

# PROTECTION OF NEW PLANT VARIETIES BILL, 2013

## Arrangement of Sections

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### Section

<b>PART I–PRELIMINARY</b>	<b>4</b>
1. Short title and commencement.....	4
2. Interpretation.....	4
3. Application of Act.....	5
4. Register.....	6
<b>PART II–BREEDERS’ RIGHTS</b>	<b>6</b>
5. Criteria for protection.....	6
6. Novelty.....	6
7. Distinctiveness.....	7
8. Homogeneity.....	7
9. Stability.....	7
<b>PART III–ENTITLEMENT TO PROTECTION</b>	<b>8</b>
10. Right to apply for protection.....	8
11. Presumption of title.....	8
12. Application by person other than owner.....	8
13. Persons entitled to file applications.....	8
14. Agents.....	9
<b>PART IV–ASSIGNMENT AND TRANSFER OF THE APPLICATION OR OF THE BREEDERS RIGHT</b>	<b>9</b>
15. Assignment and transfer.....	9
16. Joint applicants and joints holders of rights.....	9
<b>PART V–SCOPE AND DURATION OF BREEDER’S RIGHTS</b>	<b>10</b>
17. Scope of breeder's right.....	10
18. Exceptions to breeder's right.....	11
19. Exhaustion of breeder's rights.....	11
20. Maintenance of propagating material.....	12
21. Period of protection.....	12
22. Renewal fees.....	12

<b>PART VI–TERMINATION, INVALIDATION AND FORFEITURE</b>	<b>13</b>
23. Termination of protection.....	13
24. Invalidation.....	13
25. Forfeiture.....	13
<b>PART VII–PROCEDURE IN CASES OF REQUESTS FOR INVALIDATION AND FORFEITURE</b>	<b>14</b>
26. Procedure in cases of requests for invalidation.....	14
27. Procedure for forfeiture of breeder's right.....	14
<b>PART VIII–APPLICATIONS</b>	<b>15</b>
28. Application.....	15
29. Priority.....	15
30. Documents and materials to be furnished for priority.....	16
31. Where application is not in English.....	16
<b>PART IX–VARIETY DENOMINATION</b>	<b>16</b>
32. Application and procedure for variety denomination.....	16
33. Use of the variety denomination.....	18
34. Prior rights.....	18
35. Cancellation of a registered variety denomination.....	18
36. Filing date.....	19
<b>PART X–EXAMINATION OF THE APPLICATION</b>	<b>19</b>
37. Formal examination of application.....	19
38. Examination of novelty, distinctiveness, etc.....	19
39. Grant and refusal of breeder's right.....	20
40. Provisional protection.....	21
<b>PART XI–OPPOSITION</b>	<b>21</b>
41. Opposition.....	21
<b>PART XII–RULES ON PROCEEDINGS BEFORE THE OFFICE</b>	<b>22</b>
42. Proceedings before the Office.....	22
<b>PART XIII–APPEALS AND ENFORCEMENT PROCEEDINGS</b>	<b>23</b>
43. Appeals.....	23
44. Civil proceedings.....	23
45. Criminal liability for non-compliance or misuse of variety denomination.....	24
<b>PART XIV–LICENCES AND LEGAL PROCEEDINGS BY LICENSEE</b>	<b>24</b>
46. Licence contracts.....	24
47. Licensor may grant further licences.....	24
48. Assignment of licences.....	24

49.	Licences of right.....	24
50.	Compulsory licences.....	25
51.	Legal proceedings by licensee.....	26

**PART XV–GENERAL PROVISIONS** **26**

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**OBJECTS AND REASONS** **27**

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# PROTECTION OF NEW PLANT VARIETIES BILL, 2013

## A BILL FOR AN ACT TO PROVIDE FOR THE PROTECTION OF NEW VARIETIES OF PLANTS AND FOR CONNECTED PURPOSES

Enacted by the Parliament of The Bahamas

### PART I—PRELIMINARY

#### 1. Short title and commencement.

- (1) This Act may be cited as the Protection of New Plant Varieties Act, 2013.
- (2) This Act shall come into operation on such day as the Minister may, by notice published in the Gazette, appoint.

#### 2. Interpretation.

In this Act —

“**Agent**” means a counsel and attorney who is resident in, and practising in The Bahamas in accordance with section 2 of the Legal Professions Act (*Ch. 64*).

