



# CANADIAN SEED TRADE ASSOCIATION

L'ASSOCIATION CANADIENNE DU COMMERCE DES SEMENCES

39 Robertson Road., Suite 302, Ottawa, Ontario K2H 8R2 Telephone (613) 829-9527

Email: [csta@cdnseed.org](mailto:csta@cdnseed.org)

<http://www.cdnseed.org>

FAX (613)829-3530

February 25, 2005

## RESPONSE TO THE CONSULTATION DOCUMENT ON PLANT BREEDERS' RIGHTS

The Canadian Seed Trade Association supports the proposed amendments to PBR to bring existing legislation into conformity with the 1991 UPOV convention. Not only will the amendments foster increased innovation in Canada, they are also essential to meeting our obligations under the World Intellectual Property Organization (WIPO). It is important to note that implementation of UPOV 1991 in its entirety is needed.

The opportunities for tomorrow are dependent upon an agriculture environment which provides our farmers with the tools necessary to compete in an increasingly competitive global marketplace. The adoption of PBR has been a success for Canadian farmers over the last decade with increased investment resulting in a rate of varietal development and available new varieties unparalleled in Canadian history. However, agriculture is not a static industry and it depends on the creation of varieties with ever-increasing yield, resistance to diseases and pests, and more specific end use traits suited for specialty products. Amending Canada's PBR legislation into conformity with the 1991 UPOV convention will allow continued Canadian innovation in plant breeding, equipping farmers with the new varieties necessary for a prosperous future.

At the same time, the seed industry is very sensitive to the current financial challenges that face the farm community. The seed industry wants to avoid burdening our farm customers. At the same time continuing innovation in breeding and crop and variety development is critical to the success of farmers, and whether undertaken by the public or private sector costs money. There must be some means of recouping investment in research, development, and the commercialization of crop genetics. Without bringing the Canadian PBR Act into compliance with UPOV 1991 in its entirety, including the recognition of its contribution to innovation, there is a risk that innovation will stall. Proceeding with amendments to the Plant Breeders' Right legislation is an important step that is long overdue.

We must become fully compliant with PBR for these additional reasons:

- 1) Under the World Intellectual Property Organization and the Trade Related Aspects of Intellectual Property Agreement (Art. 27.3.b), at a minimum an **effective** *sui generis* system is required for the protection of intellectual property embodied in plant varieties, and it is the view of the international community that **complete** implementation of UPOV 1991 satisfies this requirement.
- 2) Improving PBR will increase Canadian competitiveness by allowing Canadian farmers access to world-class technologies, increasing production capabilities through improved varieties, and attracting valuable investment into R&D in Canada.

- 3) Among our global competitors, 58 countries, including South America, the EU, and the U.S., have either ratified the agreement or instituted laws conforming to the 1991 UPOV agreement. We must create an equal playing field with our competitors to maintain a viable industry.
- 4) In a time when the rate of consolidation in agriculture worldwide is of major concern, in Canada the number of small and medium sized seed companies has bucked the trend, in large part due to the opportunities provided by the implementation of PBR. Annual private sector research investment has more than doubled during the existence of PBR. This positive trend must be perpetuated by updating PBR and retaining precious private sector research dollars.
- 5) Agriculture and Agri-Food Canada has acknowledged the importance of innovation in agriculture and its importance is cited in the Agriculture Policy Framework, which stresses the value of identity-preserved programs and research. The amendments to PBR serve to accomplish this objective.

PBR is widely recognized to have served the agriculture community well over the 13 year existence of the current Act. It has reinvigorated private sector investment in agriculture research, producing tangible benefits ranging from improved yield and disease tolerance to increasing the available cropping options for Canadian producers. However, the benefits delivered via PBR are not unique to Canada. The rest of the world has also captured the benefits of PBR and moved on ahead of Canada. It is vital to our country's future competitiveness to further enhance the value plant breeders can bring not only to our farmers, but indeed to the entire Canadian agriculture sector.

