

# CETA + BILL C-18 = too much power for seed companies

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The federal government is winding up to give Canadian farmers a one-two punch with Bill C-18 and CETA. Bill C-18 is the controversial agriculture omnibus bill that would make big changes to Canada's *Plant Breeders' Rights Act* and other agriculture-related legislation. CETA, the *Canada-European Union Comprehensive Economic and Trade Agreement*, is still being negotiated behind closed doors – in spite of the October 2013 announcement that an agreement in principle had been reached. Leaked draft negotiating texts reveal that CETA is not only about trade. In addition, CETA would install a new legal framework that benefits global corporations more than citizens. If both CETA and Bill C-18 are adopted, the world's largest agri-business corporations will have much greater control over the seed used in commercial production, and thus be in a position use this power to shape and our food system and demand more than their fair share of the wealth produced by Canada's farmers. (See chart, page 2)

Within CETA's hundreds of pages there is a section specifically about enforcement of "intellectual property rights". *Intellectual property* refers to the private ownership of knowledge, inventions, creative works and techniques – cultural production that was once freely shared. Intellectual property rights such as copyright, trademarks and

patents are legal tools to restrict access and allow creators/owners a limited time to collect royalties from those who would like to use the protected knowledge.

Canada does not permit patenting of higher life forms such as plants, but does allow gene sequences to be patented. These patented genetic constructs are then incorporated into the cells of plants through the processes of genetic modification. Biotech companies have been able to use their patent rights to control access to the seed of genetically modified (GMO) varieties of canola, soybeans, sugar beet and corn.

Plant Breeders' Rights (PBR) are intellectual property rights (IPR) defined through national legislation and first granted in the 1960s to accord private ownership of new plant varieties to the breeders who developed them. Since then, the seed industry has used both PBRs and gene patents, along with contracts and hybrids<sup>1</sup>, to increase their control of and revenues from commercial seed production and distribution world-wide. These tools allow companies to privatize the new varieties they derive from the common heritage embodied in the seed that farmers, indigenous people and public plant breeders have created and shared for generations.

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<sup>1</sup> Hybrids are produced by crossing two inbred parent lines in a controlled fashion to produce an offspring generation with predictable and desirable traits from each parent. When seed from the hybrid crop is planted, the resulting next generation will have varying levels of the desired traits, thus farmers who use hybrid seed must buy new seed each year. Hybrid seed is used to produce most of the corn grown in Canada.



	<b>Without CETA</b>	<b>If Canada adopts CETA</b>
<b>If Bill C-18 is not passed</b>	<ul style="list-style-type: none"> <li>- PBR holders can sue someone who <u>sells</u> seed or propagating material of a PBR-protected variety, <u>uses it to produce hybrids</u> or <u>uses plant parts</u> to commercially produce a PBR-protected variety without permission.</li> <li>- The PBR holder can sue for damages; and</li> <li>- The PBR holder can ask the judge to order the convicted infringer to stop any further infringement, to fine the infringer if he/she continues to infringe, and to dispose of the seed in question.</li> <li>- Penalties come into effect following judgement in the courts.</li> </ul>	<ul style="list-style-type: none"> <li>- PBR holders can sue someone who <u>sells</u> seed or propagating material of a PBR-protected variety, <u>uses it to produce hybrids</u> or <u>uses plant parts</u> to commercially produce a PBR-protected variety without permission.</li> <li>- The PBR holder can sue for damages; and</li> <li>- <b><u>Even before hearing the case, the courts can take “provisional and precautionary measures” to stop the suspected infringer (and relevant third parties) from selling the seed or crop in question, by seizing the seed, crop and equipment and by blocking the bank accounts of the suspected infringer.</u></b></li> <li>- <b><u>If the court finds someone to be infringing, it can issue and order to destroy the seed or crop as well as the materials and implements used to produce it.</u></b></li> <li>- <b><u>The assets of a suspected infringer can be seized before the case is heard in court.</u></b></li> <li>- Other penalties come into effect following judgement in the courts.</li> </ul>
<b>If Bill C-18 is passed</b>	<ul style="list-style-type: none"> <li>- <i>PBR holders of varieties protected after Bill C-18 is passed can sue someone who <u>sells, reproduces, conditions, stocks, imports, exports, repeatedly uses to create a hybrid or uses plant parts to commercially produce plants</u> of a PBR-protected variety without permission.</i></li> <li>- The PBR holder can sue for damages; and</li> <li>- The PBR holder can ask the judge to order the convicted infringer to stop any further infringement, to fine the infringer if he/she continues to infringe, and to dispose of the seed in question.</li> <li>- Penalties come into effect following judgement in the courts.</li> </ul>	<ul style="list-style-type: none"> <li>- <i>PBR holders of varieties protected after Bill C-18 is passed can sue someone who <u>sells, reproduces, conditions, stocks, imports, exports, repeatedly uses to create a hybrid or uses plant parts to commercially produce plants</u> of a PBR-protected variety without permission.</i></li> <li>- The PBR holder can sue for damages; and</li> <li>- <b><u>Even before hearing the case, the courts can take “provisional and precautionary measures” to stop the suspected infringer (and relevant third parties) from selling the seed or crop in question, by seizing the seed, crop and equipment and by blocking the bank accounts of the suspected infringer.</u></b></li> <li>- <b><u>If the court finds someone to be infringing, it can issue an order to destroy the seed or crop as well as the materials and implements used to produce it.</u></b></li> <li>- <b><u>The assets of a suspected infringer can be seized before the case is heard in court.</u></b></li> <li>- Other penalties come into effect following judgement in the courts.</li> </ul>

PBRs have helped facilitate concentration within the seed industry, with just ten global corporations now controlling over three-quarters of the world's commercial seed trade.<sup>2</sup> If adopted, CETA's new enforcement measures will permit them to become even more powerful and extract even more wealth from Canadian farmers and their communities through enhanced enforcement powers that can be used to intimidate and promote a culture of fear.