“**Authority of a Contracting Party**” means the Authority entrusted with the implementation of the law on the protection of new varieties of plants for that Party;

“**breeder**” means the person who has bred or discovered and developed a variety;

“**Contracting Party**” means a State other than The Bahamas or an intergovernmental organisation party to the 2 December, 1961 Act

of the International Convention for the Protection of New Varieties of Plants as amended;

“**Convention**” means the International Convention for the Protection of New Varieties of Plants of 1978;

“**Court**” means the Supreme Court;

“**holder**” means the holder of a breeder’s right;

“**Intellectual Property Office**” means the Intellectual Property Office referred to in section 3 of the Patents Act;

“**Minister**” means the Minister responsible for the administration of this Act;

“**Office**” means the Intellectual Property Office;

“**periodical**” includes the Gazette, daily newspapers circulating in The Bahamas or other publication issued by the Office;

“**propagating material**” means any material or plant, or any part of the plant, used for multiplication or reproduction;

“**protected variety**” means any variety that is the subject of a breeder’s right;

“**Register**” means the Register of Breeder’s Rights in which the matters specified in section 3 are required to be recorded;

“**Registrar**” means the Registrar of the Intellectual Property Office and any reference to the Registrar shall be construed as including a reference to any officer discharging the functions of the Registrar;

“**Union**” means the State parties to the International Convention for the Protection of New Varieties of Plants, made December 2, 1961;

“**variety**” means a Plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, can be —

- (a) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;
- (b) distinguished from any other plant grouping by the expression of at least one of the said characteristics; and
- (c) considered as a unit with regard to its suitability for being propagated unchanged.

### **3. Application of Act.**

Protection shall be accorded to plant breeders' rights as further provided in this Act.

#### **4. Register.**

- (1) The Registrar shall maintain a Register in which the following shall be entered —
  - (a) any grant of a breeder's right;
  - (b) any change in the holder of that right;
  - (c) any invalidation or forfeiture of the right;
  - (d) any submission, registration, change or cancellation of the variety denomination;
  - (e) any licence of right or compulsory licence granted, with an indication of the conditions of such licences; and
  - (f) the conclusion of any licence contract at the request of one of the parties to such contract.
- (2) A person who has paid the prescribed fee shall be entitled, during normal business hours, to examine the Register and to make copies of or extracts from the information contained therein.

## **PART II—BREEDERS' RIGHTS**

#### **5. Criteria for protection.**

Subject to this section and any other formal requirements of this Act, a right to be known as a breeder's right shall be granted in respect of plant varieties of those genera or species specified in the Regulations where the variety is —

- (a) new;
- (b) distinct;
- (c) homogenous;
- (d) stable; and
- (e) given a variety denomination which is acceptable for registration in accordance with section 32.

#### **6. Novelty.**

- (1) Subject to subsection (2), a variety shall be new if the propagating or harvested material of the variety has not been sold or otherwise disposed of to others with the authorisation of the plant breeder or his successor in title —
  - (a) in The Bahamas, for longer than one year before the date on which protection is applied for under this Act; and

- (b) outside The Bahamas, for longer than six years in the case of trees or vines or longer than four years in the case of other plants, before the effective filing date in The Bahamas.
- (2) It shall not be considered detrimental to the novelty of a variety if the propagating or harvested material of that variety has been sold or otherwise disposed of to others in The Bahamas with the authorisation of its breeder or his successor in title for up to four years prior to the inclusion of the genus or species to which the variety belongs in the list of genera and species specified in the Regulations, and for a maximum of six months after such inclusion where the application is filed within that six month period.

## **7. Distinctiveness.**

- (1) A variety shall be considered to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application or where relevant, at the priority date.
- (2) Common knowledge may also be established by reference to various factors such as the exploitation of the variety already in progress, grant of a breeder's right in the variety, entry of the variety in a catalogue of varieties admitted to trade or entry in the register of varieties kept by a recognised professional association, or inclusion of the variety in a reference collection.
- (3) The filing, in any State, of an application for a breeder's right, or for entry in a catalogue of varieties admitted to trade, shall be deemed to render the variety the subject of the application a matter of common knowledge from the date of the application, provided that the application leads to the grant of the breeder's right or the entry in the catalogue, as the case may be.

## **8. Homogeneity.**

A variety shall be considered to be homogenous if its plant shows the same expression of the same characteristics, subject to the variation which may be expected in view of the particular features of its propagation.

## **9. Stability.**

A variety shall be considered to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

## **PART III—ENTITLEMENT TO PROTECTION**

### **10. Right to apply for protection.**

- (1) Subject to this Part, the breeder of a variety or his successor in title shall be entitled to apply for protection under this Act.
- (2) The breeder or his successor in title may be a natural or a legal person.
- (3) Where two or more persons have bred, or discovered and developed, a variety jointly, the right to protection shall vest in them jointly, and subject to any agreement to the contrary between the joint breeders, their shares in the property of the breeder's rights shall be equal.
- (4) Where a variety has been bred, or discovered and developed by several persons independently of each other, the right to apply for the grant of the breeder's right shall belong to the person who has first applied for protection or filed an application with an earlier priority date at the Office.
- (5) Where a variety has been bred or discovered and developed in execution of a commission or a contract of employment, the right to apply for protection shall belong, in the absence of contractual provisions to the contrary, to the person who commissioned the work or to the employer.

