

HONG KONG
PLANT VARIETIES PROTECTION ORDINANCE

Gazette Number: L.N. 492 of 1997

Version Date: 24/10/1997

An Ordinance to provide for the protection of plant varieties

Section 1: Short Title

PART I

PRELIMINARY

(1) This Ordinance may be cited as the Plant Varieties Protection Ordinance.

(2) (Omitted as spent)

Section 2: Interpretation

Remarks: Amendments retroactively made-see 25 of 1998 s. 2

In this Ordinance, unless the context otherwise requires-

"applicant", in relation to any application, means the person by whom or on whose behalf that application is made;

"application" means-

(a) an application for a grant; and

(b) an application for a declaration under section 31(1)(b);

"court" means the Court of First Instance; (Amended 25 of 1998 s. 2)

"denomination", in relation to any protected variety, or any variety that was a protected variety until the grant made in respect of it expired, means the distinguishing name or identification approved for that variety by the Registrar under section 18(2)(a);

"grant" means a grant of plant variety rights under this Ordinance;

"grantee" means the holder of a grant and, in relation to a protected variety, means the holder of a grant in respect of that variety;

"owner", in relation to any variety, means-

(a) a person who bred or discovered and developed that variety;

(b) an agent of that person;

(c) a successor to that person;

"plant" means-

(a) any multi-cellular vascular organism with a root system;

(b) any algae;

(c) any fungi;

"prescribed" means prescribed or provided for by regulations made under section 42;

"protected variety" means a variety in respect of which a grant is in force;

"publication" means public notification, and includes public notification in the Gazette;

"register" means the Register of Plant Variety Rights maintained under section 8(1);

"Registrar" means the Registrar of Plant Variety Rights;

"reproductive material", in relation to any variety, means any portion of a plant of that variety by means of which plants of that variety may be reproduced or propagated; and means spores and seeds;

"sale" includes any disposition for valuable consideration and any offer for sale, and "sell" and "sold" have corresponding meanings;

"term" means the period that a grant is in force under section 22;

"UPOV country" means a country that is a member State of the International Union for the Protection of New Varieties of Plants, constituted pursuant to the international agreement called the International Convention for the Protection of New Varieties of Plants;

"variety" means a cultivar of a plant to which this Ordinance, by virtue of section 4 and the Schedule, applies, and means any clone, hybrid, stock, or line, of such a plant, but does not mean a botanical variety of such a plant.

Section 3: Binding Effect of Ordinance

This Ordinance binds the Government.

Section 4: Application

(1) This Ordinance applies to the plants listed in the Schedule.

(2) The Secretary for the Environment and Food may, by notice in the Gazette, amend the Schedule. (Amended 78 of 1999 s. 7)

Section 5: Registrar of Plant Variety Rights

PART II

REGISTRAR OF PLANT VARIETY RIGHTS AND REGISTER

(1) The Director of Agriculture, Fisheries and Conservation shall be the Registrar of Plant Variety Rights for the purposes of this Ordinance. (Amended L.N. 331 of 1999)

(2) The Registrar may authorize in writing any public officer to perform or exercise all or any of the functions which are imposed or conferred on him by this Ordinance.

Section 6: Appeals against decisions of the Registrar

Except as otherwise prescribed, an appeal lies to the court, to the extent and in the manner provided in Part IV, against any decision of the Registrar made under this Ordinance.

Section 7: Registrar not liable in respect of official acts

(1) The Registrar shall not be taken to warrant the correctness or validity of the registration of a plant variety right under this Ordinance or under any international agreement, or convention, which has been applied to Hong Kong.

(2) The Registrar is not subject to any liability by reason only of the fact of any examination required or authorized by this Ordinance, or any such international agreement or convention, or any report or other proceedings consequent on such examination.

(3) No proceedings lie against any public officer authorized by the Registrar under section 5(2) in respect of any matter for which, by virtue of this section, the Registrar is not liable.

