



Canada: Patents for Agricultural Chemicals

December 2004

LL File No. 2005-01473
LRA-D-PUB-000187

This report is provided for reference purposes only.
It does not constitute legal advice and does not represent the official
opinion of the United States Government. The information provided
reflects research undertaken as of the date of writing.
It has not been updated.

LAW LIBRARY OF CONGRESS

CANADA

PATENTS FOR AGRICULTURAL CHEMICALS

Canada has a separate patent system that is similar, but not identical, to that of the United States. This system does not contain special provisions for pesticides or other agricultural chemicals. Historical differences between United States and Canadian patent law have been narrowed through international agreements, including the North American Free Trade Agreement. Canada still has important safeguard rules for government use of patents and the granting of compulsory licenses or the loss of patent protection in cases of abuse.

I. Canada's Separate System and Agricultural Chemicals

Canada has its own patent system that is independent of the United States patents system. The North American Free Trade Agreement did not create a common North American patent system or provide for recognition and enforcement of patents issued by Canada, the United States, or Mexico in all three countries.

Canada's patent laws are almost entirely contained within the Patent Act and accompanying regulations.¹ This statute does not contain special provisions for the patenting of pesticides or agricultural chemicals. Consequently, the general rules of the Patent Act apply to pesticides and agricultural chemicals.²

II. Canada's Patent Act

Canada's Patent Act has been heavily amended over the years, chiefly as a result of requirements contained in the TRIPS agreement, the Canada-United States Free Trade Agreement, and the North American Free Trade Agreement. Since the inception of the Canadian patent system, most applicants for Canadian patents have been foreign inventors or foreign-owned companies. Largely as a consequence of this phenomenon, Canadian law long provided significantly less patent protection for inventors.

While the United States has long been an international force favoring extensions of patent rights, Canada traditionally has been more concerned with rules respecting abuses and the creation of exceptions to the normal rules. Over the years, the differences between the two systems have narrowed. For example, in anticipation of NAFTA, Canada phased out its rules that allowed companies to produce generic copies of patented medicines under a compulsory licensing regime. Canada also has been forced to make changes to its laws as a consequence of WTO decisions. For example, in 2000, the WTO ruled that Canada's term of protection for patents based on applications filed before 1989 was inconsistent with

¹ Patent Act, R.S.C. ch. P-2 (1980), as amended.

² For an overview of the Canadian patent system, see *Canadian Commercial Law Guide*, paras. 18-120 – 18-340 (2004). Appendix I.

TRIPS. Canada subsequently amended its law to extend patent protection for all subsisting patents to the minimum of twenty years from the date of filing.³

Canadian courts have also played a role in limiting patent protection in Canada. For example, the courts have interpreted such concepts as patentability fairly narrowly. In 2002, the Supreme Court held against Harvard College in a widely reported decision on the patentability of mice bred for cancer research.⁴ Canada is the only major industrialized country to have ruled against the patentability of higher life forms.

III. Safeguards

Two provisions of Canada's Patent Act are designed to provide safeguards to prevent patent abuse or to guarantee supplies of patented products to the country. Under section 19 of the statute, the Commissioner of Patents can authorize the Federal Government and the governments of the provinces to use patents for the public good. The circumstances under which this can be done are limited, and there are requirements that oblige government officials to work with patent holders in order to honor patent protection whenever possible except in cases of national emergency or extreme urgency.⁵ Nevertheless, the Federal and provincial governments retain the right to use patents for the public good.

Section 65 of the Patent Act provides for the awarding of compulsory licenses or the forfeiture of a patent if the demand for a patented article in Canada is not being met to an adequate extent and on reasonable terms. A patent also can be deemed to have been abused if, by refusing to grant a license, a patentee has prejudiced the establishment of any new trade or industry in Canada.⁶ In these cases, the Government is required to consult with the patent holder and to try to work out satisfactory arrangements. However, if such efforts are unsuccessful, patent protection can be lost.

Prepared by Stephen F. Clarke
Senior Legal Specialist
December 2004

³ Industry Canada, *Government of Canada Brings Patent Act into Conformity with Obligations Under the World Trade Organization*, Appendix II (July 12, 2001) .

⁴ *Harvard College v. Canada (Commissioner of Patents)* [2002] S.C.R. 4.

⁵ Patent Act, R.S.C. ch. P-2, s. 19.1 (1985), as amended.

⁶ *Id.* S. 65(2).