### **11. Presumption of title.**

The applicant shall, in the absence of proof to the contrary, be presumed to be entitled to protection under this Act, but where the application is made by a successor in title it shall be accompanied by sufficient proof of the successor's title.

### **12. Application by person other than owner.**

- (1) Where an application is filed for a breeder's right by a person who is not entitled to protection, the person entitled may bring an action before the Court for the assignment to him of the application or if the application is already granted, of the breeder's right.
- (2) No action shall be commenced after five years of the publication of the grant of the breeder's right.

### **13. Persons entitled to file applications.**

- (1) An application for the grant of a breeder's right may be filed by the owner of a variety who is a national or resident of —
  - (a) The Bahamas;
  - (b) a Contracting Party;



- (c) any State which, not being a Contracting Party, grants reciprocity of treatment to The Bahamas; or
  - (d) nationals of countries outside the Union who are domiciled or who have real and effective industrial or commercial establishments in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union.
- (2) For the purposes of subsection (1)(b), “national” means, where the Contracting Party is a State, a national of that State, and where the Contracting Party is an intergovernmental organisation, the nationals of the States that are members of that organisation.

**14. Agents.**

- (1) An applicant whose ordinary residence or principal place of business is outside The Bahamas shall be represented by an Agent.
- (2) Such applicant shall give the Agent power to act on his behalf before the Office and in legal proceedings relating to the protection of new varieties of plants, by executing a power of attorney appointing the Agent.
- (3) For the purposes of instituting legal proceedings by or against any applicant represented by an Agent, the place which the Office identifies as the address of the Agent, or where there are several Agents, the address of the main Agent, or Agent first designated, shall be deemed to be the place where the right in the variety is located.

## **PART IV—ASSIGNMENT AND TRANSFER OF THE APPLICATION OR OF THE BREEDERS RIGHT**

**15. Assignment and transfer.**

- (1) An application for the grant of a breeder’s right may be assigned or otherwise transferred.
- (2) The assignment or transfer shall be in writing and shall be signed by the parties.
- (3) An assignment or transfer shall be registered in the Register on the written request of the assignor or transferor and on payment of the prescribed fee.
- (4) No assignment or transfer to a successor in title shall have effect against a third party unless it has been registered.

**16. Joint applicants and joint holders of rights.**

- (1) Where there are two or more applicants for the grant of a breeder’s right or where there are two or more holders of such a right in any protected

variety, in the absence of any agreement to the contrary, each applicant or holder may separately transfer his shares, or exploit the variety as the case may be, or subject to this Act, exclude others from exploiting it.

- (2) In the case of the grant of an exclusive licence however, the holders of the breeder's licence may only jointly grant an exclusive licence to a third party to exploit the variety.

## **PART V—SCOPE AND DURATION OF BREEDER'S RIGHTS**

### **17. Scope of breeder's right.**

- (1) Subject to sections 18 and 19, the following acts in respect of the propagating material of a protected variety shall require the authorisation of the holder of the breeder's right granted in respect of the variety –
  - (a) production or reproduction (multiplication);
  - (b) conditioning for the purpose of propagation;
  - (c) offering for sale;
  - (d) selling or other marketing;
  - (e) exporting;
  - (f) importing; and
  - (g) stocking for any of the purposes referred to in paragraphs (a) to (f), and the holder may make his authorisation subject to conditions and limitations.
- (2) Subject to sections 18 and 19, the acts referred to in paragraphs (a) to (g) of subsection (1) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorised use of the propagating material of the protected variety shall require the authorisation of the holder.
- (3) The provisions of subsections (1) and (2) shall also apply in relation to varieties –
  - (a) which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;
  - (b) which are not clearly distinguishable in accordance with section 7 from the protected variety; and
  - (c) whose production requires the repeated use of the protected variety.
- (4) For the purposes of subsection (3)(a), a variety shall be deemed to be essentially derived from another variety (“the initial variety”) where —

- (a) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotypes of the initial variety;
  - (b) it is clearly distinguishable from the initial variety; and
  - (c) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.
- (5) For greater certainty, breeder's rights extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers.

#### **18. Exceptions to breeder's right.**

- (1) The breeder's right shall not extend to —
- (a) acts done privately and for non-commercial purposes;
  - (b) acts done for experimental purposes; and
  - (c) acts done for the purpose of breeding other varieties, and, acts referred to in section 17(1) and (2) in respect of such other varieties.
- (2) The Minister may by regulations, within reasonable limits and subject to the safeguarding of the legitimate interest of the holders of breeder's rights, restrict the breeder's right in relation to the varieties of any specified plant genera or species in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by subsection (3)(a) or (b) of section 17.

