

CSTA POSITION PAPER
Plant Breeders' Rights and its Use in Field Crops
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Canadian agriculture has always relied on its innovative spirit to create opportunities for tomorrow, but the ability for this spirit to flourish depends on an environment which fosters innovation. The future of Canadian competitiveness is dependent on such an environment to attract and sustain R&D dollars, both domestically and from the international community.

Plant Breeders' Rights was established in Canada in 1990, and has contributed to a positive investment climate. However, PBR in Canada has not kept pace with changes in technology and the marketplace. As the result, its usefulness, and thus its use in the field crop sector, has been declining.

Analysis by the Canadian Seed Trade Association finds that since July, 2004, 387 new field crop varieties have been registered. Only 87 (or 22%) of those new varieties have been granted a Plant Breeders' Right Certificate. Some examples of specific field crop use of PBR are:

- There were 19 new varieties of Alfalfa registered with no PBR granted
- 10 of the 25 new Barley varieties registered (40%) were granted PBR
- 7 of the 37 new Canola varieties registered (19%) were granted PBR
- 22 new Oat varieties were registered, with 11 granted PBR (50%)
- Only 4 of the 133 new Soybean varieties registered (3%) were granted PBR

The greatest users of Plant Breeders' Rights appear to be public sector institutions. For example Agriculture and Agri-Food Canada obtained Plant Breeders' Rights on 14 of its 47 new varieties (30%). In contrast, the private sector use of Plant Breeders' Rights is significantly lower. In the period July 2004 to present, 49 of the 255 private sector registrations (18%) were granted Plant Breeders Rights.

It is acknowledged that there are benefits to using Plant Breeders' Rights as tools of intellectual property protection. Benefits include:

- The variety rights holder has the ability to manage the import of varieties which are registered for sale in other countries as well as Canada, conferring the ability to monitor seed quality and manage direction of seed which could flow into identity preserved markets
- The existence of breeders' rights provides some security for potential investments in Canadian agriculture.
- Broader protection than is provided by contract law because Plant Breeders' Rights protects against non-contracted 3rd party infringements.

However, the fact is that PBR use in field crops is declining as shown above. Consultation with Canadian private sector breeders has revealed that there are a number of reasons for this decline including, but not limited to:

- The process for obtaining a Plant Breeders' Right certificate has not kept pace with the plant breeding industry and the pace of change in the market place. The time required to apply and obtain a Plant Breeder's Right often exceeds the life cycle of the variety for which the right is sought.
- A lack of recognition and respect, on the part of government agencies and regulatory bodies, for Plant Breeders' Rights. This includes a lack of willingness to inform and communicate the provisions of PBR to all stakeholders, and extends to unwillingness to assist with enforcement.
- The availability and use of other intellectual property protection tools such as bag licenses, contracts such as technology use agreements; and identity preserved contract systems that offer premiums and incentives.

While some Canadian breeders will likely continue to make use of other intellectual property protection tools, others believe that with improvement, the system could be made more useful, and encourage increased use. Some of these improvements are procedural and administrative, while others will require legislative amendments.

Procedural and administrative improvements include:

- The development of a statement of vision, mission and values, like that of the Canadian Intellectual Property Protection Office. The statement should clearly establish a commitment to encouraging innovation, investment and creativity in Canadian plant breeding. It should also include a commitment to continuously strive to improve performance of the office based on that commitment.
- A transparent review of the role, mandate and decision making procedures of the Plant Breeders' Rights Office. This review would include but not be limited to an examination of:
 - How applications are prioritized
 - Time-frames for processing applications – are there checks and balances?
 - The process for gathering further information during the assessment process
 - The opportunity for applicants to get information on the status of the application
 - How is the performance of the PBR office measured?
 - The opportunities for appeal
- Engagement of CFIA inspectors in the process of reporting PBR violations to the rights holder
- Reduced and streamlined information requirements including one year of trials instead of the current two years
- To increase efficiency and improve logistical planning, trial examiner services could be privatized. (E.g. plant breeders officially recognized by the Canadian Seed Growers Association as a conformance verification body, could serve as PBR trial examiners). CSTA supports and appreciates the commitment of the PBR office to develop policy options including third party verification.
- Agreement that applicants will choose reference varieties for PBR purposes
- Official recognition by the Plant Breeders' Rights office of a statement jointly developed by the Canadian Seed Trade Association and the Canadian Seed Growers Association, to be included in contracts, that outlines the conditions of seed multiplication that do not constitute a sale for purposes of plant breeders rights.

Improvements that require legislative change include:

- Updating Canada's Plant Breeders' Rights legislation to be UPOV '91 compliant
- Clear recognition of the legitimate rights of the breeder, and clarification of its balance with farmers' privilege.
- Clarification of, and criteria for, the inclusion of conditioning in farmers' privilege.
- A change in the definition of sale to ensure that testing and contract multiplication does not constitute a sale of a variety, nor does the resulting product from those tests. This change will harmonize the provisions of the Plant Breeders' Rights Act to those in the Seeds Act.
- Change the requirements around Provisional Protection to recognize publication in the PBR journal as notice

Advisory Committee - In reviewing and amending Plant Breeders' Rights legislation, regulation and administration, the government must be guided by an effective advisory committee. The membership of the advisory committee must have sufficient representation of the clients of Plant Breeders' Rights – the applicants.

CSTA submits that with the improvements laid out above, Plant Breeders' Rights in Canada could become a more effective, more widely used tool of intellectual property protection.

-CSTA Board of Directors, November, 2006-