

Can I save it? A guide for seed savers on plant intellectual property rights in Canada



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The Bauta Family Initiative on Canadian Seed Security

The Bauta Family Initiative on Canadian Seed Security (BFICSS), a program of SeedChange, is building a movement for resilient seed systems across Canada. The Initiative's mission: to build a Canadian seed system that promotes food security and is resilient in the face of climate change. Since 2013, we have been collaborating with farmers, seed producers, researchers, and more than 100 partners from civil society, government, and businesses, to implement on-farm research and education programs on seed conservation, seed production, and plant breeding that will increase the quality, quantity, and diversity of regionally-adapted seed for organic and climate-resilient farming conditions in Canada.

“Can I save it? A guide for seed savers on plant intellectual property rights in Canada” is inspired by the Organic Seed Alliance's [Intellectual Property Rights on Seed](#) guidance document. This document provides an overview of the different kinds of IPR mechanisms that operate in the US. For more information about the Organic Seed Alliance and their efforts to advance ethical seed stewardship in the US, please visit seedalliance.org.

Can I Save It?

“Can I save it?” It is one of the most common questions heard by staff members of The Bauta Family Initiative on Canadian Seed Security: whether or not one is allowed to save seed of a particular plant variety. Within a historical context in which seeds have been freely saved and shared over millennia, it seems like it should be a simple question to answer. However, when considering this question in the context of an agricultural system increasingly characterized by the use of proprietary seeds, the question becomes much more complicated.

The relatively recent expansion of intellectual property rights (IPRs) to plant life and the unsettling news coverage of its enforcement (e.g., the 1997 Supreme Court of Canada *Monsanto v. Schmeiser* case, among many others)¹ has cast a chill among farmers and gardeners wanting to avoid litigation for saving seed. Naturally, seed savers at all scales are often concerned about the legality of saving certain types of seed varieties.

The reality is that the vast majority of plant varieties in circulation among gardeners in Canada are *not* covered by Canadian intellectual property rights (IPR) restrictions.² Varieties that are covered by IPR restrictions are predominantly ones used for large-scale field crop or intensive greenhouse production.³ Furthermore, Plant Breeders Rights (PBRs) do not apply to seed saved privately for on-farm or in-garden use. However, more and more agri-input corporations and public crop development institutions are considering the use of IPR tools to recover breeding costs in the absence of adequate public funding.⁴ It is important then to develop educational resources to empower seed savers to continue the important work stewarding the biodiversity of humanity’s common seed heritage.

This guide covers four kinds of IPR mechanisms: PBRs, seed patents, seed contracts, and seed trademarks. It also discusses alternatives to IPR protections: public domain varieties and Open Source Seed Initiative (OSSI) pledges. The intention of this guide is to clarify the differences between forms of IPR protection in Canada. It details what rights and restrictions you have as a seed saver to save, replant, store, clean, condition, and distribute IPR-protected and unprotected varieties.

¹ Busscher 2020; Peschard and Randeria 2020; Andrée 2011, pp. 181; Carolan 2010, pp. 121-3; Peekhaus 2010, pp. 423-4; Elliott 2006

² Canada uses far fewer IP protections on plant varieties when compared to other G7 countries (5.47% of global horticultural PBR application from 1992–2014. - Carew et al 2017, p. 742).

³ Relative to the vast biodiversity of plants in Canada, there have only been 4,071 food crop varieties granted PBRs between 1990 and 2022 (calculated from information in CFIA 2021a)

⁴ Kotschi et al. 2021; Carew et al. 2015; Gray and Malla 2011

This guide will only be covering what you can do with the germplasm (i.e. seeds, rhizomes, cuttings, etc.) and not what you can do with the food the plants produce (i.e. grains, fruits, vegetables, etc.). Throughout the guide we also clarify how IPR protections issued in other countries do not apply in Canada unless equivalent IPR protections are in place domestically,⁵ and that the restrictive plant and utility patents that are common in the United States are very rare and used differently here.

The Bauta Family Initiative believes in building a seed system in Canada that supports food sovereignty and is resilient to climate change. We believe that any kind of intellectual property mechanism that encroaches on farmers' rights to save seed inhibits building that kind of system. We hope that by empowering farmers and gardeners with the knowledge of how these tools are applied in Canada, we can build ethical alternatives to these types of arrangements that respect the work of plant breeders developing new crop diversity, protect farmers' rights to save seed in perpetuity, and respect Indigenous seed sovereignty.