#### **19. Exhaustion of breeder's rights.**

- (1) A breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of subsections (3) and (4) of section 17, which has been sold or otherwise marketed by the breeder or with his consent in The Bahamas, or any material derived from the said material unless such acts —
- (a) involve further propagation of the variety in question; or
  - (b) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

- (2) For the purposes of subsection (1), “material” means, in relation to a variety —
  - (a) propagating material of any kind; and
  - (b) harvested material, including entire plants and parts of plants.

## **20. Maintenance of propagating material.**

- (1) The holder of a breeder’s right shall, throughout the period for which the right is exercisable, be under an obligation to provide the Registrar in accordance with subsection 28(3) with propagating material capable of producing plants which correspond to the characteristics defined for the variety when the right was granted.
- (2) The holder of a breeder’s right shall also provide the Registrar with all such information and assistance as the Registrar may request for the purpose of ensuring that the holder of the breeder’s right is fulfilling his obligations under subsection (1), including facilities for the inspection by or on behalf of the Registrar of the measures taken for the maintenance of the variety.

## **21. Period of protection.**

- (1) Subject to subsection (2), the breeder’s right in respect of vines, forest trees, fruit trees and ornamental trees including in each case, their rootstocks, shall expire twenty five years after the grant thereof.
- (2) Protection for all other genera or species shall expire twenty years after the grant thereof.
- (3) Where in the cases referred to in subsection (2) of section 6, a variety has already been offered for sale or marketed in The Bahamas for a period of more than one year before the date of the filing of the application, the duration of the protection shall be reduced by the number of full years minus one year that have elapsed since the beginning of the offering for sale or the marketing, with the authorisation of the breeder or his successor in title, before the filing of the application.

## **22. Renewal fees.**

The holder shall, every year during the period of protection, pay the Registrar the annual renewal fee prescribed, which fee shall fall due at the beginning of the calendar year to which it relates, and shall be payable by January 31 of each such calendar year.

## **PART VI—TERMINATION, INVALIDATION AND FORFEITURE**

### **23. Termination of protection.**

- (1) The breeder's right shall terminate before the term expires where the holder of that right renounces it by written declaration addressed to the Registrar.
- (2) The date of termination shall be that specified in the declaration or if none is specified the date on which the declaration is received by the Registrar.

### **24. Invalidation.**

- (1) The Registrar shall invalidate a breeder's right at the request of any interested person where it is established that —
  - (a) the variety is not new or distinct within the meaning of, and on applicable dates referred to in, sections 6 and 7; or
  - (b) the holder of the right is not the owner of the variety.
- (2) Where the fee prescribed in accordance with subsection (1) of section 26 is not paid within three months of the request being filed, the request shall be deemed never to have been filed.

### **25. Forfeiture.**

- (1) The Registrar shall declare the breeder's right to be forfeited where the holder of the right —
  - (a) is no longer in a position to provide the Registrar, if he requests it, with the propagating material capable of producing plants which correspond to the characteristics defined for the variety when the right was granted;
  - (b) does not fulfil his obligation under subsection (2) of section 20; and
  - (c) does not pay the renewal fee, within three months after the date on which the renewal fee becomes due, unless the holder can demonstrate to the satisfaction of the Registrar, a valid and sufficient reason for non-payment.
- (2) A licence agreement made under this Act shall become ineffective if the breeder's right under which it was granted is invalidated or forfeited, save however that no payment of any royalty which was due before the date of invalidation or forfeiture can be demanded by the licensee in view of that invalidation or forfeiture.

## **PART VII—PROCEDURE IN CASES OF REQUESTS FOR INVALIDATION AND FORFEITURE**

### **26. Procedure in cases of requests for invalidation.**

- (1) An application for the invalidation of a breeder's right may be filed by any interested person and shall be deemed not to have been filed if the fee prescribed is not paid.
- (2) The application shall be filed in a written reasoned statement and may be filed even after the breeder's right has expired.
- (3) The application may not be filed during the period in which an appeal may still be made against the grant of the breeder's right or while proceedings on such appeal are still pending before the Court.
- (4) The Registrar shall not accept the application if it is not accompanied by a reasoned statement, or if it was filed during the period within which an appeal could still be made against the grant of the breeder's right, or while proceedings on such an appeal are still pending before the Court.
- (5) Where he accepts the application, the Registrar shall hear the holder of the breeder's right and may obtain any other evidence and shall conduct the hearing on his own initiative.
- (6) The Registrar shall discontinue the hearing if the request for the invalidation is withdrawn.
- (7) Where the Registrar finds that the application is not justified, he shall reject it.
- (8) Where the Registrar finds that the application is justified he shall declare the breeder's right null and void.