Section 8: Register to be maintained

- (1) The Registrar shall maintain a register called the Register of Plant Variety Rights.
- (2) There shall be entered in the register-
 - (a) notice of every decision of the Registrar to make or decline to make a grant of a plant variety right;
 - (b) such particulars as may be required to be entered by this Ordinance or as may be prescribed; and
 - (c) any other matters and information relating to plant varieties or plant variety rights whose entry in the register appears to the Registrar to be important or useful.
- (3) The register need not be kept in documentary form but shall be kept in such manner as may be prescribed by manual, mechanical, electronic, optical or other means, and provision shall in particular be prescribed for-
 - (a) public inspection of the register;
 - (b) the supply of certified or uncertified copies, or extracts, of entries in the register; and
 - (c) publication in each year of any matter or information entered in the register, including information as and relating to plant varieties for which a grant has been made and which remains in force for that year.

Section 9: Rectification of the register

- (1) Any person having a sufficient interest may apply to the Registrar for the rectification of an error or omission in the register.
- (2) Except where the Registrar directs otherwise, the effect of rectification of the register is that the error or omission in question shall be deemed never to have been made.
- (3) The Registrar may, on request made in the prescribed manner by the grantee of a registered plant variety right, enter any change in his name or address as recorded in the register.
- (4) The Registrar may remove from the register matter appearing to him to have ceased to have effect.

Section 10: Registration to be prima facie evidence of validity

In any proceedings before the court relating to a registered plant variety right, the registration of a person as grantee of a plant variety right shall be prima facie evidence of the validity of the original registration and of any subsequent assignment or other transmission of it.

Section 11: Certificate of validity of contested registration

- (1) If in proceedings before the court the validity of the registration of a plant variety right is contested and it is found by the court that the plant variety right is validly registered, the court may give a certificate to that effect.
- (2) If the court gives such a certificate and in subsequent proceedings-
 - (a) the validity of the registration is again questioned; and
 - (b) the grantee obtains a final order or judgment in his favour,

he is entitled to his costs as between solicitor and client unless the court directs otherwise.

(3) Subsection (2) does not extend to the costs of an appeal in any such proceedings.

Section 12: Burden of proving use of plant variety right

If in any proceedings before the court to which a grantee or a person authorized by licence or otherwise under section 25(1) is a party of a question arises as to the use to which a registered plant variety right has been put, it is for the grantee or that person to show what use has been made of it.

Section 13: Application for grant

PART III

GRANT OF PLANT VARIETY RIGHTS

(1) Every application shall be in such manner and form as the Registrar may require and shall-

(a) be accompanied by the quantity of reproductive material, if any, prescribed in respect of varieties of the kind concerned;

(b) be completed and signed by or on behalf of the applicant;

(c) nominate an address for service in relation to that application, being an address within Hong Kong; and

(d) be accompanied by the prescribed application fee.

(2) Within the prescribed period after making an application, the applicant shall give to the Registrar-

(a) in such detail as the Registrar requires, a description of-

(i) the origin and breeding of the variety concerned;

(ii) the botanical features of that variety; and

(iii) those aspects of that variety that, in the opinion of that applicant, distinguish it from those other varieties whose existence was a matter of common knowledge at the time of that application; and

(b) the proposed denomination for that variety.

(3) Within the prescribed period after being requested by the Registrar to do so, the applicant shall furnish the Registrar with-

(a) such further reproductive material of the variety concerned as the Registrar may specify;

(b) any other information that the Registrar thinks relevant and requests from that applicant.

(4) An application that complies with subsection (1) at the time it is received at the office of the Registrar shall, for the purposes of this Ordinance, be deemed to be made at that time.

(5) An application that does not comply with subsection (1) at the time it is received at the office of the Registrar shall, for the purposes of this Ordinance, be deemed to be made at the time at which it first complies with that subsection while being held at that office.

(6) If satisfied that an application complies with subsection (1) the Registrar shall-

(a) notify in the Gazette the making of that application; and

(b) advise the applicant accordingly.

(7) The Registrar shall notify in the Gazette every proposed denomination for a variety given to the Registrar by any applicant that, in the opinion of the Registrar, complies with the prescribed requirements.

(8) For the purposes of subsection (2)(a)(iii) and section 18(4)(b), common knowledge of a variety is established if that variety is a variety-

- (a) in respect of which a grant or an application has been made under this Ordinance;
- (b) in respect of which in a UPOV country an equivalent grant or equivalent application has been made;
- (c) which has been precisely described in any publication;
- (d) which appears or has been included in a reference collection; or
- (e) which has been cultivated or marketed for a period exceeding the prescribed period.

Section 14: Objections before grant

(1) Any person who considers that the Registrar should not approve a proposed denomination notified in the Gazette may, within 3 months of its notification in the Gazette under section 13(6)(a), by notice in writing to the Registrar, object to the approval of that denomination.