An Acknowledgement on Indigenous Seed Sovereignty

Indigenous Peoples and farmers are the original plant breeders. The crop diversity all people benefit from today across the world is a result of their seed stewardship and their deep knowledge of their land and food. This crop diversity was also developed without IPR protections. Instead, humans have historically managed plant genetic resources through a plurality of public and community-governed seed commons.⁶

The Bauta Family Initiative affirms that Indigenous sovereignty is paramount when it comes to making decisions about Indigenous seeds, as well as the land and food systems in which they are embedded. While we cannot advise on the legal applicability of Canadian IPRs to Indigenous communities, we acknowledge that Indigenous nations should be able to exercise full control over their seed systems without being limited by legal restrictions imposed by settler colonial states.

We believe that whenever settler communities and institutions engage with Indigenous communities on the subject of IPRs on seeds, we must 1) acknowledge and respect the diversity of different Indigenous seed governance models that exist across different nations and 2) acknowledge the historical and contemporary contributions of Indigenous communities to the crop diversity in use today. We commit to continuing to learn from Indigenous partners about how we can be stronger allies in this struggle.

⁵ CIPO 2019; CFIA 2015

⁶ Brandt 2014; The Bauta Family Initiative on Canadian Seed Security 2014; Fitting 2006

Canadian Seed IPR Table

	PBR Varieties *	Seed Contracts		Registered Seed Trademarks	Seed with no IPRs	
		VUAs	TUAs		Public Domain	Seed Commons
Can I save it?	Yes	Yes**	No	Yes	Yes	Yes
Can I replant it?	Yes	Yes**	No	Yes	Yes	Yes
Can I store it?	Yes	Yes**	No	Yes	Yes	Yes
Can I clean it?	Yes	Yes**	No	Yes	Yes	Yes
Can I distribute ⁷ it?	No	No	No	Yes***	Yes	Yes
Can I trial it?	Yes	No	No	Yes	Yes	Yes
Can I research it?	Yes	No	No	Yes	Yes	Yes
Can I breed with it?	Yes	No	No	Yes	Yes	Yes
Can I claim IPRs?	No	No	No	Yes****	Yes	No

* For PBRs granted in Canada. Those granted elsewhere only apply in Canada if there is a PBR equivalent in Canada.

** Subject to the terms and conditions of the contract agreement; VUAs permit these activities if pay a royalty fee.

*** Seed, grain, or produce cannot be sold by the registered trademark name or symbol.

**** Newly bred crop varieties cannot be registered or protected with a trademarked name. If the variety has a registered seed trademark and meets the eligibility criteria of PBRs, a PBR can be claimed on it.

⁷ The term “distribute” in the context of this guide refers to any form of seed distribution, whether commercial or non-commercial. This includes selling, trading, gifting, or otherwise sharing seeds with others.

Plant Breeders' Rights

What are Plant Breeders' Rights?

PBRs are a form of intellectual property that allows plant breeders (or the companies they work for) to secure exclusive rights to commercialize and distribute plant material that they have developed. It first emerged in the 1960s as a form of intellectual property promoted by the International Union for the Protection of New Varieties of Plants (UPOV).⁸ The PBR system allows a breeder to exclusively control the use of a variety they developed: growers are not allowed to save *and* distribute seed from a PBR-protected variety without explicit permission from the PBR-holder.⁹ In Canada, PBRs are issued by the Canadian Food Inspection Agency's (CFIA) Plant Breeders Rights Office (PBRO) Commissioner.¹⁰

There have been three versions of the UPOV convention: UPOV '61, UPOV '78, and UPOV '91. Each version of the UPOV convention has been more restrictive than the last when it comes to constraining seed freedoms. Canada initially became a party to UPOV in 1990 and drafted the Plant Breeders' Rights Act (the PBR Act)¹¹ to conform with the terms of the 1978 convention. Canada's PBR system emerged around the same time as funding for formerly extensive public breeding programs was being cut.¹² The PBR Act was updated in February 2015 to conform with the 1991 UPOV convention.

The stated intention of the PBR system is to encourage innovation in the sector by securing exclusivity rights for breeders who develop plant varieties that are beneficial for Canadian farmers.¹³ However, whether or not PBRs encourage innovation is highly contested. Many would argue that the free sharing of plant genetic material for thousands of years allowed for extensive innovation and adaptation suited to local and regional growing conditions and cultural needs.¹⁴ Others would agree that breeding a variety requires a lot of work so it is critical to reward that work with a form of legal protection while also protecting farmers' rights to save seed.¹⁵

⁸ UPOV 2011

⁹ Please note that the PBR Act grants a monopoly over the use of a variety's germplasm (e.g., seeds) but not the food it produces (e.g., grain).

¹⁰ PBR Act

¹¹ PBR Act

¹² Kuyek 2004

¹³ CFIA 2015

¹⁴ Peschard and Randeria; 2020; Shiva 1991

¹⁵ OSA (n.d.)

What kinds of seeds are eligible for protection under the PBR Act?

To be eligible for PBR protection, the applicant must demonstrate that the variety in question is new, distinct, uniform, and stable according to specific criteria.