### **27. Procedure for forfeiture of breeder's right.**

- (1) Proceedings for forfeiture of a breeder's right shall be initiated by the Registrar if the requirement specified in subsection (1) (a) of section 25 is fulfilled, or may be initiated by the Registrar or a third person if any of the requirements specified in subsection (1)(b) and (c) of section 25 are fulfilled.
- (2) An application shall not be necessary for the commencement of such proceedings but where any such application is filed, the Registrar shall treat it as a suggestion to initiate official proceedings.
- (3) Before declaring a breeder's right to be forfeited, the Registrar shall permit the holder of that right an opportunity to be heard.

- (4) Where after having heard the holder of the breeder's right, the Registrar finds that there is no reason to declare the right forfeited, he shall declare the proceedings terminated and inform the holder of the right accordingly in writing.
- (5) Where the Registrar declares a breeder's right forfeited, he shall inform the holder in writing, giving reasons therefor and shall state the date of forfeiture.

## **PART VIII—APPLICATIONS**

### **28. Application.**

- (1) An applicant for the protection of a variety shall file an application with the Registrar in the prescribed form.
- (2) The application form shall be accompanied by the technical questionnaire in the prescribed form for the relevant genus or species, which shall be completed by the applicant to the best of his knowledge.
- (3) At the request of the Registrar, the applicant shall, on the date and at the place fixed by the Registrar, submit the amount of propagating material determined by the Registrar.
- (4) Every application received by the Registrar and completed in accordance with this section shall, along with the date of filing, the name and address of the applicant and the original breeder, the variety denomination proposed under section 32 and the main characteristics of the variety as indicated in the application, be published in a periodical.
- (5) The application shall be accompanied by the application fee prescribed.
- (6) The refusal or withdrawal of an application shall also be published in a periodical.

### **29. Priority.**

- (1) The applicant may avail himself of the priority of an earlier application (hereinafter referred to as the "right of priority") that has been duly filed for the same variety by himself or by his predecessor in title with the Authority of a Contracting Party.
- (2) Where the application filed with the Registrar is preceded by several such applications, priority may be based only on the earliest application.
- (3) The right of priority shall be expressly claimed in the application filed with the Registrar and may only be claimed within a period of twelve months from the date of filing of the earliest application, but the day of filing shall not be included in the said period.

**30. Documents and materials to be furnished for priority.**

- (1) In order to avail himself of the right of priority, the applicant shall submit to the Registrar within three months of filing the application in The Bahamas, a copy of the documents that constitute the earlier application, certified to be a true copy by the Authority with which that application was filed.
- (2) Where the earlier application is not in English, the Registrar may request that a translation thereof be produced within three months from the date of receipt of the request.
- (3) The effect of the right of priority shall be that, with respect to the conditions of protection attached to the variety, the application shall be deemed to have been filed at the date of the filing of the earlier application.
- (4) The applicant may declare that he will submit the propagating material referred to in subsection (3) of section 28 or any additional documents required by the Registrar at a later date, but no later than two years after the start of the priority period unless the earlier application referred to in subsection (1) has been withdrawn or refused in the country in which it was filed, in which case the applicant may not rely on the priority date of such application.
- (5) If any of the provisions of this section are not complied with, the application shall be dealt with as if no priority has been claimed.

**31. Where application is not in English.**

Any application or other document filed under this Act (not being an application or document referred to in section 30) shall, if not in English, be accompanied by a translation thereof in English, verified by the translator that the translation is to the best of his knowledge complete and faithful; and in the event of any discrepancy, the English translation shall prevail.

## **PART IX—VARIETY DENOMINATION**

**32. Application and procedure for variety denomination.**

- (1) The applicant for a breeder's right shall, within three months of the filing of the application, propose on the form issued by the Registrar for that purpose, a variety denomination in accordance with subsections (2) and (3).



- (2) A variety denomination may consist of one word, a combination of not more than three words, a combination of words and figures, of words and letters or of letters and figures, but shall not consist wholly of figures save however that in a word and figure combination, the figures shall have a meaning in relation to the words.
- (3) No person shall use as a variety denomination a designation which —
  - (a) does not enable the variety to be identified;
  - (b) is liable to misled a person of average attentiveness or to cause confusion concerning the origin, derivation, characteristics, value or identity of the variety, or the identity of the breeder;
  - (c) is identical to or can be confused with a variety denomination which in The Bahamas or in another State party to the Convention designates an existing variety of the same or of a related botanical species, save however that the denomination shall be admissible if the other variety is not registered and has not been grown for a considerable time;
  - (d) is identical to or can be confused with a designation in which a third party enjoys a prior right, either of which would prohibit the use of the designation as a variety denomination;
  - (e) is contrary to public policy or morality;
  - (f) refers solely to attributes which are also common in other varieties of the species concerned;
  - (g) consists of a botanical or common name of a genus or species, or includes such a name where this is likely to mislead or cause confusion;
  - (h) suggests that the variety is derived from a related to another variety when this is not the case;
  - (i) includes words such as “variety”, “cultivate” “form”, “hybrid”, “cross” or a translation of such words; or
  - (j) is, for reasons other than those mentioned in this subsection, in the reasonable opinion of the Registrar, suitable as a genera designation of the variety.
- (4) Subject to subsection (5), where a variety is already protected by a Contracting Party or where an application for the protection of the same variety is filed in such State, only the variety denomination which has been proposed or registered in that other State may be proposed and registered, and the Registrar shall not register any other designation as a denomination for the variety.
- (5) Where the variety denomination used in the other State is inappropriate for linguistic reasons, or for any reason specified in subsection (3), the