(2) Any person who considers that an application has been made by or on behalf of an applicant who is not an owner of the variety concerned may, at any time before a grant is made to the applicant in respect of that variety, by notice in writing to the Registrar, object to the making of a grant in respect of that variety to the applicant.

(3) Any person who considers that an application has been made in respect of a variety that is not new, distinct, stable, and homogeneous, as required by section 18(2)(d) may, at any time before a grant is made in respect of that variety, by notice in writing to the Registrar, object to the making of a grant in respect of that variety.

(4) If an objection is made under this section, the Registrar shall not make a grant in respect of the variety concerned before giving the applicant concerned and the objector a reasonable opportunity to be heard.

Section 15: Withdrawal or lapse of applications

(1) Any application may be withdrawn by the applicant at any time before a grant is made in respect of it.

(2) The withdrawal of an application shall not affect the liability of the application for any fees that may have become payable up to the date of that withdrawal.

(3) If any information or material required to be given to the Registrar under section 13(2) or (3) is not supplied within the prescribed period, the application concerned shall lapse upon the expiration of that period.

Section 16: Inspection of applications

After an application is made, the Registrar shall hold it and any document or instrument accompanying it or supplied subsequently pursuant to section 13(2) or (3), or a copy of that document or instrument, certified by the Registrar to be a true copy, available for public inspection during ordinary business hours of the office of the Registrar.

Section 17: Provisional protection

(1) Subject to subsection (2), on and after the day on which an application is made, the applicant shall have the same rights to take proceedings under this Ordinance as if on that day a grant had been made to the applicant in respect of the variety concerned.

(2) The rights conferred by subsection (1) shall be treated as never having been conferred if the-

(a) application concerned is withdrawn or lapses; or

(b) Registrar declines to make a grant in respect of that application.

Section 18: Making grants

(1) The Registrar shall-

(a) subject to section 19, make a grant in respect of every application that is eligible for the making of a grant; and

(b) decline to make a grant in respect of every application that is not eligible for the making of a grant.

(2) An application shall be treated as being eligible for the making of a grant if, and only if, the applicant has given the Registrar all reproductive material of the variety concerned requested by the Registrar, and the Registrar-

(a) has approved for that variety a denomination proposed by the applicant;

(b) is satisfied that that applicant is an owner of that variety;

(c) has received the prescribed fee; and

(d) is satisfied that that variety is new, distinct, stable, and homogeneous.

(3) The Registrar shall approve a proposed denomination for a variety if, and only if, in the opinion of the Registrar, it complies with the prescribed requirements.

(4) For the purposes of subsection (2)(d)-

(a) subject to subsection (6), a variety is new if there has been no sale of that variety with the agreement of any relevant owner of that variety-

(i) in Hong Kong, for more than 12 months before the date on which that application was made; and

(ii) outside Hong Kong, for more than 6 years before that date in the case of trees or vines, or for more than 4 years before that date in every other case;

(b) a variety is distinct if it is clearly distinguishable from any other variety whose existence was a matter of common knowledge when the application concerned was made;

(c) a variety is stable if, in its relevant characteristics, it remains true to its description-

(i) where the applicant concerned has described particular cycles of propagation or reproduction for that variety, at the end of each such cycle; and

(ii) in every other case, after repeated propagation or reproduction;

(d) a variety is homogeneous if all of its plants carry, exhibit or show the same expression of that variety's relevant characteristics, subject to any variation which may be expected having regard to any particular feature of its propagation or reproduction.

(5) In determining, for the purposes of subsection (2)(d), whether or not the Registrar is satisfied that a variety is homogeneous, the Registrar shall have regard to the particular features of its propagation or reproduction, whichever is applicable to it.

(6) Where, to increase the stock of a variety or for tests of a variety, its owner makes arrangements under which-

- (a) reproductive material of that variety is to be sold to or used by some other person;
- (b) any unused portion of that reproductive material, and all the material of any sort produced from that reproductive material, is-
 - (i) to be sold to that owner, by that other person; or
 - (ii) otherwise to become the property of that owner,

then for the purposes of subsection (4)(a), no account shall be taken of any sale under that arrangement of-

- (i) reproductive material of that variety by that owner to that other person; or
- (ii) material of any sort of that variety by that other person to that owner.

