

CLEARFIELD® Lentils

What Producers Need To Know

SASKATCHEWAN

pulse
Growers



Saskatchewan Pulse Growers (SPG) wants producers to have the **FACTS** on how CLEARFIELD® Lentils were developed, and what your rights are, should you choose to grow CLEARFIELD® Lentils.

1. Do I need to sign a CLEARFIELD® Commitment™ for Lentils?

NOT NECESSARILY. If you are presented with a CLEARFIELD® Commitment™ for Lentils at the time that you purchase lentil seed being sold as CLEARFIELD® Lentil Seed, then you are likely going to be required to sign the CLEARFIELD® Commitment™ for Lentils to purchase the seed. BASF (or their agent) has no right to interfere with (or even ask about) your use of saved or common seed if you have never signed a CLEARFIELD® Commitment™ for Lentils with BASF and if you are not referencing the variety name or the CLEARFIELD® trade-mark (see page 3/4).

If you are purchasing CLEARFIELD® Lentil Seed from a BASF authorized dealer, that dealer is required by BASF to have you sign the CLEARFIELD® Commitment™ for Lentils prior to giving you possession of the CLEARFIELD® Lentil Seed. **IT IS IMPORTANT TO READ AND UNDERSTAND THE CLEARFIELD® COMMITMENT™ FOR LENTILS BEFORE YOU SIGN IT!**

If you do not sign a CLEARFIELD® Commitment™ for Lentils when you pick up your CLEARFIELD® Lentil Seed and you do not verbally agree to the CLEARFIELD® Commitment™ for Lentils terms then **NO ONE HAS THE RIGHT TO MAKE YOU SIGN A CLEARFIELD® COMMITMENT™ FOR LENTILS AFTER THE FACT** (see page 3/4).

IF YOU ARE UNCERTAIN ABOUT YOUR RIGHTS IT IS IMPORTANT FOR YOU TO OBTAIN LEGAL ADVICE SPECIFIC TO YOUR SITUATION.

2. Can BASF fine me for not signing a CLEARFIELD® Commitment™ for Lentils?

No. Legislative or contractual authority is required to impose penalties or fines. However, if you have signed a CLEARFIELD® Commitment there is a clause allowing BASF to charge a penalty of up to \$100 per acre for non-compliance with the contract.

3. Will there be a technical fee on CLEARFIELD® Lentils?

BASF has the right to charge a technical fee on CLEARFIELD® Lentils; however they have not done so yet. SPG will continue to work with BASF to attempt to keep CLEARFIELD® Lentils free of a technical fee.

4. Are CLEARFIELD® Lentils GMO?

NO! CLEARFIELD® Lentils are non-GMO. An established and common technique called mutagenesis was used to create genetic diversity in lentil breeding lines, leading to the discovery of the “imi” tolerant trait.

5. How were CLEARFIELD® Lentils developed?

Dr. Bert Vandenberg and Dr. Al Slinkard of the Crop Development Centre (CDC), and Prof. Rick Holm of the University of Saskatchewan (U of S) discovered the “imi” tolerant trait in a lentil breeding line called RH44. The CDC produces an “imi” tolerant lentil variety by inserting the “imi” tolerant trait from the RH44 line into a conventional lentil variety using a breeding technique called “backcrossing.” For example, the RH44 line was backcrossed into the conventional small red lentil variety CDC Blaze to create CDC Impact, a CLEARFIELD® Lentil variety. SPG has collaborated with the CDC at the U of S and BASF to make CLEARFIELD® Lentils available in Saskatchewan. The CLEARFIELD® trade-mark is owned by BASF.

6. Who paid for the development of CLEARFIELD® Lentils?

The research to discover the “imi” tolerant trait in line RH44 was funded by BASF and the provincial government through an Agriculture Development Fund (ADF) grant. BASF provides funding to the CDC to backcross line RH44 into conventional CDC lentil varieties to develop a CLEARFIELD® variety.

