

Western Canadian Wheat Growers Association

**Submission to the Plant Products Directorate,
Canadian Food Inspection Agency
Regarding proposed Amendments to the Plant Breeders' Rights Act**

March 8, 2005

The Western Canadian Wheat Growers Association welcomes this opportunity to submit its views on proposed amendments to the Plant Breeders' Rights legislation.

For the past 35 years, the Wheat Growers has been an association of progressive, business-minded prairie farmers who recognize the importance of innovation to the success of our businesses. Our mandate is to advance the development of a profitable and sustainable agriculture industry.

Farmers in western Canada are distant from offshore markets, so maintaining our competitive edge is dependent on having a regulatory environment that encourages plant research and the early adoption of new technology. Canada must strive to be among the world leaders in introducing varieties that offer agronomic advantages or end-use quality traits that can earn farmers a higher net return in the marketplace. Modernizing plant breeders' rights, encouraging private investment, and making a stronger commitment to public research, are all important elements in ensuring these goals are met.

Our Association generally supports the proposed amendments the CFIA is contemplating to bring the *Plant Breeders' Rights Act* ("PBR Act") into conformity with the 1991 UPOV convention, as Canada will then be in a position to ratify the convention. In our view, ratifying the convention will help to ensure plant research investments will be made in Canada that might otherwise flow to other jurisdictions.

We provide the following specific comment on various aspects of the proposed legislation.

Scope of the Breeder's Right

Existing Plant Breeders' Rights

As we understand it, section 5 of the existing PBR Act provides the holder of a plant breeder's right with the exclusive right: to sell seed of the protected variety; to produce seed of the protected variety for the purpose of selling; to make repeated use of seed of the protected variety where necessary to produce another commercial variety (e.g. to produce a hybrid); and, to authorize others, either conditionally or unconditionally, to undertake these acts.

The Wheat Growers support the retention of these rights.

Extension of PBR

The proposed amendments to bring the PBR Act into conformity with the 1991 UPOV convention would extend a breeder's rights to include the multiplication, conditioning, export, import and stocking of seed of the protected variety.

The Wheat Growers support the extension of these rights, providing the right for a farmer to save seed for their own use (i.e. farmer's privilege) is enshrined in the legislation.

In this regard, we recommend the PBR Act be amended so that it explicitly states that a plant breeder's rights do not extend to "the conditioning and use of harvested material of the plant variety grown by a farmer on the farmer's holdings for subsequent reproduction by the farmer of the plant variety on the farmer's holdings."

The wording here is identical to an amendment that was proposed in Bill C-80, except that a reference to "conditioning" has been added and the phrase "those holdings" at the end of the clause has been replaced with "the farmer's holdings" to make it clear that the farmer is permitted to plant the harvested material on any land the farmer may subsequently own or rent.

Harvested Material

Compliance with UPOV 1991 requires that breeders' rights to intellectual property protection also be extended to harvested material in cases where the harvested material is obtained through the unauthorized use of seed. The Wheat Growers can support the extension to harvested material obtained from unauthorized seed use providing the following conditions are met:

- 1) That the extension of breeder rights to harvested material does not undermine the farmers' privilege to save his own seed of a protected variety.
- 2) That the extension of breeder rights to harvested material should apply only when the breeder can prove that the harvested material was obtained through the unauthorized use of propagating material, and that the breeder had no opportunity to exercise his or her rights. However, if the breeder had reasonable opportunity to exercise his or her rights in relation to the propagating material but failed to do so, then there should be no extension of the breeder's rights to the harvested material. Further, if breeder rights are extended to harvested material, the legislation must be clear that those rights apply only to the amount of harvested material that is equivalent to the amount of propagating material that was used in violation of the breeder's rights.
- 3) Any grain company, processor or feedgrain user who purchases harvested material in the normal course of business (i.e. not for re-sale as seed) should not be held liable for any PBR infringements. Buyers of grain are not in a position to

verify whether the grain they purchase has been grown in violation of a plant breeder's rights. The extension of plant breeders' rights to harvested grain should only apply to those who sell harvested grain from seed they grew in violation of a plant breeder's rights.

Products of harvested material

We understand that UPOV 1991 provides for the extension of plant breeders' rights to the products of harvested material (e.g. flour, vegetable oil) on an optional basis. In our view, Canada should not extend PBR to products of harvested material because again, the producers of such products are in no position to verify whether any of the grain they purchase has been grown in violation of a plant breeder's rights. Adoption of such a provision would give rise to thoroughly unworkable liability and enforcement issues.

Duration of the Breeder's Right

The Wheat Growers support the increase in the duration of protection of a plant breeder's right from 18 years to 20 years on seed, in accordance with the minimum requirement under UPOV 1991. The Wheat Growers do not support a period of protection beyond the minimum 20 years as we believe this timeframe provides breeders with an adequate incentive to encourage plant research and development in Canada.

Disclosure

The Wheat Growers believe the PBR legislation should be amended to ensure breeder's and their agents provide purchasers of protected seed with full disclosure of the extent of the plant breeder's rights, including restrictions on the use of harvested grain, and liability for payment of fees and royalties.

Sales of seed prior to the granting of Plant Breeder's Rights protection

The current PBR Act does not allow for a breeder to apply for PBR protection if the breeder has marketed that variety in Canada before the PBR application date. Under UPOV 1991, countries must allow the sale of the variety for up to one year prior to PBR application. The Wheat Growers support amending our legislation to accommodate this requirement. Allowing breeders the opportunity to sell their seed (for multiplication purposes) prior to application for PBR protection would speed up the timetable under which new varieties could become available to farmers.

Similarly, during the period between the breeder's application for PBR and the granting of PBR, we support amending the legislation to automatically provide provisional protection pending a decision on the grant of rights. Further, under provisional protection, PBR applicants should be afforded the same rights for their variety as they would be once rights are formally granted.

Summary

The Western Canadian Wheat Growers believes our position strikes a reasonable balance between the owners of new plant varieties and the users of those varieties. In our view, adopting these proposals will continue to provide plant breeders with good incentives to invest in research and development in Canada. We recognize that innovation and access to new seed technologies will be critical to the success of prairie farmers.

However, to remain profitable and competitive, farmers need access to these new technologies at a reasonable cost. Maintaining farmer's privilege encourages competition in the seed industry and safeguards the farmer's right to choose those varieties that provide them with the best opportunity to maximize profits on their farms.

The Wheat Growers thank the Canadian Food Inspection Agency for undertaking this consultation and for providing us with this opportunity to submit our views.