(7) For the purposes of subsection (2)(d), a variety does not cease to be new by virtue only of the sale at any time of-

- (a) material that is not reproductive material; or
- (b) reproductive material disposed of for purposes other than reproduction,

that, having been produced during the breeding, increase of stock, tests, or trials, of that variety, is not or no longer required for any of those activities.

(8) For the purposes of subsection (4)(b), the characteristics by which a variety may be distinguished from others may be morphological, physiological, or of any other kind or description, so long as those characteristics are capable of precise description and recognition.

(9) It shall be a condition of a grant made to any person in respect of a variety that the grantee shall-

- (a) pay such annual grant fee; and
 - (b) maintain such stock of reproductive material,
- in relation to that variety as may be prescribed.

Section 19: Varieties bred or discovered and developed by 2 or more persons independently

Subject to section 20, where-

- (a) before a grant is made in respect of a variety, 2 or more applications in respect of that variety have been made;
- (b) the Registrar is satisfied that the 2 or more applicants concerned are persons who, or successors of persons who, bred or discovered and developed that variety independently; and
- (c) the Registrar is satisfied that, but for this section, each of those 2 or more applicants is or would be entitled to a grant in respect of that variety,

the Registrar shall make a grant to that 1 of those 2 or more applicants whose application in respect of that variety was made first.

Section 20: Priority resulting from earlier applications

Where-

(a) any person makes an application for a grant in Hong Kong in respect of a variety in respect of which that person has earlier in a UPOV country made an equivalent application under the law of that country that has been accepted; and

(b) that application for a grant in Hong Kong is made not more than 12 months after that equivalent application or, if more than 1 equivalent application has been made, whether in 1 or in several countries, the earliest of them, was made; and

(c) a claim for priority in relation to that equivalent application accompanies the application for a grant in Hong Kong; and

(d) within 3 months of the making of that application for a grant in Hong Kong, a copy of any documents constituting that equivalent application, certified as correct by the authority to which it was made, is submitted to the Registrar,

sections 18(4)(b) and 19 shall apply to that application for a grant in Hong Kong as if it had been made when that equivalent application was accepted.

Section 21: Cancellation of grants because of earlier applications

Where-

(a) after a grant is made to any person in respect of a variety, another person makes an application in respect of that variety;

(b) the Registrar is satisfied that, if that grant had not already been made, that other person would, by virtue of section 20, be entitled to a grant in respect of that application,

the Registrar shall cancel that grant, and shall make a new grant to the person who would be entitled to it as if the cancelled grant had never been made.

Section 22: Duration of grant

(1) The Registrar shall endorse every grant with the date of its making.

(2) Subject to section 24 (cancellation of grants), every grant shall be in force for a term, commencing on the day it is made-

(a) in the case of any prescribed species, of 25 years, or any longer prescribed period; and

(b) of 20 years in every other case.

(3) The Registrar shall record in the register the date and other prescribed particulars, if any, of every grant.

Section 23: Objections after grant

(1) Any person who considers that a grant has been made in respect of a variety that is not new, distinct, stable, and homogeneous as required by section 18 may at any time, by notice in writing to the Registrar, object to the continuation in force of that grant.

(2) Any person who considers that a grant was made to a person who was not an owner of that variety may, by notice in writing to the Registrar, object to the continuation in force of that grant.

(3) An objection under subsection (2) may be accompanied by an application in respect of the variety concerned.

Section 24: Cancellation of grants

(1) The Registrar may cancel a grant at any time during its term if so requested in writing by the grantee.

(2) Subject to subsection (3), the Registrar shall cancel a grant at any time during its term if satisfied that-

(a) any information supplied in the application concerned or in relation to that application was incorrect and that if the correct information had been known before that grant was made, the Registrar would have declined to make that grant;

(b) the variety concerned was not, at the time of the application concerned, new and distinct within the meaning of section 18;

(c) that variety is not stable and homogeneous within the meaning of section 18;

(d) the grantee was not, at the time that grant was made, an owner of that variety;

(e) the grantee of that variety, after being requested by the Registrar to provide the Registrar within a period specified by the Registrar with reproductive material capable of producing that variety with its characteristics as described when the grant was made, has failed to do so;

(f) that grantee, after being requested by the Registrar to allow the Registrar within a period specified by the Registrar to inspect the measures taken for the maintenance of that variety, or to provide documents or information in relation to that variety, has failed to do so;

(g) in any particular year any annual grant fee in relation to the variety concerned which is required to be paid as prescribed, has not been paid;

(h) any stock of reproductive material in relation to the variety concerned which is required to be maintained as prescribed, has not been maintained; or

(i) that grantee has failed to comply with any permission or order granted under section 29(2) in relation to that variety.

