Robert Pedde Building
2717 Wentz Avenue
Saskatoon, SK S7K 4B6
p: (306) 652-9465
f: (306) 664-6226
email: nfu@nfu.ca

Submission to CFIA Consultation regarding

"Proposed amendments to the Plant Breeders' Rights Regulations"

by National Farmers Union, (NFU), SeedChange, Canadian Organic Growers, SaskOrganics, Ecological Farmers Association of Ontario (EFAO), Atlantic Canada Organic Regional Network (ACORN), Organic Alberta, FarmFolkCityFolk, Manitoba Organic Alliance and Direct Farm Manitoba.

August 2024

The following comments are in response to the Canadian Food Inspection Agency's consultation on "Proposed amendments to the Plant Breeders' Rights Regulations". These comments are endorsed by the National Farmers Union (NFU), SeedChange, Canadian Organic Growers, SaskOrganics, Ecological Farmers Association of Ontario (EFAO), Atlantic Canada Organic Regional Network (ACORN), Organic Alberta, FarmFolkCityFolk, Manitoba Organic Alliance and Direct Farm Manitoba.

General Comments

When Canada adopted the UPOV '91 Plant Breeders' Rights regime in 2015, there was strong opposition to changing farmers' **right** to save seed into a "privilege". At the time, the NFU also warned that the legislation was written to authorize future governments to remove some or all Farmers' Privilege provisions by regulation which can be approved by the Cabinet without being debated in Parliament. We oppose expanding the scope of Plant Breeders' Rights, because whoever controls access to seed has great power over our farms, our food supply and ultimately our population.

We disagree with the premise that plant breeding must be considered a profitable investment by private breeders. Instead, we see plant breeding as a public good, and the resulting varieties as part of the global commons for the benefit of all. Farmers, and particularly Indigenous farmers, created our seed heritage over millennia. Plant Breeders' Rights legislation was first proposed in 1961 in order to capture the full value of these ancient breeding practices by claiming ownership based on incremental changes to the plant's characteristics. Today, through expanding PBR regimes, especially by removing the Farmers' Privilege, governments give private companies licenses to extract agricultural wealth from our common heritage and undermine collective agricultural knowledge by holding farmers hostage for access to seed.

Canada has developed excellent public plant breeding capacity for field crops, funded by governments and farmers, which has delivered billions of dollars of value to the Canadian economy over the past century. Canada also has a strong history of successful public plant breeding in horticulture and ornamentals. This is a funding model that works well, and should expand to include vegetable breeding

and better support fruit, ornamental and other horticultural production, instead of their breeding being sidelined by measures such as Plant Breeders' Rights that promote privatization.

Canada's current Plant Breeders' Rights legislation and regulations are compliant with UPOV '91. The proposed amendments would go beyond what is required by UPOV '91, boosting the rights of plant breeders at the expense of farmers, both financially and regarding the scope of their farming practices. The proposed amendments would make seed and other propagating material less available to farmers, and/or would increase their costs by requiring annual royalty payments, for more years. The proposed amendments would also increase the ability of plant breeding companies to monopolize genetic material by preventing farmers from reproducing it for their own use on their own holdings.

Some of the proposed changes could be achieved through regulatory amendment (removing Farmers' Privilege for some crop kinds), but others would require amending the legislation (changing the definition of "sale" and increasing the period of PBR protection for non-tree crop kinds).

The CFIA's consultation on the amendments to the Plant Breeders' Rights Regulations was scheduled from May 29 – July 12, 2024, allowing just 45 days during the busiest time of year for those most affected by the proposed changes: farmers, horticulturalists, and orchardists. Changes to Plant Breeders' Rights Regulations are part of a very complex, interrelated system of seed governance, plant breeding and the trade and exchange of plant genetics, and thus require adequate time to consider and analyze. We appreciate the Plant Breeders' Rights' offices assurance that our comments are welcome and will be considered past the deadline. We also believe it is critical to ensure meaningful access to government consultations by providing adequate time for those affected to fully consider the implications of these proposed changes. We ask the CFIA to provide a longer public consultation period and to avoid scheduling future consultations on Plant Breeders' Rights issues during the summer growing season. This is in accordance with the CFIA's commitment to increase access to, and transparency of, consultation and engagement activities on CFIA's regulatory, service and strategic initiatives.