Newness is determined by whether or not the variety has been sold in Canada prior to the filing date of its PBR application. For applications filed after February 27th, 2015, a variety qualifies as new if they have been sold for no more than one year in Canada or four years outside of Canada prior to its filing date. **Distinctness** establishes whether the variety in question is sufficiently different from other varieties “of common knowledge”¹⁶ at the time of application. **Uniformity** establishes whether or not the variety produces predictable and uniform characteristics across a plant population. **Stability** requires that successive generations of the variety will reproduce these same uniform characteristics. Failing to meet any of these requirements may result in the denial of the PBR application.

Once a PBR certificate is granted, that variety is eligible for protection for 20 years (or 25 for trees and vines). The PBR holder is responsible for paying an annual fee to maintain a variety’s protection. At any time, the PBR holder can abandon the variety, at which time any restrictions on the use of that variety would no longer apply.¹⁷

What kind of crops are typically covered by PBRs?

There have been 4,071 food crop varieties¹⁸ granted PBR protections from 1990 to 2022.¹⁹ They are predominantly varieties developed for large-scale field or greenhouse production.

¹⁶ According to the [Guide to Plant Breeders’ Rights in Canada](#), “a variety of common knowledge includes a variety already being cultivated or exploited for commercial purposes or a variety described in a publication that is available to the public”. This can include publication in seed catalogues, academic journals, or “defensive publication” databases (publications made for the purpose of protecting a variety from IPR claims).

¹⁷ You can access the full, updated list of PBR-protected varieties in Canada via [the CFIA’s database](#).

¹⁸ “Food crop varieties” are defined here as crop types destined for agrifood supply chains as opposed to ornamental plants for landscaping or plants used exclusively in the production of medicinal products

¹⁹ <https://inspection.canada.ca/english/plaveg/pbrpov/cropreport/level2e.shtml>

Top 10 PBR-Protected Food Varieties by Crop Kind - From 1990 to 2022²⁰

Crop Kind	PBRs	Proportion
Potato	827	20.3%
Canola	697	17.1%
Wheat	384	9.4%
Soybean	364	8.9%
Strawberry	223	5.5%
Pea	202	5.0%
Barley	190	4.7%
Apple	153	3.8%
Corn	113	2.8%
Oat	105	2.6%

*See Appendix 1: PBR-Protected Food Varieties by Crop Kind

Can I save or replant a seed protected under the PBR Act?

Yes, for now. Farmers and home gardeners are allowed to save and replant seed from PBR-protected varieties for replanting *on their own farm*. This right is currently protected under the PBR Act by the Farmers' Privilege clause. However, you are not allowed to distribute PBR-protected seed without explicit permission from the PBR holder.

When the PBR Act was changed in 2015, it opened the door for making changes to Farmers' Privilege down the road. Countries that have signed onto UPOV '91 and ratified its provisions into domestic law, have the *option*, rather than the *obligation*, to protect Farmers' Privilege. If a variety is protected under UPOV '91, rules around saving and replanting seed for that variety could change in the future.

Can I store, clean, and condition seed that is protected under the PBR act?

Yes, as long as you do not store, clean, or condition the seed with the intention of distributing it to others *as seed*. A harvested crop that will be consumed as food (i.e., grain) or feed is not currently impacted by the PBR Act.

²⁰ Calculated from information in CFIA 2021a. For a full list of protected varieties, see Appendix 1

The 2015 re-write of the PBR Act made explicit, for the first time, the exclusive right of PBR holders to set the terms for stocking, cleaning, and conditioning PBR-protected seed. It was only through advocacy from seed movement actors like the National Farmers' Union (NFU)²¹ that a farmer's right to store seed for replanting on their own holdings, or for selling as grain continues to be protected under Section 5.3(2) of the PBR Act. Notably, the NFU has cautioned that the 2015 update to the PBR Act leaves farmers more vulnerable to end-point royalties or legal action by seed companies if they have reason to believe that seed is being stored, cleaned, or conditioned for uses beyond replanting on-farm or selling as grain.

Can I distribute seed that is protected under the PBR Act?

No, unless you secure authorization from the PBR holder. Regardless of whether they secured PBRs prior to or after 2015, the PBR holder has exclusive rights to distribute a PBR-protected seed. This includes any form of distribution, including trading, gifting, selling, or commercializing in any way. PBR-protected seed can only be saved and replanted on your own farm. You are also prohibited from producing ornamental plants or cut flowers with seed saved from PBR-protected flower varieties. You are, however, permitted to distribute seedlings and plants from a non-ornamental PBR-protected variety since the PBR royalty would have been paid when the seed itself was purchased.²²

Any violation of the conditions detailed above would be considered infringement of the PBR holder's rights, and they could sue. The courts would decide whether infringement had occurred, and if so, would be able to order a remedy such as payment of compensation for lost profits and court costs, or banning the offending grower from future use of the variety.²³ For varieties that received PBR protection after the PBR Act was updated in February 2015, that remedy could also include the seizure of harvested material propagated through unauthorized use of the variety.²⁴

²¹ For an overview of the NFU's advocacy on this issue, refer to their [2015 briefing](#) on the Agricultural Growth Act, which received royal assent in February 2015.