(3) Before cancelling a grant under subsection (2), the Registrar shall give the grantee written notice of intention to do so and, unless that grantee shows sufficient cause within 28 days of the date of the notice why that grant should not be cancelled, shall cancel that grant on the expiration of that period.

(4) Where-

(a) the Registrar has cancelled a grant under subsection (2)(d); and

(b) any application, other than the application in respect of which that grant was made, has at any time, whether before or after the making of that grant, been made in respect of the variety concerned,

the Registrar shall deal with all applications in respect of that variety as if that grant had never been made.

Section 25: Rights of grantees

(1) Subject to section 27, a grantee shall have the exclusive right-

(a) to produce for sale, and to offer for sale or sell, reproductive material of the variety concerned;

- (b) to import or export reproductive material of the variety concerned;
 - (c) if that variety is a plant of a type prescribed for the purposes of this section, to propagate that variety for the purposes of the commercial production of fruit or flowers of that variety;
 - (d) subject to any terms and conditions that grantee may specify, to authorize, by licence or otherwise, any other person or persons to do any of the things described in paragraph (a), (b) or (c).
- (2) The rights of a grantee under a grant are proprietary rights, and their infringement shall be actionable accordingly; and in awarding damages, including any exemplary damages, or granting any other relief, a court shall take into consideration-
- (a) any loss suffered or likely to be suffered by that grantee as a result of that infringement; and
 - (b) any profits or other benefits derived by any other person from that infringement; and
 - (c) the flagrancy of that infringement.
- (3) Where there is imported into Hong Kong any reproductive material of a protected variety, any propagation, sale, or use, of that material-
- (a) as reproductive material; and
 - (b) without the authority of the grantee concerned,
- constitutes an infringement of the rights of that grantee under this section.
- (4) The importation into Hong Kong-
- (a) from a country that is not a UPOV country of harvested material of a protected variety; or
 - (b) from a UPOV country of harvested material of a protected variety in respect of which, under the law of that country, it is not possible to make the equivalent of a grant,
- without the consent of the grantee is an infringement of the grantee's rights under this Ordinance.
- (5) The sale under the denomination of a protected variety of reproductive material of some other variety constitutes an infringement of the rights under this section of the grantee of that protected variety, unless the groups of plants to which those varieties belong are internationally recognized as being distinct for the purposes of denomination.
- (6) Where, in any proceedings under this section for the infringement of the rights of a grantee, it is proved or admitted that an infringement was committed but proved by the defendant that, at the time of that infringement, the defendant was not aware and had no reasonable grounds for supposing that it was an infringement, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of that infringement, but shall be entitled instead to an account of profits in respect of that infringement.
- (7) Nothing in subsection (6) affects any entitlement of a grantee to any relief in respect of the infringement of that grantee's rights under this Ordinance other than damages.

Section 26: Exceptions to grantee's rights

Notwithstanding section 25 it shall not be an infringement of the rights of a grantee for any person-

(a) to use reproductive material from a protected variety for human consumption or other non-reproductive purposes;

(b) to use, propagate or grow a protected variety for-

(i) non-commercial purposes;

(ii) experimental or research purposes; or

(iii) the purposes of breeding a new variety; or

(c) engaged in farming activities for the purpose of safeguarding agricultural or horticultural production, to use for reproductive purposes on his own holding, reproductive material from a protected variety where the type within which the protected variety is classified has been prescribed for the purposes of this section as exempt from the rights of a grantee and where such reproductive material-

(i) has been legitimately obtained by purchase or otherwise with the authority of the grantee concerned; or

(ii) having been so legitimately obtained has subsequently been propagated or grown on his own holding.

Section 27: Rights under licence

Where a person has been authorized by licence or otherwise under section 25(1)(d) that person so authorized shall have the same rights as that grantee to take proceedings in respect of any infringement of the rights of that grantee in respect of the variety concerned affecting the rights given under that licence and committed after it was granted.