Leaked draft negotiating text of CETA dated December 2013 shows that Canada and Europe agree to co-operate to promote and reinforce the UPOV<sup>3</sup> PBR system.<sup>4</sup> Today, Canada's PBR Act is based on UPOV '78.

The draft text also reveals that Canada has agreed to bring in new IPR enforcement measures as part of the deal. To comply with CETA, Canada will have to amend our laws to ensure that IPR holders will be able to use the courts to seek injunctions against suspected infringers before determining whether there was an actual violation. Judges will be granted authority to order the seizure of assets, equipment and inventory of suspected infringers and any third parties they believe are helping the suspected infringement – even before the case is ever heard in court.<sup>5</sup>

The IPR enforcement mechanisms in CETA are to be used to uphold each country's own laws. If CETA is adopted and Bill C-18 is not passed, PBR holders will be able to add these new tools to their existing ability to sue if they believe someone has sold - or

might sell – PBR-protected seed without the company's permission. They can ask the courts to stop the suspected infringer, seize the seed in question, and even freeze the person's bank accounts before the case is heard in court.

CETA's new enforcement measures will support the greatly expanded rights conferred upon plant breeders if our current PBR Act is amended. Bill C-18 would add the exclusive rights to produce, reproduce, condition, stock, import and export propagating material (seed) of the variety. As well, it gives PBR-holders the exclusive right to authorize anyone else to do any of the above and to charge royalties for such use. C-18 gives PBR-holders these same exclusive rights regarding the use of harvested material produced from seed for which no royalty has been collected.<sup>6</sup>

Under Bill C-18, the Farmers' Privilege clause allows farmers to produce, reproduce and condition (clean and treat) seed of a PBR-protected variety to sow on their own holdings. However, Bill C-18 does not clarify how long a farmer could *store* seed before it would be considered "stocking" and thus an infringement on the exclusive rights of the PBR holder. The allowable storage period would be up to the courts to determine – if and when a farmer was accused of infringement. Until then, all farmers who save PBR-protected seed would be under a cloud of uncertainty.

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<sup>2</sup> Putting the Cartel before the Horse ...and Farm, Seeds, Soil, Peasants, etc.: Who Will Control Agricultural Inputs, 2013? ETC Group, September 2013 <http://www.etcgroup.org/sites/www.etcgroup.org/files/CartelBeforeHorse11Sep2013.pdf>

<sup>3</sup> International Convention for the Protection of New Varieties of Plants

<sup>4</sup> CETA: consolidated texts, 20 December 2013 (accessed May, 2014 at [https://www.piratenpartei.de/wp-content/uploads/2014/02/CETA-consolidated-texts-December2013\\_IPR\\_v4.pdf](https://www.piratenpartei.de/wp-content/uploads/2014/02/CETA-consolidated-texts-December2013_IPR_v4.pdf))

<sup>5</sup> *Ibid*, Section 12, Intellectual Property, Article 18, Provisional and Precautionary Measures and Article 19, Other remedies.

<sup>6</sup> *Bill C-18, An Act to amend certain Acts relating to agriculture and agrifood*. Second Session, Forty-first Parliament, 62 Elizabeth II, 2013 —



Worse, the Farmers' Privilege can be diminished – even eliminated – over time. Section 50 of Bill C-18 authorizes the Governor in Council (Cabinet) to make new regulations to exclude classes of farmers or plant varieties from the Farmers' Privilege provisions and to restrict, prohibit or put conditions on the use of saved seed. Thus, in the future farmers could be accused of infringement in more situations due to the narrowing of the Farmers' Privilege. Today's normal farming methods may become tomorrow's PBR violations, subject to aggressive court action by giant corporations.

The 2004 Supreme Court of Canada decision in the *Monsanto v. Schmeiser* case ruled that a farmer can be found in violation of patent rights regardless of how patented genes in seed arrive on the farmer's land.<sup>7</sup> If the courts interpret PBR infringement in the same fashion, even farmers who use older seed that is not PBR-protected might be accused of infringement if their crops contain small amounts of a PBR-protected variety. They could lose everything as a result of a mere accusation of infringement. Seizing a farmer's property, crop and bank account

on mere *suspicion* of infringement before going to court would deny the farmer the means to mount a defence. To avoid such risk, farmers may decide to simply purchase and sow PBR-protected seed every year and pay the royalties. This "litigation chill" would result in a severe loss of farmer autonomy as well as a massive annual transfer of wealth from Canadian farmers to foreign-based seed companies.

Expanding the exclusive rights of PBR holders through C-18 in light of the enforcement tools anticipated as a result of CETA would allow a few global seed companies to wield far too much power over farmers, the crops they grow and the food Canadians eat. These corporations continue to extract ever more wealth from farmers and the food system, then use that money to lobby decision-makers and those who influence them in countries around the world for even greater concessions through trade deals such as CETA, bilateral agreements and the Trans Pacific Partnership. If we are to protect the common heritage collected in our seeds, farmers' autonomy and Canada's national sovereignty, both CETA and Bill C-18 must be defeated.

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**For more information about the implications of CETA and Bill C-18 on farmers, see [www.nfu.ca](http://www.nfu.ca) .**

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- Become an Associate Member of the NFU**
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<sup>7</sup> *Monsanto Canada Inc. v. Schmeiser*, Supreme Court Judgments, May 21, 2004. <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2147/index.do>