²² This is permitted under the "doctrine of exhaustion", where once a protected product (seed) has been legally purchased, you can resell it to somebody else. Effectively, a person who lawfully purchased PBR-protected seed has paid the royalty on the seed. When they sell the plant they grew from the seed, the company cannot claim royalties a second time for the same seed. You cannot, however, save seeds in order to continue to propagate the variety to sell as plants (Sumi 2021).

²³ See Section 9 in CFIA 2015.

²⁴ Harvested material cannot be seized if the PBR holder had a "reasonable opportunity" to intercede before the material was planted.

In the US and the EU, Plant Variety Protections (PVPs) are the enabling mechanisms for UPOV, and function similarly as PBRs in Canada. However, varieties protected under Plant Variety Protection (PVP) legislation in the US and EU are not subject to restrictions in Canada unless they are *also* protected under Canada's PBR Act. If you would like to save seed of a variety sold by a company in the US with a PVP label attached to it, you should check if that variety has Canadian PBR protection by looking it up in the PBR database. If it is not in the database, it is not a PBR-protected variety and you can freely save, replant, store, clean, condition, and distribute the seed in Canada.²⁵

Can I trial, research, or breed with seed that is protected under the PBR act?

Yes. Under the PBR Act, there are exemptions under the Breeder's Privilege with regards to the use of PBR-protected material for scientific research and breeding, including the development of new varieties.²⁶ However, if a PBR-protected variety is used as a parent line for the commercial production of a hybrid, the PBR would extend to that hybrid variety.

Patents

What are patents?

A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. To get a patent, technical information about the invention must be disclosed to the public in a patent application.²⁷ Patents are designed to protect an invention and allow its creator to profit from their work by prohibiting others from recreating and selling the same work without the patent holder's permission for a specific period of time. In Canada, the patent protection period is 20 years.²⁸

In 2002, the Supreme Court of Canada (in what is known as the "Harvard mouse" case) banned the patenting of "higher life forms", or multicellular organisms on the

²⁵ It is fairly easy for foreign plant breeders and companies to obtain PBR protection for their varieties in Canada if they already have their varieties registered in another UPOV member country. UPOV has a platform called PRISMA to facilitate plant breeders' rights applications between countries. Accordingly, it is in your best interest to regularly check the PBR database to make sure varieties you might be saving and distributing as seed have not become protected varieties.

²⁶ See Section 9 in CFIA 2015

²⁷ WIPO n.d.-c

²⁸ Patent Act, R.S.C. 1985, s. 44

grounds that the Patent Act's definition of "invention" excludes them.²⁹ **Seeds and plant parts are thus not eligible for patenting under Canadian law.** Patent protection can be sought for "processes to produce higher life forms", as well as for new genetic sequences because they are considered inventions.³⁰ If using patent protected seed, it is important to be aware of any particular licensing requirements and other restrictions that might apply.

Farmers who purchase seed from the US will see that some varieties are subject to "plant patents",³¹ including utility patents. These patents, while a cause of significant concern for seed savers in the the US,³² are not valid in Canada.³³

What kind of crops are covered by patents?

In Canada, the only plant varieties covered by patents are those containing "patented genes, plant cells, and genetic processes",³⁴ also known as genetically engineered varieties or genetically modified organisms (GMOs). The crops grown in Canada that include genetically engineered varieties with patents are corn, canola, soy, sugar beet, and alfalfa.³⁵ When buying patented varieties, farmers must sign a Technology Use Agreement (TUA), which details how you can use the seed (see "Seed Contract" section below).

Can I save and replant patented varieties?

No. If the variety you are growing contains protection via a Canadian patent, the TUA will generally outline how the patent holder can restrict the use of that seed, including prohibiting saving and replanting (even for on-farm use) and requiring the payment of a royalty to the patent holder when purchasing seed.

US patents are not enforceable in Canada. That means that if a variety you grow in Canada has a utility or plant patent attached to it in the US, restrictions on saving and replanting do not apply, unless the variety is also registered with the Canadian

²⁹ 2002 SCC 76

³⁰ For more information on processes and plant elements that are eligible for patenting, see section 23.02.01 of the Manual of Patent Office Practice (MOPOP).

³¹ Kloppenburg 2014

³² Organic Seed Alliance has been diligently tracking the evolution of seed patents in the US and the dangers they pose to farmers (OSA 2021). For more information, check out [their website](#).