Section 28: Notice of protection

(1) Any person who-

(a) has acquired rights in respect of a variety under section 17(1) or 25; and

(b) sells any reproductive material of that variety,

shall take all reasonable steps, by means of suitable labelling or other identification of that material, to inform the purchaser concerned of those rights.

(2) In determining, for the purposes of section 25(6), whether or not any person had reasonable grounds for supposing that any action was an infringement of the rights of a grantee, a court may take into account the extent, if any, to which that grantee or, as the case requires, the licensee concerned had complied with subsection (1) in respect of any material in respect of which, or in respect of material propagated from which, that infringement occurred.

Section 29: Use of reproductive material with permission of Registrar etc.

(1) Any person may at any time after the making of a grant, on payment of the prescribed fee request the Registrar to consider whether or not reasonable quantities of reproductive material of a reasonable quality of the variety concerned are available for purchase by members of the public at a reasonable price.

(2) Where a request is made under subsection (1), the Registrar shall give the grantee concerned notice of it and a reasonable opportunity to be heard in relation to it, and if, after considering any submissions made to the Registrar by that grantee within that time, the Registrar is satisfied there are not available for purchase by members of the public at a reasonable price reasonable quantities of reproductive material of reasonable quality of the

variety concerned, the Registrar shall grant to the person who made that request one or both of the following-

(a) permission for the reproduction and sale of reproductive material by that person of that variety;

(b) an order requiring that grantee to sell to that person reproductive material of that variety.

(3) In considering whether or not there are available to members of the public at a reasonable price reasonable quantities of reproductive material of reasonable quality of a variety, the Registrar shall not take into account any reproductive material that is available only subject to the condition that all or any of the produce from that material must be sold or offered to a specified person, or to 1 of a specified group of persons, or to a member of a specified class or description of person.

(4) Any permission or order granted under subsection (2) shall be in writing.

(5) When granting any permission or order under subsection (2), the Registrar shall specify a royalty or payment or a means of calculating a royalty or payment, payable by the person to whom that permission is granted or by the purchaser concerned to the grantee concerned, being, in the opinion of the Registrar, a royalty or payment that is, or a means that will produce a royalty or payment that is, in all the circumstances, equitable, and-

(a) it shall be a condition of that grant of permission or order that the person to whom that permission is granted or purchaser shall pay to that grantee that royalty or payment or a royalty or payment so calculated, as the case requires; and

(b) that grant of permission or order shall be subject to any other terms and conditions the Registrar thinks fit.

(6) Any permission or order granted under subsection (2) shall have effect according to its tenor as if it were a contract voluntarily entered into by the grantee and the other person concerned.

(7) Subject to this Ordinance, the Registrar may at any time-

(a) on the application of any person; and

(b) if the Registrar thinks it appropriate,

limit, vary, extend, or revoke, any permission or order granted under subsection (2).

(8) As soon as is possible after granting any permission or order under subsection (2), or limiting, varying, extending, or revoking, any such permission or order, the Registrar shall notify in the Gazette brief details of the action taken.

Section 30: Use of denomination

Any person who sells reproductive material of-

(a) a protected variety; or

(b) a variety that was a protected variety until the grant made in respect of it expired,

shall use its denomination, and shall not associate any trade mark, trade name, or other similar indication with that denomination unless that denomination is clearly recognizable.

Section 31: Extension of grant of plant variety rights to cover essentially derived varieties

(1) Where-

(a) after a grant is made to any person in respect of a variety (the "initial variety") and is made to another person in respect of another variety; and

(b) the Registrar, on the application of the first-mentioned person, by notice in writing declares that the other variety is an essentially derived variety from the initial variety,

the rights granted in respect of the initial variety mentioned in section 25 (rights of grantees) shall apply, with effect from the date of the notice in writing, to that other variety.

(2) An application made under subsection (1) shall be accompanied by the prescribed application fee and treated as if it were an application made under section 13 (application for grant) and Part III (grant of plant variety rights) shall be read with such modifications as may be necessary to make the same applicable to the circumstances of an application made under subsection (1).

(3) For the purposes of this section a variety shall be treated as being an essentially derived variety of another variety if-

(a) it is predominantly derived from that other variety;

(b) it retains the relevant characteristics that result from the genotype or combination of genotypes of that other variety;

(c) it is clearly distinguishable from that other variety; and

(d) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the relevant characteristics that result from the genotype or combination of genotypes of that other variety.

