



## **PLANT BREEDERS' RIGHTS FOR NEW FEEDSTOCKS IN CANADA**

JEREMY LAWSON AND MICHEINE AYOUB<sup>\*</sup>  
**LEGER ROBIC RICHARD, LLP**  
LAWYERS, PATENT AND TRADE-MARK AGENTS

While patents remain the principal form of intellectual property for protecting technological advancements in Canada, plant breeders' rights (PBR) can provide an alternative or complementary protection for new plant varieties. Species engineering has begun on heralded under-researched plant feedstocks such as switchgrass, camelina and jatropha.

Protecting the fruits of such research and development labour could be achieved in Canada through a combined strategy of patenting and PBR.

### **Criteria for Patents Versus Plant Breeders' Rights**

A valid patent will be granted for an invention that is novel, useful and non-obvious. If the invention was disclosed by the applicant more than one year before filing a patent application, then it is considered unpatentable in Canada for lack of novelty.

To qualify for a PBR certificate a plant variety must be new, distinct, uniform and stable. A "new" variety must not have been sold in Canada before the filing of the PBR application, and must not have been sold abroad for more than four years or for more than six years in the case of woody plants and their rootstocks. A "distinct" variety possesses measurably different characteristics from commonly known varieties. For example, a variety could be "distinct" because its seed oil content is higher than any known variety of the same species. Furthermore, a "uniform" variety exhibits predictable variation in its characteristics and a "stable" variety has characteristics that remain unchanged over successive generations.

### **Subject Matter of Patents Versus Plant Breeders' Rights**

The Canadian Intellectual Property Office currently takes the position that multicellular organisms are not patentable subject matter. It may be possible to patent new and inventive methods of genetic engineering or individual cells of multicellular organisms, but any claims to a plant itself will be rejected by CIPO. The

---

© CIPS, 2009.

<sup>\*</sup> Of LEGER ROBIC RICHARD, LLP, a multidisciplinary firm of lawyers, and patent and trade-marks agents. Published in the January 2009 issue of *BioEnergy Canada*. Publication 063.008.

**LEGER ROBIC RICHARD, L.L.P.**  
1001 Square-Victoria - Bloc E - 8<sup>th</sup> floor  
Montreal (Quebec) Canada H2Z 2B7  
Tel.: (514) 987-6242 Fax: (514) 845-7874  
[www.robic.ca](http://www.robic.ca) [info@robic.ca](mailto:info@robic.ca)

PBR Act allows the exclusive right to a plant variety that is asexually or sexually reproducible. However, PBR cannot be obtained for fungi, algae or bacteria.

### **Duration and Scope of Patents Versus Plant Breeders' Rights**

While the term of a patent is 20 years from the date of filing a patent application, the duration of PBR is 18 years from the PBR certificate issue date.

The scope of a patent is defined by its claims and often allows broad coverage of an invention, such as a plant cell containing a new chimeric gene that is applicable to several plant species. Each PBR certificate however, covers a particular variety belonging to a particular plant species. The PBR certificate holder may exclude others from selling the protected variety, producing it for sale and making repeated use of the protected variety as a step to commercially produce another variety.

### **Plant Protection in the United States**

In the United States, breeders' rights can be obtained for sexually reproduced (by seed) or tuber-propagated plants. It is also possible to obtain a so-called "plant patent" for an asexually reproduced plant. The United States also allow regular utility patents for plants.

Given the need for improved plant feedstocks in the energy industry and the particularities of the Canadian intellectual property system, neither patents nor plant breeders' rights should be overlooked as valuable means of protection.



