



Guide to Plant Breeders' Rights in Canada

Canada is known for its agricultural innovations, the protection of which is important for commercial success. This article provides a detailed review of the requirements to obtain a Plant Breeders' Rights (PBR) certificate in Canada – a form of protection consistent with Canada's obligations under the *International Union for the Protection of New Varieties of Plants (UPOV) Convention*.

Borden Ladner Gervais LLP acts as PBR Agent for applicants who require assistance with the application, examination, grant, and maintenance steps, or who may wish to pursue counterpart foreign rights.

What are Plant Breeders' Rights?

Plant Breeders' Rights are a form of intellectual property by which a breeder of a new plant variety may obtain exclusivity over its propagating material. While some facets of plant-based technologies are amenable to patent protection, in others a subject matter exclusion on whole plants may pose an obstacle to meaningful patent protection. PBR can provide a proprietary commercial position when a plant variety has been obtained through traditional breeding methods, for example (genetically modified plants are, however, not excluded).

An applicant for PBR benefits from provisional protection, which permits it to seek remuneration from any party that carries out an act that would otherwise require its authorization if a certificate of PBR were granted.

Once granted, PBR for trees and vines remain in effect for up to 25 years, while those for all other plants last for up to 20 years.

A PBR holder may bring an action in court against any party who infringes its exclusive rights, and is entitled to receive compensation from that party if the court so orders. This could occur, for example, if harvested grain from a protected variety is obtained or used without authorization.

When properly maintained, PBR can be commercialized, for example, through sale or licensing.

A holder of PBR has exclusivity:

- to produce and reproduce propagating material of the variety,
- to condition propagating material of the variety for the purposes of propagating the variety,
- to sell propagating material of the variety,
- to export or import propagating material of the variety,
- to make repeated use of propagating material of the variety to produce commercially another plant variety if the repetition is necessary for that purpose,
- in the case of a variety to which ornamental plants belong, if those plants are normally marketed for purposes other than propagation, to use any such plants or parts of those plants as propagating material for the production of ornamental plants or cut flowers,
- to stock propagating material of the variety for the purpose of doing any of the above, and
- to prevent others from using the approved denomination (name) of their protected variety for sale of propagating material of another variety of the same genus or species.

What eligibility requirements must a plant variety meet to qualify for Plant Breeders' Rights?

Plant Breeders' Rights will be granted if a plant variety is:

- **New.** To qualify as new, a variety must not have been sold in Canada more than one year prior to the filing date of the application. In addition to this, the variety must not have been sold outside of Canada more than six years prior to the filing date (for trees and vines), or more than four years prior to the filing date (for other plants).
- **Distinct.** Distinctness is assessed against varieties of common knowledge. These include varieties already cultivated for commercial purposes, and varieties described in publications that are available to the public.
- **Uniform.** Uniformity is assessed for relevant characteristics, and is tolerant of variation provided that it is predictable, describable, and commercially acceptable.
- **Stable.** Stability is assessed over successive generations for the essential characteristics used to describe the variety.



What is required to apply for Plant Breeders' Rights?

Applications are made to the Plant Breeders' Rights Office (PBRO) at the Canadian Food Inspection Agency (CFIA), and must include:

- **A proposed name (“denomination”).** This must be unique, and must not be misleading or confusing. It cannot be a trade-mark. Applicants should consult the PBRO’s detailed [Variety Naming Guidelines](#).
- **A description of the origin and breeding history of the variety.** This should describe parental varieties, breeding techniques, selection methods, and the location of breeding.
- **A statement of uniformity and stability.** This may include the description and frequency of any off types, provided they are predictable and commercially acceptable.
- **A statement of distinctness.** This should take into account the reference varieties to be included in field trials (see below).
- **The address at which and method by which the variety is to be maintained.**
- **A sample of propagating material** (when applicable). The PBRO has published [Seed Sample Requirements](#) for sexually reproduced varieties. This is not a requirement for vegetatively propagated varieties.
- **Appointment of an applicant’s PBR Agent, if any.** While optional for Canadian residents, a foreign applicant must authorize a Canadian resident to act on its behalf. BLG is able to act as PBR Agent.
- **Evidence establishing the applicant as the legal representative of the breeder** (when applicable). This is required when the applicant is not the plant breeder.
- **The required fee.**

When and how is an application for Plant Breeders' Rights examined?

Examination is conducted by the PBRO to determine whether the candidate plant variety meets the requirements for distinctness, uniformity, and stability. This requires field trials, a site examination, and submission of information by the applicant. The deadline for requesting examination and paying the examination fee is determined by the PBRO, and is generally within two to four years from filing, depending on the plant variety.

Field Trials

Canada has a breeder-run testing system, in which the trials are conducted by the breeder, the applicant, the PBR agent, or a party contracted to do so. Field trials must be conducted over two growing cycles for woody and seed-propagated plants, or for one growing cycle for plants that are non-woody and vegetatively reproduced.

The PBRO has published [Guidelines for Conducting Plant Breeders' Rights Comparative Tests and Trials](#), and can often refer applicants to growers who can assist with field trials.

Field trials must include reference varieties grown at the same site under the same conditions.

Reference varieties for field trials:

- should be of the same species as the candidate variety,
- should include a variety grown in Canada at the time of filing the application that is the most morphologically similar to the candidate variety in its selected characteristics,
- should include sibling plants from the same cross when that cross is made in the course of developing a product line,
- may additionally include foreign varieties for the purposes of comparison, and
- should, when the candidate variety is genetically modified, include a variety that is genetically modified in the same way.



Site Examination

The PBRO conducts independent site examinations between June 1st and September 30th of each year to verify results of field trials. A request for site examination must be submitted by May 1st before the relevant growing cycle. For varieties requiring trials spanning two growing cycles, the request must be made before the second growing cycle.

Submission of Information

Within six months of the site examination, the applicant must provide:

- **A description of the comparative tests and trials.** This should describe the test site and test parameters.
- **A Test Guideline document (TG) completed with relevant data.** TG may be obtained from the PBRO and, once completed, provide evidence of distinctness drawn from field trials. These results may be supplemented with molecular data.
- **Comparative photographs.** Photographs must show distinctiveness for relevant traits of the variety versus reference varieties, which should be in the same frame.

Substitution of Foreign Test Results in Lieu of Field Testing in Canada

For vegetatively propagated varieties for which rights have been granted in another member country of the UPOV, the applicant may purchase a "Distinct, Uniform, Stable" (DUS) report through the PBRO in lieu of testing in Canada. This option is not available for potatoes of the genus *Solanum*.

Are there additional obligations to obtain and maintain Plant Breeders' Rights?

Once notified by the PBRO that the variety is eligible for grant of PBR, a confirmation form must be completed and submitted and a grant fee paid.

Following grant, a PBR holder is required to pay annual renewal fees and must maintain propagating material of the variety. Failure to meet these obligations will result in revocation of the PBR.

If the PBR is assigned to another party, the assignment document must be registered with the PBRO within 30 days.

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