Section 32: Rights of appeal

PART IV

APPEALS

(1) Any person aggrieved by a decision of the Registrar made in respect of him to decline to make a grant under section 18 may, within 28 days after being given notice of that decision by the Registrar, appeal to the court against that decision.

(2) Any person aggrieved by the making of a grant may, at any time, appeal to the court against the making of that grant upon the ground that that grant was made in contravention of this Ordinance.

(3) Where the Registrar cancels a grant under section 21, the grantee may, within 28 days after being given notice of the cancellation by the Registrar, appeal to the court against that cancellation on the ground that it has not been established that, if that grant had not already been made, some other person making an application in respect of the variety concerned would, by virtue of section 20, be entitled to a grant in respect of that application.

(4) Any person aggrieved by any decision of the Registrar made in respect of him, not being a decision referred to in any of subsections (1) to (3)-

(a) relating to an application or the cancellation of a grant;

(b) imposing any condition in respect of a grant;

(c) declining to modify any aspect of a grant; or

(d) refusing to grant any permission or order under section 29(2),

may, within 28 days after being given notice of that decision by the Registrar, appeal to the court against that decision.

(5) The owner of a protected variety may, at any time, appeal to the court against any decision of the Registrar to grant any permission or order under section 29(2) in respect of that variety, or to extend or vary any such grant of permission or order.

(6) The person to whom any permission or order was granted under section 29(2) may, at any time, appeal to the court against any decision of the Registrar to limit, vary, or revoke that grant of permission or order, or to issue it subject to any terms or conditions.

Section 33: Right to appeal in person

(1) Notwithstanding any rule of law to the contrary, an appellant may begin and carry on an appeal in the court under this Part by a solicitor or in person.

(2) A person, being a body corporate, may begin and carry on an appeal in the court otherwise than by a solicitor by an officer or a director of the body corporate authorized in that behalf by a resolution of the board or committee of the body corporate.

Section 34: Filing and notice of appeals

Remarks: Amendments retroactively made-see 25 of 1998 s. 2

(1) Every appeal to the court under section 32 shall be made by-

(a) filing a notice of appeal in the prescribed form at the office of the Registrar of the High Court; and

(b) serving a copy of that notice of appeal on the Registrar.

(2) Where an appeal is begun or carried on by a person being a body corporate, by an officer or a director of the body corporate authorized in that behalf, a copy of the resolution referred to in section 33(2) shall be filed at the office of the Registrar of the High Court.

(Amended 25 of 1998 s. 2)

Section 35: Advice to court as to technical or specialised matters

(1) If a court is satisfied whether or not on the application of any party to that appeal that any appeal under section 32 involves the consideration of technical or specialised matters, and that it would be desirable for a person with expert knowledge of those matters to be an s

(a) the court shall consult the parties to the appeal as to a suitable person to be an adviser in relation to the appeal;

(b) if the court and those parties agree on a suitable person, the court shall appoint that person to be an adviser in relation to that appeal;

(c) if the court and those parties do not agree on a suitable person, the court may appoint to be an adviser in relation to that appeal any person the court thinks suitable; and

(d) an adviser appointed under this subsection shall sit with the court during the appeal, but shall have no power of decision in relation to the appeal.

(2) A court may appoint 1 or more adviser under subsection (1) in respect of a single appeal if satisfied that the nature of the technical or specialised matters concerned so warrants.

(3) No appointment of an adviser under subsection (1) shall, in any proceedings, be called into question on the grounds that the occasion for that appointment had not arisen or had ceased.

- (4) Every adviser appointed under subsection (1) is entitled to receive such-
- (a) remuneration by way of fees or allowances, for his services as an adviser; and
 - (b) payment of travelling allowances or expenses in respect of time spent travelling in connection with undertaking services,
- as may be prescribed and any such remuneration or payment shall be charged on the general revenue.
- (5) Subject to subsection (6) a court, after hearing an appeal under section 32, may-
- (a) confirm the decision appealed against; or
 - (b) modify or reverse that decision or any part of it.
- (6) Nothing in subsection (5) authorizes a court to review any decision of the Registrar, or any part of a decision of the Registrar, if no appeal has been made against that decision or part.

