

WORLD TRADE ORGANIZATION

RESTRICTED

IP/C/W/125/Add.12

12 March 1999

(99-0994)

**Council for Trade-Related Aspects of
Intellectual Property Rights**

Original: English

REVIEW OF THE PROVISIONS OF ARTICLE 27.3(b)

Information from Members

Addendum

CANADA

The present document represents the information requested by the Council for Trade-Related Aspects of Intellectual Property Rights which the Secretariat has received from Canada by means of a communication from its Permanent Mission, dated 17 February 1999.¹

A. PATENT SYSTEM QUESTIONS

1. *In your territory, is there any basis for denying a patent on an invention consisting of an entire plant or animal that is novel and involves an inventive step?*

Yes. To date, our courts have held that higher life forms (e.g. multi-cellular differentiated organisms) are not patentable subject-matter. This matter is still under appeal before the Federal Court of Appeal.

2. *If the answer to question 1 is yes, please respond to the following questions:*

(a) *Does your patent system exclude entire plants or animals as inventions? If it does, please cite the legal basis for this.*

Yes. To date, our courts have held that entire plants *per se* and animals *per se* are not patentable subject-matter. This matter is still under appeal before the Federal Court of Appeal.

(b) *If your patent system does recognize entire plants and animals as inventions, does it exclude all such inventions from being patentable subject-matter, or does it only exclude certain types of plants or animals? If it excludes all, please cite the legal basis for their exclusion (e.g. lack of industrial applicability). If it excludes only certain types, please identify the categories or characteristics of inventions that are excluded and cite the legal basis for their exclusion.*

Not applicable.

¹ The questions to which answers are provided are those which can be found in document IP/C/W/126.

(c) *Is there any other basis in your law that precludes the grant of a patent on any categories of plant or animal inventions that otherwise are novel, involve an inventive step and are capable of industrial application? If so, please cite the legal basis for that exclusion from patent eligibility.*

No.

3. *Other than with respect to subject-matter you defined as being ineligible to be patented under question (2), is it possible in your territory to obtain a patent claim defined in any of the following ways?*

(a) *A patent claim that is not limited to a specific plant or animal variety.*

Plant and animal varieties are not patentable subject-matter.

(b) *A patent claim that is expressly limited to a plant or animal variety.*

Plant and animal varieties are not patentable subject-matter.

(c) *A patent claim that is expressly limited to a group of plants or animals, where the group is defined through reference to a shared characteristic such as incorporation of a particular gene.*

The particular gene may be patentable, but not the group of plants or animals.

(d) *If the answers you provide to question (3)(a) to (c) vary, please provide the definitions of a "plant variety" and an "animal variety" that are used by your examining authority.*

Not applicable.

4. *Is it possible to obtain a patent in your territory on a microorganism that is novel, involves an inventive step and is capable of industrial application? If not, please identify the legal basis under which these inventions are deemed ineligible to be patented.*

Microorganisms, including cell lines and hybridomas, are patentable.

5. *Is it possible to obtain a patent in your territory on an essentially biological process for the production of a plant or animal (i.e. a process limited to those acts that are necessary for sexual or asexual reproduction of a plant or animal)? If not, please identify the legal basis under which a patent on such a process would be denied.*

Essentially biological processes, such as natural cross breeding processes, are not eligible to be patented.

6. *Is it possible to obtain a patent in your territory covering subject-matter that is identical to that found in nature (e.g. a plant or animal in its natural state)?*

No. Subject-matter identical to that found in nature (e.g. a plant or animal in its natural state) is not patentable.

B. PLANT VARIETY PROTECTION SYSTEMS

7. *Do the laws applicable to your territory provide for a sui generis form of protection for a new plant variety?*

Yes.

8. *If the answer to question 7 is "yes", does that protection conform to the standards defined in one of the Acts of the International Convention for the Protection of New Varieties of Plants (UPOV)?*

Yes.

9. *If the answer to question 8 is "yes", please specify the Act of the UPOV Convention upon which your legislation is based (i.e. the 1991 Act, the 1978 Act or the 1961/1972 Act).*

The 1978 Act.

10. *If sui generis protection for plant varieties is provided in your territory, would any of the following acts require the prior authorization of the right holder:*

(a) *acts performed for research or experimental purposes, or to develop new varieties of plants;*

No.

(b) *acts performed to commercially exploit a variety distinct from the protected variety but sharing its essential characteristics;*

No.

(c) *acts performed by a farmer of harvesting seed from his planting of a protected variety legitimately obtained, storage of that seed, and replanting of that seed on the farmer's land.*

No.

If prior authorization is not required for any of the above examples of activities, is there any requirement that the party undertaking the specified actions provide the right holder with remuneration in any form?

No.

11. *Can protection be obtained for a plant variety that was known to the public, or was publicly available, prior to the application for sui generis protection for that plant variety, and, if so, under what conditions (i.e. what are the time-limits during which public disclosure or availability will not preclude the grant of protection).*

Protection can not be obtained for a variety that has been sold in Canada prior to application, or sold outside of Canada for four (4) years, or six (6) years for woody plants prior to application. The exception to this is for "recently prescribed categories". There is a transitional period, of one year from the date Regulations came into effect, that permits the sale of varieties prior to application. In this case, varieties may have been sold in Canada after August 1, 1990, and sold outside of Canada after August 1, 1984 for woody plants and after August 1, 1986 for all other plants.

12. *Can protection be predicated on identification of an unexpressed gene, on an unexpressed set of genes present in the genome of the plant variety, or on the characteristics of germplasm, rather than the expressed characteristics of plant varieties derived from such genes or germplasm?*

No.
