequently restrict the construction of any residential buildings on agricultural land. These rules are a good example of institutional failure to adapt to the evolving realities of farmland succession. When the majority of farmland was transferred between generations within the same close-knit family, large single on-farm residences could easily accommodate two or more family generations within the same household. But as farm succession has opened up to non-family individuals, the restricted supply of on-farm housing, and an inability to create new residences on farms, have been significant barriers to new farmers. Not only is living off-farm likely to be more expensive, residence restrictions also represents a special form of tenure insecurity for entrant farmers by making them less likely to feel personally invested in and connected to the farm operation.⁷² The tenure insecurity associated with being prevented from living on the farm is closely aligned with a sense of place and a desire by many new farmers from non-farm backgrounds to integrate their working and personal lives within the same physical space.

Everdale LandLink, a non-profit organization that supports new farmers located in Wellington County, northwest of Guelph, Ontario, has recently developed an initiative to help these farmers locate viable on-farm residency options, where they are available within existing institutional arrangements. In this municipality, some exceptions do exist to the default rule against multiple on-farm dwellings, but these are generally difficult to navigate. For example, secondary residences may be allowed on some designated agricultural lands, but require certain standards of proof to demonstrate that the proposed project will not hinder current or future agricultural uses.⁷³ Legal expertise and access to information may therefore also be important considerations.

The example of on-farm housing bylaws also provides some insight into why municipal planners may exhibit a level of resistance to institutional change. Even

71. Wayne Caldwell, *Rural Planning and Agricultural Land Preservation: The Experience of Huron County, Ontario*, 2 GREAT LAKES GEOGRAPHER 21, 29 (1995).

72. Interview with Amy Daniels, Everdale FarmLink Program (Oct. 14, 2009).

73. Everdale LandLink, *Housing for New Farmers in the Town of Erin* (2009) (unpublished) (on file with the author).

the brief survey of some select preconditions to environmentally positive farmland succession arrangements above reveals that municipal level policy making, in some respects, has not been sensitive to the changing social and economic context of farmland succession. Is this result incompatible with the claim that policy making to support small farm is best enacted at the local level? Not necessarily. In large part, municipal jurisdiction over land use planning and zoning laws is circumscribed by the provincial Planning Act,⁷⁴ which imposes specific requirements and limitations on local planning departments to meet provincial standards. For example, the Planning Act imposes strict limits on the creation of temporary accessory dwelling units that might benefit new farmers in need of on-farm housing. The extent to which multiple levels of governmental control might make local decision-making less sensitive to the particular needs of rural communities is an open question, but one that deserves attention in future research.

B. Third-Party Conservation Bodies

A second set of institutional preconditions relates to the potential for land trusts and conservation agreements to deliver their predicted environmental benefits. These are discussed mainly in respect of conservation agreements (although similar concerns hold for land trusts hold title in fee). Recall that a number of organizations are authorized under the CLA to hold conservation agreements as designated “conservation body,” including municipal councils, conservation authorities, charitable corporations, and any person or body specifically recognized in the regulations.⁷⁵ A central concern is about the capacity of conservation bodies to monitor and enforce conservation agreements. Monitoring farmlands for compliance with the terms of a conservation agreement can be more or less costly, depending on the specific provision of the instrument, but costs will inevitably grow with the number of agreements under an organization’s control. Likewise, enforcing conservation agreements may require organizations to set up a process of warnings to inform landowners about violations, and may ultimately require organizations to go to court to seek enforcement. Preferably, conservation bodies will also provide positive support landowners to meet their commitments and avoid costly adjudication if possible. While public municipalities and conservation organizations are more likely to have the financial resources, expertise, and institutional capacity available to monitor and enforce conservation agreements, smaller non-profit organizations will face constraints and challenges. The capacity of these organizations to monitor and enforce landowner commitments is necessary to realize the environmental benefits of conservation agreements. An ongoing failure to ensure that commitments are strictly followed threatens the stability of this statutory scheme overall if these organizations themselves come to be viewed as illegitimate.

These concerns may be more prevalent in the short term as conservation agreements gain popularity. Since, as noted above, farm conservation agreements

74. Planning Act, R.S.O. 1990, c. P-13 (Can.)

75. Conservation Land Act, R.S.O. 1990, c. 28, § 3.1 (Can.).

have generally been untested in the courts, initial challenges to the validity of these agreements risk ending up in costly legal battles. Public organizations, not private bodies or non-governmental organizations (NGOs), are better suited to bear the costs of working out the legal contours of conservation agreements. This suggests a larger role for municipalities and conservation organizations to hold conservation agreements in the short term, and perhaps a growing space for NGOs as the legal landscape and best practices develop over time.

VII. CONCLUSION

The analysis in this essay reveals that the succession arrangements yielding the highest environmental benefits for existing and entrant farmers will be contingent on the specific contexts in which they are crafted. While farmland succession has moved away from the traditional “family farm model,” the non-formal norms associated with these traditions and based on ideas of trust and community integration are likely to remain important determinants of environmental outcomes. New farmers in particular should pay close attention to these traditional models, such that existing norms do not undermine attempts to “formalize” tenancy contracts and other agreements. With these norms in mind, parties to farmland succession arrangements now have a number of flexible legal instruments available to help them structure the appropriate incentives for improving environmental quality on farmlands and in surrounding ecosystems.

Equally important is the institutional landscape that circumscribes connections between farmland succession and environmental outcomes. As succession arrangements invariably move from the informal to the legal realm, municipal governments and third-party conservation bodies will likely continue to create new legal instruments and take on new roles to monitor and enforce existing agreements. Overall this is a positive trend. When local institutions become the focal point for policy development in this area, small farmers can utilize their comparative advantages to participate effectively in local governance and influence processes of decision-making. These advantages include better knowledge transfer to and from the local community, stronger integration with local markets, and a tighter fit with sustainable rural development strategies. With attention to these dimensions, new generations of small farmers stand a good chance of cultivating strong institutional linkages for improved environmental outcomes well into the future.