Our detailed responses to each of the consultation questions follow.

Q1 - Should Canada better align with other similar jurisdictions, such as the United States of America and the European Union, by clarifying that the farmers' privilege does not extend to the saving and reusing of propagating material (e.g. cuttings, budding, grafting, seeds, etc.) of PBR protected fruit, vegetable, and ornamental varieties?

No. Removing the Farmers' Privilege for protected fruit, vegetable, and ornamental varieties is an unacceptable encroachment on farmers' age-old practice of saving and using farm-saved seed to plant their crops in future growing seasons.

The ability to use farm-saved seed, cuttings, budding, grafting, etc., to continue growing PBR protected fruit, vegetable, and ornamental varieties on their own holdings after having paid the required royalty on the initial purchase, enables farmers to adapt varieties to their specific farming conditions and climates. The Farmers' Privilege also allows farmers to reduce production costs by using farm-saved seed and other propagating material.

Even if seldom used, or used by only a few farmers, closing the door on the use of farm-saved seed and other propagating material for farmers, growers, horticulturalists, and orchardists takes away their freedom and weakens their autonomy. Seed saving is vital not only so that farmers have secure access to their most important input, but also because the practice enables on-farm climate resilience through variety adaptation to specific environments and farming practices. By restricting the ability of farmers to save protected varieties, the CFIA would be limiting the ability of farmers to appropriately adapt those varieties to their own farms and climates *when that is the best option for their farm and livelihood*. The Farmers' Privilege also allows farmers to continue using a variety on their own farm if the breeder decides to take it off the market before the PBR protected period ends.

Additionally, the proposed amendment would also place severe restrictions on fruit producers who use grafting to top work their trees or vines. It would also have a severe impact on berry producers who need to propagate bushes under the Farmers' Privilege to replace lost stock with the same variety, which may no longer be offered commercially. Orchardists and berry fruit producers face many risks and costs due to climate change impacts, and restricting access to propagation material would be an added, and unnecessary burden.

The Farmers' Privilege also ensures farmers, growers, horticulturalists, and orchardists have access to propagating material in the event of severe supply chain disruptions that could prevent access to imported seed. Wars, climate change, cyber attacks, the Covid 19 pandemic and logistical challenges have already had an impact on supply chains in several sectors. Canada's dependence on imported vegetable seed already makes our food supply vulnerable, and it would be a mistake to further restrict access to seed by removing the Farmers' Privilege for all horticultural crops.

The argument that using farm-saved propagation material is not widespread in Canada's horticultural sector also means this practice does not have a large impact on PBR-holders. The proposed regulatory change would set an extremely negative precedent by removing a fundamental right from farmers who grow horticultural and ornamental crops in order to deliver a minor increase in revenue to a few companies while creating a significant risk to the long-term resilience of Canada's food supply.

The CFIA claims that "international breeders are reluctant, and sometimes even refuse, to introduce their new and improved varieties into jurisdictions that allow an unrestricted farmers' privilege for horticulture and ornamental crop kinds." This claim seems to contradict the reality of how horticultural seed is distributed in Canada. For instance, Canada imports approximately $269 million in vegetable seed. These vegetable varieties are typically bred in the US or Europe, scaled up by seed multipliers in the US, Netherlands, Peru, France, Italy, China, and other countries, then sold to North American seed companies wholesale. Virtually all of the varieties offered through these vegetable seed wholesalers in Canada are also offered to, and by, vegetable seed resellers in the US (where the intellectual property restrictions are even more stringent); it is unclear how making Canada's PBR framework even more restrictive would generate greater access to new and improved varieties.

When the 2015 amendments to the Plant Breeders' Rights Act to adopt UPOV '91 were introduced via Bill C-18, the NFU highlighted the problem of providing "rights" to companies and mere "privileges" to farmers. We warned that the new law's Farmers' Privilege provisions could be removed by simply amending the regulation. We are now seeing the first attempt to do just that.

During the 2014-15 debate on the bill, one farmer put it this way: “Bill C-18 is like moving livestock. You start by herding them into a large corral, and then close the gates behind them one by one until they cannot turn around. Eventually, there will be little choice but to buy seed and pay royalties every year.”