### **ESSENTIALLY DERIVED VARIETIES**

Along with the other proposed amendments, CSTA wants to particularly highlight the need for Essential Derivation amendments. This is an important protection as it provides a balance between access to and protection of the initial originators of the germplasm.

### **FARMER'S PRIVILEGE**

International standards set out in UPOV 1991 clearly indicate that PBR must strike a balance between the legitimate interests of farmers and of the plant breeder. The Canadian legislation needs to respect that balance. Any provisions for farmer's privilege must be clearly laid out so that all parties understand what is allowed.

To this end, we believe that Section 17 in the Australian PBR legislation offers useful language that should be replicated in the Canadian legislation. The Australian model was the primary model for the original Canadian legislation and offers a straightforward solution to give clear meaning to the balance of farmer and breeder needs. The Australian language reads:

*Conditioning and use of farm saved seed does not infringe PBR*

- 1) *If:*
  - (a) *a person engaged in farming activities legitimately obtains propagating material of a plant variety covered by PBR either by purchase or by previous operation of this section, for use in such activities; and*

- (b) the plant variety is not included within a taxon (CSTA suggests “crop species” be used instead of the term taxon throughout) declared under (subsection 2) to be a taxon to which this subsection does not apply; and*
  - (c) the person subsequently harvests further propagating material from plants grown from the first-mentioned propagating material; the PBR is not infringed by:*
  - (d) conditioning of so much of that further propagating material as is required for the person’s use for reproductive purposes; or*
  - (e) the reproduction of that further propagating material.*
- 2) The regulations may declare a particular taxon to be a taxon to which subsection (1) does not apply.*

Use of this language would be an acceptable form of amendment to CSTA and would be consistent with UPOV 1991. It is noted that subsection two provides for making species-specific decisions by regulation.

### **PRODUCTS OF HARVESTED MATERIAL**

The opportunity to share the cost of variety development throughout the value chain could be created by extending protection to products of harvested material as per UPOV 1991. This would allow breeders to choose to collect royalties on end use products. It is important to think about ways of sharing risk throughout the value chain, because all links in the agricultural value chain benefit from innovation in plant breeding. Again, the Australian legislation offers a useful guide and CSTA endorses the wording in Section 15 of that country’s Act:

*Extension of PBR to products obtained from harvested material in certain circumstances*

*If:*

- (a) propagating material of plant variety covered by PBR is produced or reproduced without authorization of the grantee; and*
- (b) the grantee does not have a reasonable opportunity to exercise the grantee’s rights in relation to the propagating material; and*
- (c) material is harvested from plants grown from the propagating material but the grantee does not have, in the circumstances set out in section 14, a reasonable opportunity of exercising the grantee’s rights in the harvested material; and*
- (d) products are made from the harvested material.*

Section 11 operates as if these products were propagating material.

### **DEFINITION OF SALE**

The Act should be amended to say that testing and contract multiplication does not constitute a sale of variety, nor does the sale of the resulting product from those tests into commercial grain channels. Certainly, the PBR legislation should not impede proper testing and information sharing of varieties.

### **DEFINITION OF SEED**

To clarify the scope of Section 10.1 of the consequential amendments, change the words “plant variety” to “seed/material for propagating purposes”.

### **PROVISIONAL PROTECTION**

Clarify Section 19 to say “following publication of the application in the PBR Journal as provided for in the Act”, rather than the reference to notice in writing.

### **OVERVIEW**

The seed industry drives fundamental innovation in the crop sector. Proper handling of the issues of farmer’s privilege and products of harvested material is essential to the success of the amendments. Along with the other proposed provisions concerning essentially derived varieties, harvested materials, and related amendments as outlined in the consultation document, these amendments begin to bring Canada into the next century of tools needed to foster innovation.

Consistent with the government’s Innovation Strategy, these changes are required to sustain the private sector’s investment in agricultural research and development. That investment, as well as the returns to public sector programs, may not be sustainable without making these PBR amendments.