

# Plant Breeders' Rights

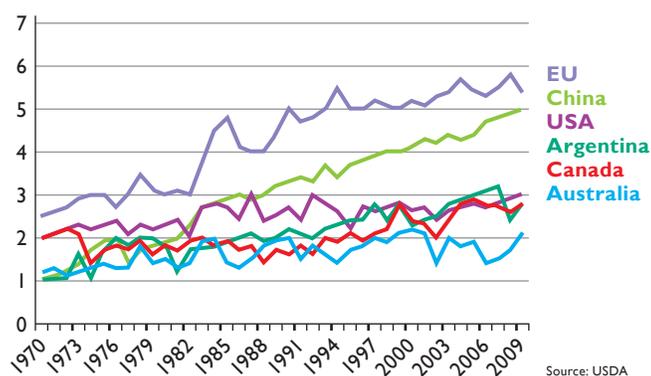
Putting Canada's PBR legislation into perspective.

Protecting seed intellectual property (IP) provides both the public and private sector plant breeders the tools to invest in research and develop improved varieties with higher yields, agronomic benefits and new traits for healthier foods or renewable resources. Creating an improved IP environment for our Canadian plant breeders is vital to promoting this investment, encouraging seed innovation and keeping Canadian farmers competitive in the global market.

## Background on the UPOV Convention –

As was required by international trade rules, Canada implemented its Plant Breeders' Rights (PBR) Act in 1990. The legislation complied with the 1978 International Convention for the Protection of New Plant Varieties (UPOV). That Convention was revised in 1991, and despite the fact that Canada signed the Convention and signalled its intention to ratify by amending its PBR legislation, those amendments have still not been made. In fact, Canada is one of the only developed countries that is not a member of the 1991 Convention. Without access to the improved IP tools contained in the 1991 Convention, the Canadian seed industry and Canadian farmers are missing the opportunities created with the introduction of new and improved seed varieties.

Wheat Yield, Selected Countries (tonnes per ha)



## Convention Summary

**Sale of Seed** – Both UPOV 1978 and UPOV 1991 prohibit sale, production for sale and marketing of seed of protected varieties by anyone except the breeder or someone authorized by the breeder. UPOV 1991 extends that to include conditioning for the purposes of propagation.

**Farm Saved Seed** – UPOV 1978 contains no language around the ability for farmers to save production and use it as seed. UPOV 1991 has specific language to permit countries to allow farmers to save production for use as seed on their own farms. The sale of saved seed of a protected variety is prohibited by both Conventions.

**Further Breeding** – UPOV 1991 contains a clause that makes it compulsory for breeders to allow other breeders to use protected material to develop new and different varieties. UPOV 1978 does not include this provision.

**Essential Derivation** – UPOV 1991 requires the authorization of the breeder of a protected variety before a new variety can be “essentially derived” from it.

**Enforcement and Penalties** – Neither Convention specifies enforcement measures or penalties for actions that break the law established by Plant Breeders' Rights. That is the responsibility of the individual UPOV member country.

Review the table on page 2 for a detailed comparison between UPOV 1978 and 1991.

*A recent international study put Canada at the very bottom of the pile when it comes to generating funds for re-investment in plant breeding and research, and the effect is clearly evident when Canada's wheat yield improvements are compared to those of our competitors: the EU, China, the United States and Argentina.*

# Comparison of UPOV 1978 and 1991

An overview of the specific Convention issues that have debated in Canada since the UPOV 1991 Convention was signed.

UPOV 1978 (Canada's Legislation Complies)	UPOV 1991 (Canada's Legislation Does Not Comply)
<b>Issue 1 – Scope of the Breeders' Right</b>	
<p>Requires prior authorization of the breeder<sup>1</sup> for:</p> <ul style="list-style-type: none"> <li>• production for the purposes of commercial marketing;</li> <li>• offering for sale;</li> <li>• and marketing;</li> </ul> <p>of the reproductive material of the variety.</p>	<ul style="list-style-type: none"> <li>• Expands the scope to also require the authorization of the breeder for conditioning for the purposes of propagation; offering for sale; selling or other marketing; importing; stocking; and exporting.</li> <li>• Also extends the right to the harvested material (e.g. grain produced from a protected variety) if the breeder has not had the opportunity to exercise his right (collect a royalty, etc.) on the propagating material.</li> <li>• Also extends the right to essentially derived varieties. Where it can be proven that a new variety has been derived from an initial variety that is protected, and that new variety retains all of the same characteristics of the initial variety, except for the one characteristic that makes it different, the breeder of the initial variety has right over the derived variety, and must authorize its commercialization.</li> </ul>
<b>Issue 2 – Duration, Annulment and Revocation of the Plant Breeders' Right</b>	
<p>The convention sets the protection period at 15 years except for vines, forests, fruit and ornamental trees, which must be protected for 18 years. Canada's legislation sets protection at 18 years for all species.</p>	<p>Increases the minimum protection period to 20 years except for vines, forest, fruit and ornamental trees which would be protected for 25 years.</p>
<p>The Plant Breeders' Right can be annulled if the variety is found to not have been new or distinct from other varieties at the time that the right was granted.</p>	<p>The Plant Breeders' Right can be annulled for the reasons stated in UPOV 1978, but can also be annulled if:</p> <ul style="list-style-type: none"> <li>• The variety is found to not have been stable or uniform; or</li> <li>• If the right was granted to a person who is found to not have been entitled to it.</li> </ul>
<p>The Right can be revoked if the breeder is not able to provide:</p> <ul style="list-style-type: none"> <li>• A sample of the reproductive material of the variety;</li> <li>• Proof that the variety is being maintained; or</li> <li>• If the breeder does not pay the required fees.</li> </ul>	<p>The Right can be revoked for the reasons in UPOV 1978 but can also be revoked if the variety is no longer uniform or stable.</p>
<b>Issue 3 – Provisional Protection</b>	
<p>Allows for the member country to provide protection for the variety in the period between the application for and being granted the PBR.</p> <p>Canada's legislation only provides provisional protection if it is requested by the breeder, and only if the breeder agrees not to sell the variety before the right is granted.</p>	<p>Requires that member countries provide provisional protection.</p>
<b>Issue 4 – Exceptions to the Plant Breeders' Right:</b>	
<b>BREEDERS' EXCEPTION</b>	
<p>The Convention and Canada's PBR legislation do not prevent the use of protected material to develop new varieties.</p>	<p>Includes a compulsory exception for the purposes of breeding other varieties.</p>
<b>FARMERS' EXCEPTION</b>	
<p>There is no provision in this Convention for an exception to the right to allow farmers to save the production from seed of a protected variety to use as seed.</p>	<p>Includes an option for countries to allow for the farmers to save the production of protected varieties to use as seed on their own farms.</p>

<sup>1</sup>Both conventions use the term "breeder" to encompass both the breeder of the new variety, and the successor in title (e.g. the person to whom the license has been transferred by the breeder).