Registrar may request the applicant to propose another variety denomination.

- (6) The Registrar shall publish in a periodical the variety denominations which have been proposed, registered or cancelled.

**33. Use of the variety denomination.**

- (1) Any person who offers for sale or markets the propagating material of a variety protected in The Bahamas shall, even after the expiration of the protection, use the registered variety denomination only in so far as prior rights do not prevent such use.
- (2) When a protected variety is offered for sale or marketed, a trademark, trade name or other similar indication may be associated with the registered variety denomination provided that the denomination is easily recognisable.
- (3) The holder of a breeder's right may not invoke any trademark, trade name or other right in his possession against a variety denomination legitimately used in the offering for sale or marketing of the variety by another person, even after the expiration of the protection.

**34. Prior rights.**

Prior rights of third parties in a designation shall not be affected by this Act.

**35. Cancellation of a registered variety denomination.**

- (1) The Registrar shall cancel any registered variety denomination at the request of—
  - (a) any interested person or on his own initiative if the denomination should not have been registered or if, subsequent to registration, facts become known which would have justified the rejection of the denomination;
  - (b) the holder of the breeder's right or of a third person, if a final court decision is delivered according to which the variety denomination must be cancelled or if it is established that a third-party right exists in the denomination and the holder of the breeder's right agrees to the cancellation; or
  - (c) a person who is obliged to use the variety denomination under subsection (1) of section 33, if the holder of the breeder's rights is prohibited by a final court decision from using that denomination, provided that the holder of the breeder's right had participated or

had been given the opportunity to participate in the court proceedings.

- (2) Where he cancels the variety denomination, the Registrar shall request the holder of a breeder's right to submit, within the time specified by him, a proposal for a new variety denomination, and shall, if the proposal is acceptable, register it.
- (3) Where the proposal for a new variety denomination is not acceptable, the Registrar shall again request the holder to submit another proposal for a new variety denomination.
- (4) The Registrar shall establish, at the request of the holder or a third person, a provisional variety denomination where the holder or the third person demonstrates a legitimate prevailing entitlement.
- (5) Where, after the period for submitting a proposal for new variety denomination has expired, the holder of the breeder's right has not submitted the requested proposal, the Registrar may establish on his own initiative, a provisional variety or permanent variety denomination.

**36. Filing date.**

The Registrar shall accord, as the filing date of the application, the date of receipt of the application form and the technical questionnaire, duly completed.

## **PART X—EXAMINATION OF THE APPLICATION**

**37. Formal examination of application.**

- (1) The Registrar shall examine the application to determine whether it and its supporting documents fulfil the requirements for applications in section 38 and whether the required amount of propagating material has been submitted on the due date and at the proper place.
- (2) Where any of the requirements referred to in subsection (1) have not been complied with, the Registrar shall reject the application for the grant of a breeder's right, unless the Registrar grants to the applicant a further period to complete the application or to submit the propagating material, but no such further period may be granted which will expire later than three months after the application date or the date fixed for submission of the material, as the case may be.

**38. Examination of novelty, distinctiveness, etc.**

- (1) The Registrar shall examine the variety to determine whether it fulfils the requirements of novelty and where those requirements are not fulfilled, the Registrar shall reject the application.

- (2) The Registrar shall invite the applicant, on a date fixed by him before the beginning of each year or testing period, to pay the prescribed testing fee for that year or testing period and failure to do so by the applicant shall cause the application to be rejected.
- (3) The Registrar shall after receiving the testing fee for the first year or for the first testing period examine whether the variety fulfils the requirements of distinctiveness, homogeneity and stability.
- (4) Where the Registrar determines that it is expedient to do so, he may arrange to have the examination done by another national or foreign governmental authority and shall base his decision on the results of that examination and any costs incurred for such examination shall be borne by the applicant.
- (5) The Registrar may treat the examination results obtained from and expert opinions given by foreign governmental authorities, as results obtained from and opinions given by the Registrar himself.
- (6) Subject to subsection (4) of section 30, the Registrar may, where necessary for an examination, request the applicant to submit additional material or documents within the period specified in the request and where the applicant fails to do so, without giving valid reasons for such failure shall reject the application.