³³ For a US patent claim to be recognized in Canada, a separate application needs to be made to the Canadian Intellectual Property Office subject to Canadian patent laws. Since Canada does not permit patents on higher life forms, US plant patent claims cannot be extended into Canada (CIPO 2019).

³⁴ Carew et al. 2017

³⁵ CIPO n.d.

Patent Office.³⁶ You cannot, however, save the variety and then sell the seed to farmers and gardeners who intend to grow it in the US.

Can I store, clean, condition, and distribute patented varieties?

Can I trial, research, or breed with patented varieties?

No. If the variety has a Canadian patent attached to it then you are not allowed to store, clean, condition, distribute, or breed with the seed. You will be required to sign a TUA to access patented varieties, which details these restrictions (see “Contract Seed” section below).

Seed Contracts

What are seed contracts?

Contracts are agreements made privately between two or more individuals or organizations. For seed, contracts establish permitted and prohibited uses for the plant variety between those who signed the contract. There are several types of contracts that apply to breeding programs, commodity grain production, and commercial seed production such as material transfer agreements (MTAs)³⁷, identity preservation contracts³⁸, and variety license agreements,³⁹ among others. These kinds of contracts will not be covered in this guide as they can often be very customized to the materials covered in the contract. However, there are two kinds of contracts in use in Canada that apply to the purchase of seed that severely restrict what you can do with the variety: Variety Use Agreements (VUAs), and TUAs. The terms of these licenses are often found in a “bag tag” that accompanies a seed package.⁴⁰

VUA contracts were introduced in 2021, and have been applied to a small number of varieties registered under the PBR Act since 2015. Some companies have introduced new varieties that are only available to farmers who sign a binding VUA contract. The VUA sets out a fee that the farmer must pay the company every year in return for being allowed to plant farm-saved seed of that variety. The VUA program also

³⁶ Some varieties patented in the US may have PBR protection in Canada, in which case, the same rules for PBR-protected varieties discussed in the previous section would apply.

³⁷ Carew et al. 2015; CFIA 2002; WIPO. n.d.-a

³⁸ Sykuta and Parcell 2003

³⁹ WIPO n.d.-b

⁴⁰ Montenegro de Wit 2019

includes a data collection and surveillance system to enforce payment of fees by farmers using these varieties.⁴¹

A TUA or a Stewardship Agreement is a binding contract that enforces the patent holder's right to set conditions for use of the variety. These are contracts that seed companies require farmers to sign to purchase the seed. The TUA prohibits seed saving, it may require the use of specific agro-chemicals, and it authorizes the company to inspect the site.⁴² These contracts are generally used for patented plant varieties developed through genetic engineering.⁴³

What kind of crops are typically covered by seed contracts?

You may encounter these contracts if you are working with a recently-developed seed variety from a seed company that has commercialized plant varieties subject to a PBR (VUA) or patent (TUA). The restrictions to the use of these varieties are the same as the PBRs and patent protections applied to them.

Can I trial, research, or breed with seed that is subject to a seed contract?

VUAs: No. VUAs prohibit trialing, research, and breeding without authorization from the seed company.

TUAs: No. In addition to prohibiting seed saving, TUAs explicitly prohibit trialing, research, and breeding activities that use the protected seed.

Seed Trademarks

What are seed trademarks?

Seed trademarks are a form of copyright protection over words, designs, and symbols used to advertise a seed company brand or crop variety. They can be registered or unregistered. An unregistered seed trademark is considered any name or symbol that an individual or company has used to sell a seed variety in Canada for it to be "well known" by people in Canada.⁴⁴ A registered seed trademark is a name or symbol used to sell a plant variety that has been recognized by the

⁴¹ WIPO n.d.-b; NFU 2019

⁴² Carew 2000

⁴³ Barker et al. 2013; Magnan 2004

⁴⁴ Trademarks Act, R.S.C. 1985, c. T-13, s. 5

Canadian Intellectual Property Office (CIPO) and listed in the Canadian Trademark Database.⁴⁵ They last for a period of ten years, but can be continuously renewed.⁴⁶

What kind of crops are protected by seed trademarks?

Any plant variety name or symbol can be registered as a trademark as long as the words, design, or symbol are not already registered, in use as an unregistered trademark, or used as the official name in variety registration and PBR protection in Canada.⁴⁷

The “Kamut” brand is an example of a registered seed trademark that exists for “Khorosan wheat”. There are no PBR protections for Khorosan wheat in Canada, therefore anyone can save, replant, store, clean, condition, and distribute it as seed or grain. However, trademark protections for use of the name “Kamut” requires people to sign a license contract agreeing on specific production practices and consenting to inspections by Kamut International, Ltd.⁴⁸

Can I save, replant, store, clean, or condition seeds with a trademarked name?