Section 36: Procedure on appeal

Expanded Cross Reference: 33, 34, 35

Remarks: Amendments retroactively made-see 25 of 1998 s. 2

In dealing with an appeal under this Part-

- (a) a court may hear all evidence tendered and representations made by or on behalf of any party to that appeal that that court considers relevant to that appeal, whether or not that evidence would be otherwise admissible in that court;
- (b) subject to section 33 to 35 and to paragraph (a), the Rules of the High Court (Cap 4 sub. leg.) shall apply to that appeal; and < * Note - Exp. X-Ref.: Sections 33, 34, 35 * > (Amended 25 of 1998 s. 2)
- (c) except as provided in this Part, a court shall determine its own procedure in relation to the determination of that appeal.

Section 37: Suspension of decision while appeal pending

Where any person has appealed against any decision of the Registrar, the operation of that decision shall be suspended until the appeal concerned has been finally disposed of.

Section 38: Falsification of applications

PART V

OFFENCES

- (1) Any person who, in an application or in an attachment to an application, furnishes or supplies with intent to deceive any false or misleading information commits an offence.
- (2) Any person who falsely represents that any person is the owner of a protected variety or that any person has applied for a grant in respect of any variety knowing or having reason to believe that the representation is false, commits an offence.
- (3) Any person who commits an offence under this section is liable on conviction to a fine at level 6.

Section 39: Falsely representing plant variety right as registered

Any person-

- (a) who falsely represents that a plant variety right is a registered plant variety right;
 - (b) selling material of a variety who falsely represents that-
 - (i) that variety is a protected variety or a variety in respect of which an application has been made; or
 - (ii) that variety is material of some other variety being a variety that is a protected variety or a variety in respect of which an application has been made,
- knowing or having reason to believe that the representation is false commits an offence and is liable on conviction to a fine at level 6.

Section 40: Misuse of denomination on sale of reproductive material

Any person who wilfully or negligently sells reproductive material otherwise than in compliance with the requirements of section 30 commits an offence and is liable on conviction to a fine at level 6.

Section 41: Hours of business and business days

PART VI

MISCELLANEOUS

(1) The Registrar may give directions in writing specifying the hours of business of his office for the purpose of the transaction by the public of business under this Ordinance and the days which are business days for that purpose.

(2) Business done on any day after the specified hours of business, or on a day which is not a business day, shall be deemed to have been done on the next business day; and where the time for doing anything under this Ordinance expires on a day which is not a business day, that time shall be extended to the next business day.

Section 42: Regulations

(1) The Secretary for the Environment and Food may make regulations- (Amended 78 of 1999 s. 7)

- (a) for the purposes of this Ordinance authorizing the making of regulations with respect to any matter;
- (b) for prescribing anything authorized or required by this Ordinance to be prescribed; and
- (c) generally for regulating practice and procedure under this Ordinance.

(2) Without affecting the generality of subsection (1), regulations made under this section may make provision-

- (a) as to the manner of filing of applications and other documents and in respect of anything that is to accompany or be furnished together with any application;
- (b) as to the procedure to be followed in connection with any application or request to the Registrar or in connection with any proceedings before the Registrar, and authorizing the rectification of irregularities of procedure;
- (c) providing for the testing and treatment of plant varieties to which applications relate;
- (d) requiring and regulating the translation of documents and the filing and authentication of any translation;
- (e) as to the service of documents;

- (f) prescribing time limits for anything required to be done under this Ordinance;
 - (g) providing for the extension of any time limit so prescribed, or specified by the Registrar, whether or not it has already expired;
 - (h) providing for the forfeiture of any priority given in respect of an application;
 - (i) prescribing a form for appeals under Part IV;
 - (j) authorizing the preparation, publication, sale, and exchange of copies of diagrams, photographs, and documents at the office of the Registrar, and of indexes to and abridgments to them;
 - (k) prescribing the mode of publishing any matters required by this Ordinance to be published;
 - (l) prescribing the requirements to be met in selecting the denomination of varieties, and providing for the approval, rejection, or amendment of any denomination by the Registrar;
 - (m) prescribing fees and charges for anything authorized by this Ordinance.
- (3) No allowance, expense, fee or charge shall be prescribed under this section without the consent of the Financial Secretary.

SCHEDULE

[sections 2 & 4]

PLANTS TO WHICH ORDINANCE APPLIES

All plants other than-

- (a) Inedible Algae;
- (b) Inedible Fungi.