



**CSTA Policy on Plant Breeders' Rights
July, 2010**

Preamble

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, continues to decline.

Consultation with Canadian private sector breeders has revealed that there are a number of reasons for the declining use of Plant Breeders' Rights as a tool for the protection of intellectual property in field crops, 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 willingness on the part of regulatory and other government agencies to inform and communicate the provisions of PBR to all stakeholders, and an 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.

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.

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.

Despite the fact that Canada signed the most recent convention of the Union for the Protection of Plant Varieties (UPOV) in 1992, our country has still not ratified the convention by amending its Plant Breeders' Rights Act to conform with the 1991 convention. Canada is one of the only developed countries that does not comply with the UPOV 1991, and it has affected our ability to attract investment. Following is CSTA's policy on Plant Breeders' Rights.

Amendments to the Plant Breeders' Rights Act

CSTA supports amendments to Canadian Plant Breeders' Rights to bring existing legislation into conformity with the 1991 UPOV convention. Amending Canada's legislation to conform with UPOV 1991 will allow continued Canadian innovation in plant breeding, equipping farmers with the new varieties necessary for a prosperous future.

In order to ensure that Plant Breeders' Rights legislation provides the protection required to stimulate investment, it must fully comply with the UPOV convention of 1991, by implementing the convention in its entirety. However there are specific provisions of the UPOV 1991 that are of particular importance to Canada's private sector and must be incorporated in Canada's Plant Breeders' Rights legislation.

1. UPOV Provisions

- A. **Defining the Breeder's Right** – Canada's legislation must incorporate the UPOV 1991 definition of the breeder's right in its entirety, ensuring that the following actions require the authorization of the breeder:
- Production or reproduction
 - Conditioning for the purpose of propagation
 - Offering for sale
 - Selling or other marketing
 - Exporting
 - Importing
 - Stocking for any of the above purposes
- B. **Legitimate Interests of the Breeder** – UPOV 1991 specifically refers to respecting the legitimate interests of the breeder, however it does not define the term. CSTA believes that PBR legislation should contain the following definition:
- “Recognition and respect of the breeder's right to receive compensation for the initial and subsequent use of the innovation that reflects the value that the innovation brings to the purchaser/user.”*
- C. **Farmers' Exception to the Plant Breeders' Right** – the UPOV Convention of 1991 allows for an optional exception to the Plant Breeders Right to allow farmers to use the product of harvest of varieties covered by Plant Breeders' Rights for propagation on their own holdings. However the provision also states that the legitimate interests of the breeder must be safeguarded, including the payment of remuneration. If there is to be a farmers' exception in Canada's Plant Breeders' Rights legislation, the language of the UPOV must be included in its entirety. Additionally the farmers' exception must not extend to sectors of agricultural or horticultural production where such an exception is not common practice.
- D. **Products of Harvested Material** – UPOV 1991 provides that “harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.” CSTA supports the inclusion of this provision in Canada's Plant Breeders' rights legislation to ensure that the costs of innovation are shared throughout the value chain.
- E. **Reasonable Opportunity** – CSTA believes that history and case law makes it clear that the definition of “reasonable opportunity” does not include the obligation to protect the variety in other countries.

- F. **Provisional Protection** – the provisions of the UPOV 1991 which safeguard the interests of the breeder during the period between the application for the grant of a breeder's right and the grant of that right must be incorporated into Canadian Plant Breeders' Rights legislation. This protection must at least entitle the holder of the equitable remuneration from any person who has carried out acts which would require the breeder's authorization once the right is granted.
- G. **Essential Derivation** – The 1991 UPOV introduces the concept of essential derivation and dependency from an initial variety. Amendments to Canada's Plant Breeders' Rights Act to incorporate language around essentially derived varieties are important to provide a balance between access to and protection of initial originators of germplasm. CSTA supports the broad principles for codes of conduct in essentially derived varieties that has been adopted by the International Seed Federation. http://www.worldseed.org/isf/on_intellectual_property.html

2. Amendments Specific to the Canadian Situation

In addition to amending the Canadian Plant Breeders' Rights Act to fully and completely comply with the UPOV Convention of 1991, there are amendments that are required to ensure that Canada's legislation provides the protection necessary to stimulate investment in innovation in Canada.

- A. **Mission and Vision Statement** – Plant Breeders Rights Legislation, Regulations or Directives should require the development of a Mission, and Vision statement for the Plant Breeders' Rights Office (PBRO), which includes a commitment to encouraging innovation, investment and creativity in Canadian plant breeding, and to continuously strive to improve performance in keeping with the mission and vision.
- B. **Recognition, Communication, Coordination and Cross Compliance Between Regulatory Bodies and Legislation** – CSTA believes that Acts, Regulations and Directives that affect seed and seed innovation should complement and be cross compliant. Specifically:
 - i. **Crop Certificates and Plant Breeders Rights** – Canada's Plant Breeders' Rights Act grants the exclusive right to the holder of the right, to sell, produce for sale, or transfer protected varieties. CSTA believes that the process of obtaining and receiving a crop certificate from the Canadian Seed Growers Association is the first step in preparing seed for sale. Therefore only the holder of the right, either by Plant Breeders' Rights or by license from the holder of the right, should be eligible to receive crop certificates for seed of a protected variety. The Canadian Food Inspection Agency and its authorized agent, the Canadian Seed Growers Association must ensure that crop certificates are issued only to applicants who have the right to the protected variety. Amendments to the Plant Breeders Rights Act, and consequential amendments to the Seeds Act should include this requirement.
 - ii. **Reporting of Violations** – Regulations and/or directives from the Canadian Food Inspection Agency should require CFIA inspectors to note and report Plant Breeders Rights violations, through the Plant Breeders' Rights office, to the holder of the right.
 - iii. **Definition of Sale** - Amendments the Plant Breeders' Rights Act should include a definition of sale that specifies that testing and contract multiplication do 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.

- C. **Plant Breeders' Rights and Hybrids** – Canada's Plant Breeders Rights Act and Regulations should make clear that for the purposes of intellectual property protection, a hybrid is a variety. By repeated use of its parents, a hybrid can be reproduced, unchanged. Therefore the criterion of stability is fulfilled by a hybrid. Distinctness, uniformity and stability of the hybrid may then, be assessed either on the hybrid itself or on its parents and the formula that associate them.
 - D. **Reference Varieties** – Canada's Plant Breeders' Rights regime should include agreement that applicants will choose reference varieties for PBR purposes.
 - E. **Notice** – the requirements around Provisional Protection should be amended to recognize publication in the Plant Breeders' Rights Journal as notice, rather than requiring notice in writing.
 - F. **Advisory Committee** – Plant Breeders' Rights Legislation should require the Minister to establish an effective advisory committee to help to establish the PBRO mission and vision, monitor effectiveness of the process and report regularly to the Minister. The membership of the advisory committee must have sufficient representation of the clients of Plant Breeders' Rights – the applicants.
- 3. **Trial Examiner Services** – to increase efficiency and improve logistical planning, CSTA supports an assessment of the potential privatization of PBR trial examiner services. In particular, consideration should be given to authorizing officially recognized plant breeders to serve as PBR trial examiners.
 - 4. **PBRO Reporting Structure and Location** – CSTA supports a thorough assessment of the “fit” for the Plant Breeders' Rights office with the mandate of Canadian Food Inspection Agency, and an assessment of potential relocations, including to the Canadian Intellectual Property Office of Industry Canada.