Yes. Trademark protections have no restrictions on how you use the seed in your garden or farm.

Can I distribute seeds that have a trademarked name?

Yes, but not by the trademarked name. The Trademarks Act prohibits the advertisement or distribution of a seed variety using any names, symbols, or designs protected by a registered trademark.⁴⁹ Since names used in variety registration (i.e., most grains and field crops) and PBRs cannot be trademarked, there is often an existing, non-trademarked variety name that can be used for the sale of its seed, grain, or produce. For crop varieties that are only known to be sold by a trademarked name, one can simply consider using a different name.

The “Salanova” name for a particular lettuce variety is a registered trademark in Canada,⁵⁰ but there are no Canadian PBR protections for it.⁵¹ This means that

⁴⁵ CIPO 2022

⁴⁶ Trademarks Act, R.S.C. 1985, c. T-13, s.46 (1)

⁴⁷ Trademarks Act, R.S.C. 1985, c. T-13, s. 10.1; CFIA 2022d

⁴⁸ Kamut 2022

⁴⁹ Trademarks Act, R.S.C. 1985, c. T-13, s. 20.1

⁵⁰ CIPO 2022

⁵¹ PBRO 2022, Status of Plant Breeders' Rights Applications and Grant of Rights database

anyone in Canada can freely save, replant, store, clean, condition, and distribute the seed or produce from the variety in Canada. However, selling the variety by the name “Salanova” puts one at risk for copyright litigation unless they have a license to do so from the trademark holder. To make sure that one is not exposing themselves to the risk of litigation they can look up a variety name in the Canadian Trademark Database on the CIPO website.⁵²

Can I trial, research, or breed with seeds that have a trademarked name?

Yes. Trademark protections have no restrictions on trialing, research, and breeding, unless those varieties are protected through PBRs or patents. However, one cannot use the trademarked name to sell, register, or claim PBR protections for any new crop varieties that are developed through breeding.

Public Domain Seed

What are plant varieties that are in the public domain?

"Public domain" plant varieties in Canada are those that have no IPR protections attached to them. All plant varieties are considered to be in the public domain unless they have a PBR claim recognized by the Canadian Commissioner of Plant Breeders' Rights. There are also instances where IPR protections are denied, removed, or expired.⁵³ When IPR protections granted by the government end, they become part of the public domain. Once a variety is in the public domain, PBRs cannot be reinstated. A plant variety that is in the public domain does not have any IPR restrictions to its usage.

However, if the existence of a variety in the public domain is not “officially recognized”, that variety can remain vulnerable to biopiracy.⁵⁴ Biopiracy occurs when companies make unsanctioned claims to IP ownership over crop varieties and variety traits obtained through plant breeding in order to restrict access and profit from community-developed seeds and plant knowledge. The Plant Breeders Rights Office (PBRO) or the CIPO determine whether a plant variety submitted to their offices for PBR or patent protection meets the requirements for newness, distinctiveness, stability, and uniformity (see “Plant Breeder’s Rights” section).

⁵² CIPO 2022

⁵³ PBR Act, sections 6(1), 17(1), and 22(1)

⁵⁴ Biopiracy is described as the application of intellectual property rights without the consent of the community of users that developed and steward the variety (Peschard 2020).

A plant variety is only eligible for IPR protection under Canadian law if its existence and use (beyond one year prior to application) is not already published in a way that is accessible to the public.⁵⁵ The characteristics and usage of a variety can be made common knowledge through documentation in the form of academic publications, detailed seed descriptions in seed catalogs, articles in an industry publication, and disclosure reports sent to the PBRO.⁵⁶ Some defenders of public domain seed in the US have also taken to producing “defensive publications” that can be used to invalidate such claims by preemptively refuting any claims to “novelty” that an entity seeking PBR protection might assert.⁵⁷

Therefore, while anyone can save and use seed from varieties that are in the public domain, nobody can make intellectual property claims over it if its characteristics and usage are commonly known.⁵⁸

What kind of crops are typically in the public domain?

All crop varieties are considered to be in the public domain unless there is an IPR claim to it recognized by the CIPO or PBRO.

Can I save and replant seed that is in the public domain?

Yes. If the plant variety is in the public domain, you can save as much seed as you like with no restrictions. You can find out if a plant is in the public domain by checking to see if there are any PBR protections on the variety. This information is available on the PBRO website.⁵⁹

Can I store, clean, condition, and distribute seed that is in the public domain?

Yes. If the plant variety is in the public domain, you are free to clean, condition, and store the seed as you wish. You are also free to distribute it as you would like: gifting, exchanging, or selling.

Can I trial, research, or breed with seed that is in the public domain?

