

New Breeders' Rights Legislation in Canada

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Canadian plant breeders, at long last, can enjoy what most industrialized nations have had for many years: Plant Breeders' Rights. Bill C-15, written into law in August of 1990, is designed to stimulate plant breeding in Canada and encourage foreign breeders to introduce protected plants into the Canadian market.

Similar, but not identical, to the protection a US plant patent offers, the new legislation grants Canadian breeders exclusive rights over their cultivars' reproductive material. If growers wish to grow or sell the cultivars, they must obtain the breeders' permission and pay royalties.

Eugene Whelan, Minister of Agriculture for many years in the Trudeau cabinet, is reported to have said that he'd seen more rubbish written on plant breeders' rights than on any other subject. The Plant Breeders' Rights Act is one of the most publicized, persistent, and controversial pieces of legislation ever to be passed by Canada's Parliament. The debate leading to its enactment lasted for more than a decade. Plant breeders' rights was an agricultural issue that received just as much ink in consumer magazines as in farm journals. Legal advisors from the Department of Justice started drafting the legislation in July, 1977. It was the patience and persistence of at least two individuals that enabled this law to be passed. Keith Laver of Springwood Consultants, and chairman of the Plant Breeders' Rights Committee for the Canadian Ornamental Plant Foundation (C.O.P.F.) worked at least 20 years on this legislation. Wilf Bradnock, head of the Seeds Division for Agriculture Canada, continued to push for the legislation through three different administrations over a 13-year period.

A Plant Breeders' Rights Office is now set up in Ottawa to establish regulations and register plants. The address is:

Plant Breeders' Rights Office
Agriculture Canada, Plant Products Division
K.W. Neatby Building
960 Carling Avenue
Ottawa, Ontario K1A 0C6
Phone: 613-995-7900
FAX: 613-992-5219

They will publish a plant varieties journal listing applications received, rights that have been granted, and other important notices. The first issue describes guidelines for registration and is available free of charge from the above address. Collection of royalties and enforcement of the regulations will be left up to the individual breeders and organizations such as C.O.P.F.

In addition, a Plant Advisory Committee with 16 members representing interested parties, has been established to meet with the Minister of Agriculture. Standing on the Committee for the ornamentals industry are Bruce Macdonald, *Director of the University of British Columbia Botanical Gardens, representing the Canadian Nursery Trades Association*; Herb VanderEnde, of Burnaby Lake

Greenhouses representing Flowers Canada, and Keith Laver, representing C.O.P.F. Recently Jim Garrett from Mori Nurseries has been named as Keith's alternate.

Different plant groups will require somewhat different regulations, so each group will be dealt with separately. At the October, 1990 meeting, priorities were set for the various plant groups. Chrysanthemums and roses are in the first priority group, along with canola, potatoes, soybeans, and wheat. Crabapples, *Prunus* spp., herbaceous perennials, ornamental conifers, and woody ornamentals (genera to be determined) are on the secondary list. After that comes annual flowers, begonia, bulbs and corms, bush and cane fruits, cranberry, creeping red fescue, forest trees, gladioli, grape, Kentucky bluegrass, shade trees, tree fruits, and vegetables. This last list is in alphabetical order (not according to priority) and is not all-inclusive. To date, applications are available only for those species that are covered by regulation, which are roses and chrysanthemums in the ornamentals area.

In addition, it was decided that applications for protection will be accepted if sales have taken place after the date of the legislation (1 August 1990). This means that once the regulations for a particular plant group have been set, a breeder can apply for protection if initial sales of the plant did not begin in Canada before 1 August 1990. Cultivars which have already been introduced abroad, will be eligible for protection in Canada provided they were not introduced abroad prior to August 1, 1986 or 1 August 1984 for slower growing plants such as trees. The implication of this decision is that hybridizers can go ahead and introduce new plants after 1 August 1990 and then be able to apply for protection when the regulations cover that category. Introducers would be wise to advise growers that they intend to protect the cultivar legally and that the growers should undertake to agree to paying royalties before receiving stock. It should also be noted that protection is not retroactive. Rights are in effect once the right is granted, or, if a provisional directive has been applied for, rights are in effect from the date of that application.

Enforcement is a big question in many peoples' minds. As you might expect, Canadian laws do not have jurisdiction in other countries, so a Canadian nurseryman with a hot new item will still have to apply for a patent in the U.S. to protect it here. Likewise, a U.S. breeder will need to have an agent, who is a resident of Canada, register the new plant in Ottawa to receive protection there. Now that this protection is finally available in Canada, C.O.P.F. hopes that breeders from the U.S. and other countries will be more willing to introduce new plants into the Canadian market. Furthermore, there is the possibility that C.O.P.F. might act as an agent for foreign breeders. The Board of Directors presently has this under discussion, with a decision expected early next year.

Also, the Plant Breeders' Rights Office does not intend to be involved with enforcement of royalty collection. If you develop a new plant and someone is propagating it without paying you a royalty, it is up to you to take legal action. In some countries, there are independent agents who look after this for a number of plant breeders. Before the legislation was passed, C.O.P.F. was not able to do much enforcement. However, this is a service that both grower and breeder members of C.O.P.F. are now requesting.

There are some profound differences between the U.S. plant patent system and the new Canadian law. In the United States, all horticultural plants propagated asexually (except tuberous ones) can be covered by a plant patent.

Seed crops in the U.S. are covered by the more stringent Plant Variety Protection Act of 1970. This Act is reasonably restrictive and coverage costs a great deal more than protection of ornamentals under the Patent Act.

In Canada, all crops come under the one Act. This follows the trend set by most countries with PBR legislation, which passed their legislation more recently than the U.S. Plant Patent Act.

Another distinction that can be drawn between the U.S. and Canadian systems is that in the U.S., plants and unauthorized propagation of plants are covered by patents, but not necessarily the propagation of **parts** of those plants. In Canada, the rights granted are more encompassing.

Finally, the right granted in Canada is not a patent. As a breeder, you can license anyone you like to grow the plant for you. However, if you deny someone access to your cultivar, they may file a request for a compulsory license. If it is determined that, for example, unreasonable licensing conditions were demanded, i.e. excessive royalties, a compulsory license may be granted. This would compel the holder of the right to make the variety available to that person at a set royalty rate.

The reason C.O.P.F. is not so enthusiastic about the new legislation is because the costs of registration are much higher than expected. In general, it will cost \$1,800 to register in the first year, and \$300 every year after that.

The most important goal of all this effort is to see the establishment of a new profession in Canada: private plant breeding. There are growing conditions in Canada which beg for unique, hardy plants and there is talent and skill in breeding that deserve recognition. Plant Breeders' Rights Legislation lays the groundwork for this vital enterprise.