The current consultation is about closing the gates to reduce farmers’ access to seed - starting with fruit, vegetable and ornamental varieties, and hybrid seed, and – keeping potatoes, asparagus, and woody plants inside the PBR corral longer.

If the issue that the government is seeking to address is to encourage more innovation to develop better varieties for Canadian farmers to help adapt to climate change, then we should be investing in domestic *public* plant breeding for the development of open-source varieties that can perform well without the use of, or reducing dependence on, fossil-fuel based inputs in Canadian growing conditions. The advancement of varieties to help farmers adapt to climate change and sustain their livelihoods should not be contingent on whether those varieties can be protected for profit in the marketplace and whether private companies deem them profitable enough to pursue.

Q2 - Should the PBR Regulations be amended to clarify that the farmers' privilege does not apply to the saving and reusing of propagating material (e.g. cuttings and seed) of PBR protected hybrids, and protected parental inbred varieties used in hybrid combinations?

No. The PBR Regulations should not be amended to remove the Farmers’ Privilege for hybrids and parental inbred varieties. Doing so would facilitate monopolization of genetic material, and for parental inbred lines, would be redundant.

The claim that “the saving and reusing of seed from hybrids can be damaging to the reputation of that variety, negatively impacting the breeder, but also harmful to the farmer and the whole sector” disregards farmers’ seed saving and production knowledge and assumes that farmers do not have the well-being of their own farm and sector in mind.

Most farmers do not save seed from hybrid varieties because they know that the progeny of hybrid crops does not uniformly exhibit desirable traits. However, farmers who choose to save hybrid propagating material are interested in further adapting that variety as an open-pollinated variety to their own farm and/or in seeing the genetic segregation to develop new varieties.

If, through on-farm breeding, a farmer developed a stabilized open-pollinated version from progeny of a PBR-protected hybrid variety, they would not be able to sell it due to the PBR Act’s clause conferring exclusive rights to “essentially derived” varieties on the original breeder. The Farmers’ Privilege to save hybrid seed therefore does not impair PBR holders’ ability to benefit from their intellectual property rights (IPR).

Inbred parental lines for hybrid varieties can be protected as trade secrets, copyright or other forms of IPR. Trade secrets are defined by the World Intellectual Property Organization (WIPO) as commercially valuable confidential information that may be sold or licensed, where the owner takes reasonable steps to keep it secret such as confidentiality agreements for business partners and employees. Due to these IPR measures, inbred parental lines for hybrid varieties are already inaccessible to farmers. If a trade secret is revealed in Canada, the owner of the intellectual property has the ability to sue the person who

misused the secret. In effect, farmers have no access to commercially relevant inbred parental lines, so removing the Farmers' Privilege on them would be unnecessary.

Hybrids and inbred parental lines for hybrids are already well-protected in the marketplace and should not require further protections, nor additional mechanisms to prevent farmers from using farm saved seed from hybrid varieties. Farmers purchase hybrid seed because of the advantage gained due to hybrid vigour, which provides faster growing, stronger plants with higher yields. There is both a strong biological control to discourage use of hybrid seeds' progeny and an economic advantage to purchasing hybrid seed annually. These factors mean hybrid seed sellers are able to ask, and farmers are willing to pay, a premium price for these characteristics.

Preserving genetics for on-farm use from hybrid plants is one of the only ways farmers can maintain access to those genetics once a variety is removed from the marketplace. Eliminating the option for farmers to save propagating material for hybrids would only serve to further encroach on farmers' rights to save seed, and limit their ability to adapt varieties to changing climatic conditions.

Q3 - Should the period of PBR protection for potatoes, asparagus, and woody plants be extended from 20 to 25 years (or possibly longer) to encourage domestic breeding efforts and support greater access to new international varieties?

No. The CFIA should not extend the period of PBR protection for potatoes, asparagus, and woody plants.

The CFIA claims that "to attract elite potato varieties and woody ornamental plants into the Canadian marketplace, and possibly further encourage greater domestic breeding efforts in crops such as asparagus and woody berry fruits, it is important to afford a sufficiently long period of PBR protection which provides breeders a fair opportunity to recover their initial investment." However, the CFIA also claims that "85% of all PBR applications for new potato varieties entering the Canadian marketplace originate from other countries, including the Netherlands, United States of America, and Germany."