Yes. If the plant variety is in the public domain, you are free to use the plant variety to conduct trials, conduct and publish research on its characteristics and performance, and use it to cross, select, and breed new varieties.

⁵⁵ PBR Regulations, s.5

⁵⁶ Boettiger and Chi-Ham 2007

⁵⁷ OSA 2021

⁵⁸ PBR Regulations s.5 determines that a variety is considered “common knowledge” if it is already commercially cultivated or exploited, or published in the publicly-accessible publication.

⁵⁹ CFIA 2022a

Seed Commons

What are plant varieties that are in a seed commons?

A community-governed “seed commons” is a set of agreements among a community of plant variety users.⁶⁰ The developer of a new variety is potentially eligible to claim PBR protections over a variety, but may choose to waive that right by stating an intention to maintain open access to the germplasm and prohibit the application any IPR restrictions to it (sometimes called “copyleft” or “open source”).⁶¹

Open source protections are an example of a community-governed commons. This is different from public domain seed, since open source protections explicitly state the intention of the developer that no IPR protections should be applied to it, or any of its derivatives. It is a voluntary approach to community governance of plant genetic resources that offers some protections against biopiracy. However, Canada does not yet have any laws formally protecting plant varieties within a seed commons.

Examples of informal, community-governed seed commons are the Open Source Seed Initiative (OSSI) and Open Source Seeds which have gained some popularity among plant breeders in the US and EU, respectively.⁶² OSSI operates a voluntary pledge system that seed growers make to keep a plant variety free to use, breed, study, and distribute. In making an OSSI pledge, the grower promises to keep the variety in the public domain and refrain from restricting the use of that variety or its derivatives. Once the pledge has been made, the variety becomes “Freed Seed”.⁶³ The variety is then added to the official OSSI Seed List along with the name of the breeder or company, a botanical description, and photos. It is implied that the farmers and gardeners who purchase OSSI-pledged seed agree to the terms and conditions of the pledge, including pledging any new varieties they develop from it.

What kind of crops are typically in a seed commons?

Newly-developed varieties intended for organic production tend to be the kind of crops that are included in a seed commons. There are 529 varieties of 54 different

⁶⁰ Halewood et al. 2021; Kotschi et al. 2021; Sievers–Glotzbach and Christinck 2021; Mazé et al. 2020; Winkel et al. 2020; Peschard and Randeriaa 2020; Montenegro de Wit 2019; Ostrom 1990

⁶¹ Kotschi and Wirz 2015

⁶² Montenegro de Wit 2019

⁶³ OSSI n.d.

crop types included in OSSI's Seed List.⁶⁴ Other kinds of community-governed commons initiatives could be established to protect heirloom and heritage varieties from threats of biopiracy.

Can I save and replant seed that is in a seed commons?

If the plant variety has an OSSI pledge on the seed pack or tag, you are free to save the seed, as long as you do not make any intellectual property rights claims or keep others from accessing the variety or its unique characteristics.

Can I store, clean, condition, and distribute seed that is in a seed commons?

If the plant variety has an OSSI pledge on the packaging, you are free to store, clean, condition, and distribute the seed as long as you do not exclude others from accessing it, or claim IPRs over the variety or its unique characteristics.

Can I trial, research, or breed with seed that is in a seed commons?

If the plant variety has an OSSI pledge accompanying it, you can trial, research, and breed using the seed as long as you do not exclude others from accessing it, or claim IPRs over the derivative variety or its unique characteristics.

⁶⁴ OSSI n.d.

Conclusion

The work that is done by seed savers to conserve and develop crop diversity and food sovereignty is essential given the climate instability and biodiversity loss that the planet is experiencing. The vibrant food systems from which we all benefit are a result of generations of Indigenous Peoples and farmers doing precisely this work, all without the need for IPR protections. We feel it is important that seed savers feel as safe and confident as possible continuing to steward their beloved varieties while we work collectively to resist further restrictions on this fundamental right.

We hope that this guide has been useful to you. We also hope that we have made it clear that the vast majority of plant varieties in Canada are free and open for you to save and use. Our intention is to help farmers and gardeners feel empowered by understanding their rights and knowing how to identify crop varieties that have restrictions. In this guide we have covered four forms of IPR protections that are used in Canada - PBRs, patents, seed contracts, and seed trademarks. We have also discussed alternatives to IPR protections that can help keep plant genetic resources in the commons for all growers and eaters to enjoy.

This guide is only an introduction to deeply nuanced policy discussions surrounding seed. We hope that it provokes further conversation and strategizing around how to uproot the colonial system that serves as a foundation for contemporary IPR protections, how to institutionalize seed sovereignty and crop biodiversity protection, and how to support the important work of seed savers and plant breeders in equitable and just ways.