SPG and the provincial government (ADF) do provide funding to the CDC to support the lentil breeding program that includes the development of all conventional (non CLEARFIELD®) lentil varieties.

7. Does SPG have any ownership rights to the “imi” tolerant trait in CLEARFIELD® Lentils?

No, the agreement between the U of S and BASF was signed in 1995, two years before SPG signed its first agreement with the U of S in 1997. However, SPG negotiated a sub-license agreement with BASF for the exclusive Canadian rights to sell Breeder seed of CLEARFIELD® Lentil varieties to Select seed growers under SPG’s Variety Release Program.

8. Why is SPG involved in CLEARFIELD® Lentils?

SPG made a decision to collaborate with BASF because we wanted **LENTIL PRODUCERS TO HAVE A CHOICE BETWEEN CONVENTIONAL LENTILS AND CLEARFIELD® LENTILS**. SPG releases new lentil varieties in a conventional form first. The CLEARFIELD® version of the lentil is released as a new variety approximately two years later.

If SPG had not negotiated an agreement with BASF, SPG believes that either:

- CLEARFIELD® Lentil varieties would have been distributed in the same fashion as canola (royalties and tech fees), or
- CLEARFIELD® Lentil varieties would not have been commercialized in Canada.

9. What are my options if I don't want to grow CLEARFIELD® Lentils?

SPG's approach has been to **GIVE PRODUCERS THE OPPORTUNITY TO MAKE THEIR OWN CHOICE BETWEEN GROWING CLEARFIELD® or CONVENTIONAL LENTILS**. The following table lists conventional lentil varieties and their CLEARFIELD® version.

MARKET CLASS	CONVENTIONAL VARIETY	YEAR RELEASED	SIMILAR CLEARFIELD® VARIETY	YEAR RELEASED
Large Green	CDC Sedley	2001	CDC Improve	2006
Large Green	CDC Sedley	2006	CDC Impower	2009
Medium Green	CDC Meteor	2005	CDC Impress	2007
Medium Green	No commercial variety, but a breeding line similar to Meteor		CDC Imigreen	2009
Small Green	CDC Viceroy	2004	CDC Invincible	2009
French Green	CDC LeMay	2002	CDC Peridot	2008
Small Red	CDC Blaze	2001	CDC Impact	2006
Small Red	CDC Redberry	2004	CDC Maxim	2007
Small Red	CDC Red Rider	2007	CDC Imax	2009
Small Red	CDC Blaze	2006	CDC IBC-289	2010
Extra Small Red	CDC Rosetown	2005	CDC Impala	2007
Extra Small Red	CDC Robin	1999	CDC Imperial	2006

Refer to the 2010 Varieties of Grain Crops at <http://www.agriculture.gov.sk.ca> for variety details.

The CLEARFIELD® Commitment™

What Growers Need to Know

by Neal Caldwell



Common sense tells us that before we sign a contract we should understand our rights and obligations and the rights and obligations of the opposite party. Suppose you signed the *CLEARFIELD® Commitment™ for Lentils – 2010 Growing Season* (the "Contract"). Maybe you read the Contract before you signed it; maybe you didn't. Either way, what are your rights and obligations? What rights does BASF Canada Inc. ("BASF") have?

CLEARFIELD® Lentil Seed is not a "protected variety" under the Plant Breeders' Rights Act (Canada). Even if it were, that Act would not prevent a grower from producing and using farm-saved seed ("Saved Seed") produced from CLEARFIELD® Lentil Seed. Note that for "protected varieties," a grower cannot sell any seed, including common seed, without authorization from the holder of the plant breeders' right. Nevertheless, even though CLEARFIELD® Lentil Seed is not a protected variety, Saved Seed sold by a grower cannot be sold as or called "CLEARFIELD® Lentil Seed" without infringing BASF's trade-mark rights.