These claims are contradictory. From 2000 - 2022, Canada ranked 7th among UPOV nations for PBR titles received from, and issued to, non-residents (see figures 1 and 2 below). Canada also placed in the top 10 UPOV countries receiving applications from non-residents in 2012 when Canada's PBR Act was based on UPOV '78, which has a shorter period of protection than UPOV 91. This suggests the period of protection is not a major factor in breeders' decision to apply for PBRs in Canada.

In the case of potatoes, according to Canada's national variety registration database, Canada has registered 102 new potato varieties since 2020, many of which have PBRs attached to them. According to the USDA's plant variety database for potatoes, the US has registered 98 varieties with PVP protections over the same timeframe. Some of the international varieties are the same and are coming from the same breeding companies (HZPC Americas Corp, Tubersom Technologies Inc.). Of the 102 new potato varieties registered in Canada since 2020, 20 of them have been developed by Agriculture and Agri-Food Canada.

Accordingly, it is unclear how extending the period of protection on potatoes, asparagus, and woody plants, would encourage greater domestic breeding or greater access to international varieties. Canada

is clearly attracting the equivalent number of varieties as companies with larger populations and more restrictive IPR regimes (i.e. the US), and we are able to contribute varieties that we have developed ourselves through public plant breeding efforts.

The CFIA's discussion document on this question describes how the biology of potatoes, asparagus and woody non-tree plants such as berries, is less compatible with plant breeders' desire to recoup royalty payments to cover the costs of developing new varieties than in annual broadacre field crops. Instead of trying to compensate for their lower multiplication rates and slower maturation by extracting many more years of royalty payments from farmers (and, by removing the Farmers' Privilege to prevent use of farm-saved propagation material), the CFIA and AAFC should be promoting policies to support long-term, reliable funding for public breeding of these crops. A more restrictive PBR regime cannot overcome the realities of Canada's small population and challenging growing conditions across our vast geography. Depending on an entirely market-driven approach to breeding these crops will leave Canada as a residual market regardless of how tightly farmers' access to propagating material is controlled.

Extending the period of protection on these crops would only further enclose valuable genetics from the public domain for a longer period of time, and in doing so, limit these varieties from being more widely distributed to growers across the country. Investing in public plant breeding would be more strategic for Canada's agriculture economy and food security.

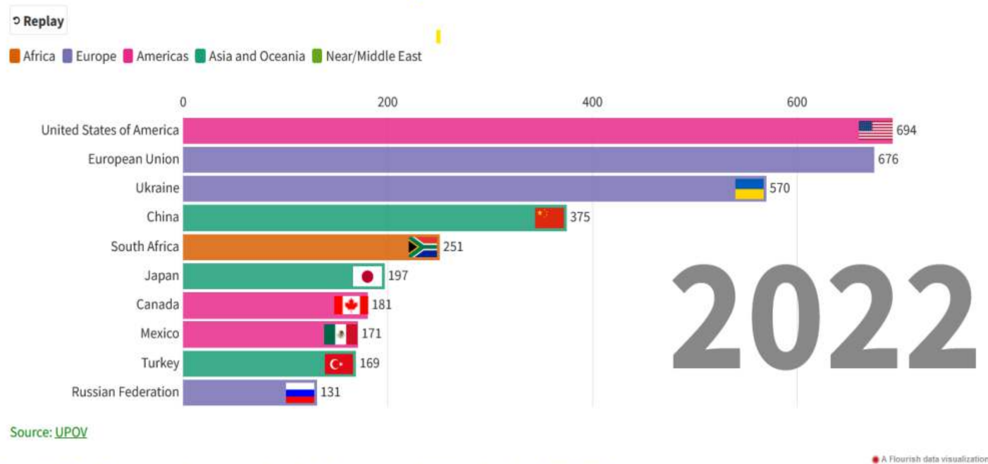

Figure 1. Source: UPOV Plant Variety Protection Data and Statistics https://www.upov.int/databases/en/

Top 10: Applications filed by non-residents (2022)