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Appendix 1 - PBR-Protected Varieties by Crop Kind - 1990 to 2022⁶⁵

Crop Kind	PBRs	Prop.	Crop Kind	PBRs	Prop.	Crop Kind	PBRs	Prop.	Crop Kind	PBRs	Prop.
Potato	827	20.3%	Grapevine	34	0.8%	Asparagus	6	0.1%	Kiwifruit	2	0.0%
Canola	697	17.1%	Pepper	31	0.8%	Elderberry	6	0.1%	Lemon	2	0.0%
Wheat	384	9.4%	Faba bean	29	0.7%	Onion	6	0.1%	Jerusalem Artichoke	1	0.0%
Soybean	364	8.9%	Blackberry	29	0.7%	Quinoa	5	0.1%	Turnip	1	0.0%
Strawberry	223	5.5%	Pear	27	0.7%	Plum	5	0.1%	Arugula	1	0.0%
Pea	202	5.0%	Lettuce	26	0.6%	Rapeseed	4	0.1%	Banana	1	0.0%
Barley	190	4.7%	Chickpea	19	0.5%	Borage	4	0.1%	Carrot	1	0.0%
Apple	153	3.8%	Mustard	19	0.5%	Watermelon	4	0.1%	Coriander	1	0.0%
Corn	113	2.8%	Triticale	19	0.5%	Basil	3	0.1%	Ginger, Chinese	1	0.0%
Oat	105	2.6%	Canola- Mustard	18	0.4%	Mint	3	0.1%	Goji Berry	1	0.0%
Raspberry	67	1.6%	Black Currant	18	0.4%	Nectarine	3	0.1%	Lemon Basil	1	0.0%
Blueberry	57	1.4%	Cucumber	17	0.4%	Orange	3	0.1%	Lingonberry	1	0.0%
Flax	52	1.3%	Hemp	16	0.4%	Buckwheat	2	0.0%	Pumpkin	1	0.0%
Cherry	52	1.3%	Peach	15	0.4%	Hop	2	0.0%	Radish	1	0.0%

⁶⁵ Calculated from information disclosed in CFIA 2021a

Crop Kind	PBRs	Prop.	Crop Kind	PBRs	Prop.	Crop Kind	PBRs	Prop.	Crop Kind	PBRs	Prop.
Tomato	43	1.1%	Cranberry	9	0.2%	Sorghum	2	0.0%	Savory	1	0.0%
Sweet Potato	40	1.0%	Hazelnut	8	0.2%	Spelt	2	0.0%	Sunflower	1	0.0%
Bean	38	0.9%	Apricot	7	0.2%	Gooseberry	2	0.0%	Tangerine	1	0.0%
Lentil	34	0.8%	Rye	6	0.1%	Huckleberry	2	0.0%			
Total: 4,071											

Examples of some vegetable varieties protected by active PBRs⁶⁶

Beans		
<ul style="list-style-type: none"> • Affirmed • Eclipse • Festina 		
Potatoes		
<ul style="list-style-type: none"> • Adirondack Blue • Adirondack Red • Alta Blush • AmaRosa • Arizona • Autumn Rose • Baltic Rose • Bellanita • Belmonda 	<ul style="list-style-type: none"> • Colorado Rose • Defender • Fenway Red • Gemson • GemStar Russet • Golden Globe • Goldeye • Highland Russet • Huckleberry Gold 	<ul style="list-style-type: none"> • Purple Majesty • Rande's Golden Gem • Red Apple • Red Emmalie • Red Endeavor • Red Maria • Red Prairie • Red Snapper • Rio Grande Russet

⁶⁶ This list was made by searching for PBR protected food crop varieties and seeing if they are listed in the seed catalogs of popular garden seed companies in Canada and the United States (i.e., not large quantity field crop seed distributors). Grain crops are excluded since small-volume seed distributors tend to sell common grade seed for grain crops, which cannot include a variety name.

- [Bridget](#)
- [Canela Russet](#)
- [Capri](#)
- [Caribou Russet](#)
- [Carminelle](#)
- [Cecile](#)
- [Cerisa](#)
- [Classic Russet](#)

- [Jazzy](#)
- [Jennifer](#)
- [Labella](#)
- [Lady Amarilla](#)
- [Lehigh](#)
- [Natascha](#)
- [Pacific Russet](#)
- [Prince of Orange](#)

- [Rosemarie](#)
- [Snow Finger](#)
- [Soraya](#)
- [Upstate Abundance](#)
- [Yukon Gem](#)
- [Yukon Nugget](#)

Lettuce

- [Clearwater](#)
- [Meridian](#)

Peppers

- [Raptor](#)
- [Redwing](#)

Sweet Potato

- [Sweet Caroline Light Green](#)

Tomato

- [Indigo Cherry Drops](#)
- [Indigo Pear Drops](#)
- [Indigo Rose](#)