What this means is that unless you contractually agree to restrict your use of Saved Seed, you never need permission to grow plants from Saved Seed (this is known as the "Farmers' Privilege"). You can, of course, voluntarily agree to restrict your use of Saved Seed of a variety as a condition of the supply of certified seed of that variety (and you do this under the Contract). Put another way, without a Contract, BASF has no right to interfere with your use of Saved Seed.

CLEARFIELD® Lentil Seed is not a "protected variety" under the Plant Breeders' Rights Act (Canada). Even if it were, that Act would not prevent a grower from producing and using farm-saved seed ("Saved Seed") produced from CLEARFIELD® Lentil Seed.

Given this, the first question you may ask yourself is: Do I really need to sign the Contract?

No grower is required to sign a Contract, ever. But, without a Contract, BASF's position is that a grower is not entitled to grow CLEARFIELD® Lentils in Canada because BASF holds exclusive rights to a Canadian patent and has a patent application (together the "Patents") relating to plants with increased resistance to certain Group 2 acetohydroxyacid synthase (AHAS) herbicides (e.g., "imi" and SA herbicides). From BASF's perspective, the Contract is a condition precedent to the sale of CLEARFIELD® Lentil Seed to a grower. In other words, no Contract means no CLEARFIELD® Lentil Seed. So, if you buy CLEARFIELD® Lentil Seed from a BASF-authorized retailer or grower-to-grower, the vendor will make you sign a Contract before giving you the seed because no one can make you sign a Contract after the fact. If you are not asked to sign a Contract when you purchase the seed, then you might not be buying CLEARFIELD® Lentil Seed.

At its root, the Contract sets out a limited license from BASF to allow a grower to use the Patents to grow CLEARFIELD® Lentils and to use and sell Saved Seed, subject to certain conditions. The Contract is the same for

all growers. The Contract is a binding agreement between you and BASF that imposes obligations on you and grants corresponding rights to BASF to ensure that you meet your obligations. Once you sign the Contract, BASF says that it has given you a license:

- (1) to grow CLEARFIELD® Lentils in Canada during the 2010 growing season so as long as you do not apply any AHAS herbicide (i.e., "imi" herbicide) other than a BASF Product to your lentil plants or the area where they are grown; and
- (2) to sell BASF-approved Saved Seed as CLEARFIELD® Lentil Seed during the 2010 growing season to other growers in Canada who have signed a Contract with BASF.

Under the Contract there are many restrictions on these licenses, each set out several times, each time using different language. What all of it means is that:

- You must buy CLEARFIELD® Lentil Seed in Canada and only from BASF-authorized retailers of CLEARFIELD® Lentil Seed or BASF-authorized sellers of Saved Seed.
- You alone have the right to plant CLEARFIELD® Lentil Seed to grow a single commercial crop, and to sell Saved Seed in Canada during 2010. You may not: (i) transfer these rights to anyone; (ii) grow CLEARFIELD® Lentils outside Canada; (iii) grow more than a single commercial crop; (iv) grow a crop after 2010; (v) sell, or let anyone else grow lentils from, your CLEARFIELD® Lentil Seed; (vi) let anyone else sell your Saved Seed; or (vii) sell or let anyone use CLEARFIELD® Lentil Seed or Saved Seed outside Canada as propagating material for crop breeding, or for research or generation of herbicide registration data.
- You may use any herbicide registered for use on lentil on your CLEARFIELD® Lentils, but if you spray an "imi" herbicide, you may only use BASF products such as ODYSSEY®, ODYSSEY DLX™ or SOLO® (not BASF's PURSUIT® herbicide).

What this means is that unless you contractually agree to restrict your use of Saved Seed, you never need permission to grow plants from Saved Seed (this is known as the "Farmers' Privilege")

- You may only sell Saved Seed to other growers in Canada who have signed a Contract.
- You do not have to pay BASF anything based on the crop you produce (it is a royalty free license).
- All of your rights expire after the 2010 growing season (but the restrictions imposed on you continue). So, if you want to grow a crop from the CLEARFIELD® Lentil Seed you purchased for 2010 (or use or sell Saved Seed) in 2011 or after, you must sign a new *CLEARFIELD® Commitment™ for Lentils*.