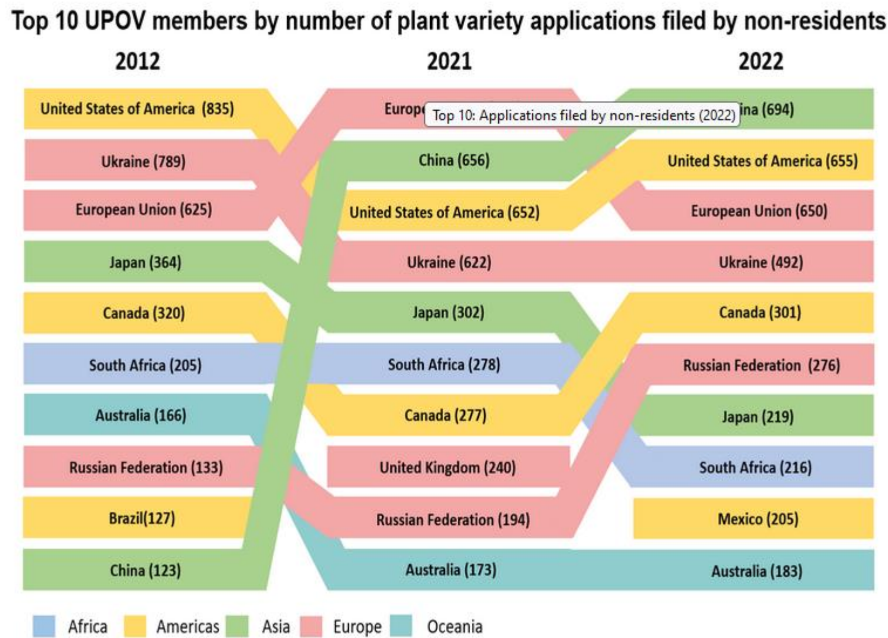

Figure 2. Source: UPOV Plant Variety Protection Data and Statistics https://www.upov.int/databases/en/

Q4 - Should the concept of "sale" for the purposes of filing a PBR application be narrowed, by excluding advertisements?

No. The concept of “sale” for the purposes of filing a PBR application should NOT be narrowed by excluding “advertisements.”

The concept of sale cannot be changed by amending the regulations, as the definition of “sell” is found in the Interpretation section of the *Plant Breeders’ Rights Act* and the Act does not allow this definition to be changed by regulation. If an amendment to the Act is contemplated, that should be stated openly in the consultation document.

Certainly, plant breeders have the capacity, foresight, and understanding of existing law to ensure that PBR protection applications are submitted on time. The large number of applications for PBRs in Canada suggests that companies are not having difficulty complying. The NFU believes it is reasonable for breeders to continue to refrain from advertising new varieties until they are in a position to apply for PBR protection within 12 months. Plant breeders operating internationally have the ability to restrict the geographies where their advertising is done to avoid inadvertently advertising a variety prematurely in Canada.

Removing advertising from the definition of sale would de facto extend the PBR protection period in Canada, particularly for varieties that have already been introduced in other jurisdictions. Allowing unrestricted advertising in advance of the release of a variety in Canada would allow companies to delay

their PBR application in order to maximize benefits from their marketing strategy. A company could advertise to promote the new variety, assess the success of the marketing campaign, and put the actual seed out for sale when, and if, it believed there would be adequate uptake, then after a year's worth of sales submit their application for PBRs. Thus, changing the definition of "sale" to exclude advertising would have the effect of extending the PBR protection period by the duration of any advertising campaign preceding actual physical distribution of the variety in Canada.

Ultimately, this amendment gives more power to plant breeders to advertise without restriction while maintaining their ability to receive broad-based protections through PBR rights. In doing so, this effectively encloses genetic material from the public domain for longer, limiting the accessibility and availability of those genetics for use in serving the public good.

Q5 - Should a new application fee be introduced, offering a substantially reduced price when using UPOV PRISMA in comparison to the normal PBR fee, in order to encourage the filing of electronic applications?

Not applicable.

All of this is respectfully submitted by

The National Farmers Union
SeedChange
SaskOrganics
Atlantic Canadian Organic Regional Network (ACORN)
Ecological Farmers Association of Ontario
FarmFolkCityFolk
Canadian Organic Growers
Organic Alberta
Direct Farm Manitoba
Manitoba Organic Alliance

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