### **39. Grant and refusal of breeder's right.**

- (1) Where the examination shows that the application satisfies the requirements of novelty, distinction, homogeneity and of stability and that the proper denomination of the variety can be registered, the Registrar shall grant a breeder's right and record it in the Register.
- (2) Where the examination shows that the variety is neither distinct, homogenous nor stable, the Registrar shall reject the application.
- (3) Where the examination shows that the proper denomination of the variety cannot be registered, the Registrar shall request the applicant to submit any other denomination within a period fixed by him, failing which he shall reject the application.
- (4) Where the Registrar makes a decision to grant a breeders' right he shall publish that decision as notice of an intention to grant a breeder's right in a periodical and he shall also publish in the periodical that an application for such a right has been made and approved subject to any opposition against the grant of the right.

**40. Provisional protection.**

- (1) Where a breeder's right is granted the holder of the right shall be entitled to equitable compensation for anything done during the application period which if done after the grant of the right, would constitute an infringement of it.
- (2) In this section "application period", in relation to the grant of a breeder's right, means the period —
  - (a) beginning with the day on which details of the application for the grant of the right was published in a periodical pursuant to subsection (4) of section 28; and
  - (b) ending with the grant of the right.

## **PART XI—OPPOSITION**

**41. Opposition.**

- (1) Within three months of the date of publication of the grant of a breeder's right, any interested person may on payment of the prescribed fee file with the Registrar an opposition against the grant of the right.
- (2) The opposition shall be based on any of the following grounds, namely that —
  - (a) the applicant is not the owner of the variety;
  - (b) the variety is not new or distinct at the pertinent dates in accordance with sections 6 and 7, and subsection (3) of section 30;
  - (c) it is neither homogenous nor stable;
  - (d) the variety denomination that the Registrar intends to register is inadmissible.
- (3) Where the opposition is justified the decision that a plant breeder's right be granted shall, subject to subsection (5), be revoked and the application rejected.
- (4) Where the opposition is not justified, it shall be rejected.
- (5) Where the opposition based on the claim that the variety denomination is inadmissible is justified, the Registrar shall revoke the decision that a breeder's right be granted and shall reopen the granting procedure by requesting the applicant to submit another denomination, failing which he shall refuse the application.
- (6) Where no opposition is filed within the period specified in subsection (1) or if all oppositions filed within that period have been rejected, the

Registrar shall grant the breeder's right and register the variety denomination.

- (7) The Registrar shall publish the grant of the breeder's right in a periodical.

## **PART XII—RULES ON PROCEEDINGS BEFORE THE OFFICE**

### **42. Proceedings before the Office.**

- (1) The Registrar may, in any proceedings under this Act, conduct an oral hearing.
- (2) Hearings in proceedings concerning the assignment of an application, the transfer of a breeder's right or the invalidation or forfeiture of such right shall be public, unless the legitimate interests of any person might be prejudiced thereby.
- (3) In proceedings before the Registrar evidence may be obtained either by hearing any of the parties to the proceedings, or experts or witnesses, or by requesting the competent court of the country of residence of the person concerned to take such evidence.
- (4) Evidence may also be obtained by requesting the submission of documents and other information by, or in the possession of, any party to the proceedings, or information from another government authority, an expert opinion, by inspecting the installations of any party to the proceedings with that party's consent, or by requesting the submission of a sworn statement in writing by any party to the proceedings or by any witness or expert.
- (5) Facts or evidence which are not submitted when requested by any party to the proceedings may be disregarded by the Registrar.
- (6) The Registrar may undertake investigations independently volition and shall not be limited to considering the facts, evidence or arguments provided by any party to the proceedings.
- (7) Any interested person may submit observations or suggestions to the Registrar concerning any proceedings pending before him, but that person shall not become a party to those proceedings by the mere fact of such submission.
- (8) Observations and suggestions thus submitted shall be communicated in writing to the applicant or the holder of the breeder's right as the case may be.

- (9) The Registrar shall confirm the receipt of such observations or suggestions in writing and shall forward a copy of the Registrar's decision to such interested person but need not specifically address the observations or suggestions submitted in the decision.

## **PART XIII—APPEALS AND ENFORCEMENT PROCEEDINGS**

### **43. Appeals.**

- (1) Any person aggrieved by a decision of the Registrar under this Act may appeal against that decision to the Court.
- (2) The appeal shall be filed not more than three months after the Registrar has notified the appellant of his decision or, where no notification has been made to him, not more than three months after the publication of the decision in the periodical.

