

New Canadian Law Strengthens Plant Breeders' Rights

Law360, New York (March 19, 2015, 9:12 AM ET) --

In Canada, plant breeders' rights are a form of intellectual property under the Plant Breeders' Rights Act of 1990.[1] The intent of the 1990 act was to encourage plant breeding in Canada by strengthening the protections for new varieties of plants and to provide Canada with better access to foreign varieties.[2]

An owner of a candidate variety is eligible for plant breeders' rights under the 1990 act if it can be demonstrated that the candidate variety is:

- New in that the sale of a candidate variety prior to application for protection is restricted;
- Distinct in that the candidate variety must be measurably different from all other varieties known to exist within common knowledge at the time the application was filed;
- Uniform in that the candidate variety must be sufficiently uniform in its relevant characteristics, subject to the variation that may be expected from the particular features of its propagation; and
- Stable in that the candidate variety must remain true to its description over successive generations.



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Unlike the United States, which protects asexually reproducing varieties with plant patents, both sexually and asexually reproducing plants are eligible for plant breeders' rights in Canada. Algae, fungi, and bacteria, however, are excluded.

The 1990 act allowed Canada to join the International Union for the Protection of New Varieties of Plants ("UPOV") — an intergovernmental organization established by treaty to promote plant variety protection.[3] It did so by providing variety owners with the exclusive rights to sell and produce the protected variety, to sell the variety's propagating material, to use the variety in commercially producing another variety, to use the variety in producing ornamental plants or cut flowers, and to license a third party to use the variety in Canada.[4] Section 2 of the 1990 act defined propagating material as "any

reproductive or vegetative material for propagation, whether by sexual or other means, of a plant variety, and includes seeds for sowing and any whole plant or part thereof that may be used for propagation.”[5]

Notably absent from the 1990 act were provisions protecting against the unlicensed importation, exportation or stocking of material not used for propagation, such as fruit. In this way, Canadian law was not in conformity with the 1991 act of the UPOV Convention, which is the treaty’s most recent revision. This was of special concern to plant breeders in the United States and Europe. Indeed, many crop varieties with commercially significant sales in Canada (including grapes and many fruit trees) are developed, propagated, and grown elsewhere, where the climate is more suitable. Only an end product, not suitable for use in propagation, is imported into Canada. Thus, the 1990 act left foreign companies with an enforcement dilemma.

On Feb. 26, 2015, Canada amended its Plant Breeders’ Rights Act to bring the country’s laws into line with the 1991 act of the UPOV Convention.[6] The new features of Canada’s strengthened Plant Breeders’ Rights Act include the following:

- New rights that allow the Plant Breeders’ Rights holder to exclude others from (1) reproducing or propagating the variety, (2) conditioning the variety for purposes of propagation, (3) importing or exporting the variety, and (4) stocking the variety for any of the previously mentioned purposes;
- Expanded enforcement opportunities against material, such as fruit, harvested from the variety;
- Protection for essentially derived varieties, which are varieties that are predominantly derived from the protected variety and maintain the characteristics of the protected variety;
- A one year grace period that allows for sales of a variety within Canada without affecting eligibility for protection;
- Extended protection, from 18 to 20 years for most varieties and up to 25 years for trees and vines; and
- Provisional protection that will automatically apply to new applications.[7]

Before amending the law, the Canadian Food Inspection Agency (“CFIA”) conducted a public consultation to determine the opinions of potential stakeholders. The consultation included plant breeders, farmers, seed dealers and others. As a result, the CFIA concluded that potential stakeholders generally supported the changes.[8]

The amendments are helpful not only to stakeholders in Canada, but also to those in the United States and Europe. The Plant Breeders’ Rights Act now affords protections more like those in other UPOV member countries. Importantly, owners of varieties propagated and grown outside Canada can now obtain rights in Canada that will disallow unlicensed sales of fruit and other plant material harvested from their varieties. These amendments should make plant breeders’ rights an increasingly valuable option for plant breeders seeking to commercialize their varieties in Canada and to prevent others from doing so.

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[1] S.C. 1990, c. 20.

[2] <http://www.inspection.gc.ca/plants/plant-breeders-rights/overview/guide/eng/1409074255127/1409074255924>

[3] <http://www.upov.int/overview/en/upov.html>

[4] *University of Saskatchewan v. Commissioner of the Plant Breeders' Rights Office*, 2001 Fed. Ct. Trial LEXIS 176 (2001).

[5] *Id.*

[6] http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Growth%20Act%20Now%20Law_Ottawa_Canada_3-3-2015.pdf

[7] <http://www.inspection.gc.ca/about-the-cfia/newsroom/news-releases/2013-12-09/qa/eng/1386443790655/1386443953435>

[8] *Id.*

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