BASF further limits the licenses with a number of restrictions on how and when you may use and sell Saved Seed:

- Before you use farm-saved seed or sell it grower-to-grower, you must have it CLEARFIELD-CONFIRM® tested and approved by BASF. The steps are as follows:
 - o Produce farm-saved seed under a Contract and comply with the Contract.
 - o If you spray it with an “imi” spray an approved BASF product.
 - o Submit a sample to a BASF-approved laboratory for CLEARFIELD-CONFIRM® testing.
 - o See if the laboratory issues a “PASS” grade on your Saved Seed.
 - o BASF then approves or declines to approve the Saved Seed for use or sale.
- You can only sell or use Saved Seed approved by BASF. You must report all sales and seeding of BASF-approved Saved Seed to BASF. If you seed from Saved Seed, you must self-report the amount seeded. If you sell to another grower or an Authorized Retailer, you must report the buyer’s name and address, the amount sold, your CLEARFIELD-CONFIRM® test number and (for growers only) the contract number on the grower’s Contract.

The Patents and the CLEARFIELD® trade-mark are intellectual property of BASF. Since the value of this property may be diminished or lost if licensed growers breach the Contract, BASF has contractual rights and powers to make sure you comply with your obligations. By signing the Contract, you authorize and give BASF the following rights (which BASF would not otherwise have):

- To audit and inspect your farm for five years and to: (i) access your business records related to production and sale of CLEARFIELD®

Lentils; (ii) access your owned, leased and crop-shared land involved in CLEARFIELD® lentil production; (iii) take crop samples; (iv) conduct tests to verify your compliance with the Contract; and (v) obtain lists of chemicals you used during production and harvest of your crop.

- To obtain information from third parties, and you agree to give BASF information about your purchase and use of CLEARFIELD® Lentil Seed, Saved Seed and “agrochemical products”; however, BASF agrees not to disclose your information (outside its affiliates and suppliers) without your written consent.

By signing the Contract, you are also agreeing:

- Not to challenge BASF’s patent rights.
- That BASF can terminate the Contract if you breach it. Termination means you cannot grow CLEARFIELD® Lentils or plant farm-saved seed or sell your lentil crop or farm saved seed to anyone other than lentil processors for food or feed.
- That BASF has the right to recover damages, legal fees and other costs of enforcing the Contract. BASF claims \$100 liquidated damages per acre planted with unauthorized or unlicensed CLEARFIELD® Lentil Seed or Saved Seed; but damages are always at the discretion of the court.

BASF does not guarantee availability of CLEARFIELD® Lentil Seed for 2010. BASF expressly disclaims all representations and warranties with respect to CLEARFIELD® Lentil Seed, including its performance, crop quality and yield, and the results of any sampling or testing. This means you buy and use CLEARFIELD® Lentil Seed on an “as available” and “as is” basis.

The Contract is the entire agreement on your use of CLEARFIELD® Lentil Seed, etc. Neither you nor any of these persons can add to, delete from or otherwise change the terms of the Contract. Once signed, the Contract is a binding agreement; so there is good reason to fully understand its terms.

bio This article was written by Neal W. Caldwell, formally of McDougall Gauley LLP, Barristers & Solicitors. McDougall Gauley LLP acts as legal counsel to Saskatchewan Pulse Growers and the article was prepared at the request of Saskatchewan Pulse Growers; however, the opinions contained in the article are those of the author alone. The article provides growers with information of a general nature only and only in respect of BASF Canada Inc.’s CLEARFIELD® Commitment™ for Lentils – 2010 Growing Season. The article is not intended as a substitute for professional legal consultation and legal advice in any particular case. Do not rely on the article as professional legal advice; seek detailed legal advice before acting on any information contained in the article *Commitment™ for Lentils*.



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