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Plant Protection in Canada

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Author

Julie Gauvreau

Partner, Lawyer Partner, and Patent Agent Partner, and and Trademark Agent

Although it is possible to patent certain plant-related innovations, another law exists in Canada drawn to plant protection, that is not as well-known as the Patent Act, but possesses characteristics conferring it significant advantages over the latter.

The Plant Breeders' Rights Act (PBRA) was adopted 25 years ago in Canada and was recently modernized [1] to improve the protection that it confers and for harmonization with corresponding laws around the world and with UPOV 1991 (International Union for the Protection of New Varieties of Plants), the international treaty on which they are based. The main objective of this modernization is to promote the development of and access to improved plant varieties in Canada; such as varieties with higher yield, greater resistance to pests, diseases, salt, or that are more adapted to local conditions.

Operation

Briefly, the PBRA may protect any plant variety that is:

1. Distinct: clearly distinguishable from other commonly known varieties by at least one characteristic;
2. Uniform: homogeneity between seedlings of the variety;
3. Stable: stable in its essential characteristics from one generation to the next; and
4. New: neither its propagating material (seeds, tubers, whole plants, etc.), or its harvested material (fruit, grains, etc.) has been sold:

   A. in Canada more than one (1) year before filing in Canada [2], a sale being broadly defined to include advertising, delivery for sale, etc.; and

   B. abroad more than four (4) years before filing in Canada (or more than 6 years in the case of trees and vines).

One peculiarity of this system is the need to conduct UPOV-compliant comparative trials in fields or greenhouses in Canada or abroad [3] to demonstrate that the variety meets criteria (1) to (3).

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When the comparative trial results confirm that the criteria are met, when the denomination (i.e. name) selected for the variety is deemed acceptable, and when the opposition period has expired, the application is allowed.

Comparative characteristics between the Patent Act and PBRA systems

Plant types: Plant varieties that may be protected by the PBRA include not only plants derived from genetic engineering but also those derived from natural selection or deliberate crossing, for which the genetic profile is generally not known.

The Patent Act requires that an innovation be described in sufficient detail to enable its reproduction. As a result, when one wishes to patent a new plant [4] having a novel and advantageous property (e.g., early ripening), it is generally necessary to describe the molecular feature (e.g., nucleic acid and/or protein sequence) responsible for this attribute. When the genetic source of the novel property is unknown, it is difficult to patent the plant unless a biological deposit of the plant propagating material is made, which significantly restricts the scope of protection afforded by the patent. Plant varieties derived from crosses or natural selection are rarely genetically characterized, which therefore makes them difficult to patent. The PBRA does not have such requirements and is perfectly tailored to protect these varieties.

Term: The protection term granted by the PBRA is longer than that afforded by the Patent Act: 20 years from the grant date under the PBRA for all plants except vines and trees, which are entitled to 25 years from grant, compared to a patent term of 20 years calculated from the application filing date.

Level of stringency: Plant Breeders' Rights (PBR) are usually easier to obtain since the distinctiveness of a new variety is usually much easier to demonstrate than its inventiveness.

Costs: The costs for obtaining a PBR are generally lower than those necessary for obtaining a patent.

Scope: When patent protection is available for a plant variety, it usually provides a broader scope of protection than that afforded by a PBR.

Conclusion

Plant variety developers, such as researchers in the fields of agriculture and horticulture, seed developers, and farmers would benefit from knowing all the tools at their disposal to protect the fruits of their research, including the PBRA. The PBRA has attributes that allow it to protect innovations that are not necessarily conducive to protection under the Patent Act. In situations where both laws apply, their respective characteristics should be carefully assessed to determine which system would be most beneficial in each case. Since these laws may offer complementary protection, one should also consider, if the budget allows, using both systems in parallel, in order to benefit from the advantages conferred by each.

Please do not hesitate to contact us should you require further information regarding plant protection in Canada.

1. February 27, 2015.
2. New provision in amended PBRA.
3. The amended PBRA facilitates the use of foreign trial results generated in the context of a PBR application in that country.

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4. Indirectly, since patents cannot generally claim a plant per se but only certain plant parts (e.g., plant cells, genes or plant-derived products), plant uses and plant breeding methods.

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