### **44. Civil proceedings.**

- (1) Subject to this Act, infringements of a breeder's right shall be actionable in the Court at the suit of the holder of that right.
- (2) In any proceedings for an infringement, the plaintiff in proceedings for infringement shall be entitled to relief by way of —
  - (a) an injunction to prohibit the committing or continuation of committing an infringement of the holder of the breeder's right set out in section 17;
  - (b) forfeiture, seizure or destruction of propagating material which has been produced in contravention of a breeder's right; and
  - (c) damages taking into account the pecuniary and non-pecuniary loss suffered by the holder of the breeder's right.
- (3) Where the person alleged to have infringed a right did not know or could not reasonably be expected to have known that he was engaged in an activity that infringed a right, the Court may limit damages to the profits attributable to the infringement.
- (4) The Court shall not, in respect of the same infringement, both award the holder of the breeder's right damages and order that he be given an account of profits.

**45. Criminal liability for non-compliance or misuse of variety denomination.**

- (1) Any person who wilfully offers for sale or markets propagating material of a variety protected in The Bahamas or a denomination likely to cause confusion therewith, or another variety of the same botanical or a related species commits an offence and is liable on summary conviction to a fine not exceeding fifteen thousand dollars.
- (2) Any person who wilfully makes use of the registered variety denomination of a variety protected in The Bahamas or a denomination likely to cause confusion therewith, or another variety of the same botanical or a related species, commits an offence and is liable on summary conviction to a fine not exceeding fifteen thousand dollars.

**PART XIV—LICENCES AND LEGAL PROCEEDINGS BY LICENSEE**

**46. Licence contracts.**

- (1) The applicant for, or the holder of, a breeder's right may grant to any person an exclusive or a non-exclusive licence relating to all or any of the rights provided for under this Act.
- (2) The licence contract shall be in writing.
- (3) A licence contract shall be registered by the Registrar and shall have no effect against a third party until it has been registered.
- (4) The grant of an exclusive licence shall be published in a periodical.

**47. Licensor may grant further licences.**

In the absence of any provision to the contrary in a licence contract, the grant of a licence shall not prevent the licensor from granting further licences to third parties or from exploiting the variety himself.

**48. Assignment of licences.**

Where assignment is permitted to a licensee, any assignment by licensee shall not be considered valid until it has been registered in the Register.

**49. Licences of right.**

- (1) Any holder of a breeder's right or any applicant for the grant of a breeder's right may declare that any person prepared to pay a royalty is



entitled to use his variety as from the date on which he has informed the holder or applicant accordingly.

- (2) The declaration shall be addressed to the Registrar and a reference to that effect shall be entered in the Register.
- (3) The royalty payable by the licensee of right shall be stated in the declaration to which subsection (1) refers, and shall also be entered in the Register.
- (4) After the entry in the Register, the holder of the breeder's right shall pay the prescribed renewal fees.
- (5) The Registrar may cancel the entry, under subsection (2) at the request of the holder of the breeder's right if all beneficiaries agree.

#### **50. Compulsory licences.**

- (1) At any time after the expiration of three years from the date of grant of a breeder's right under this Act, any interested person may apply to the Court for the grant of a compulsory licence in respect of any breeder's right on the ground that it is necessary to safeguard the public interest in The Bahamas.
- (2) Subject to subsections (4) - (8), where the Court is satisfied that the ground referred to in subsection (1) is established, the Court may make an order for the grant of the licence in accordance with the application on such terms as it deems reasonable.
- (3) A licence granted under this section shall confer, on the licensee, the non-exclusive right to perform any activity referred to in section 17 for the supply of the national market.
- (4) Any person to whom a licence is granted under this section shall pay the licensor the remuneration agreed upon or determined by a method agreed upon between that person and the licensor or in default of agreement, as is determined by the Court on the application of either party.
- (5) The Court may require the holder of the breeder's right to hold available for the owner of the compulsory licence the amount of propagating material necessary for making reasonable use of the compulsory licence against payment of adequate remuneration to the holder of the right and under conditions which are economically acceptable to him.
- (6) A licence shall not be granted under this section unless —
  - (a) the applicant for the licence is financially able and otherwise in a position to exploit the breeder's right in a competent and businesslike manner, and must be prepared to do so;
  - (b) the holder of the breeder's right has refused to permit the applicant for the licence to produce or market propagating material of the

- protected variety in a manner sufficient for the needs of the general public as referred to in subsection (1) or is not prepared to give such permission under reasonable terms; and
- (c) the applicant for the compulsory licence has paid the prescribed fee for the grant of such licence.
- (7) The duration of the licence shall be fixed by the Court and shall not, except under extraordinary circumstances, be granted for more than four years, but the period may be extended if the Court is satisfied, on the basis of a new application, that the conditions for granting a compulsory licence continue to exist after the expiration of the first period.
- (8) Before granting a compulsory licence, the Court may hear the national non-governmental organisations in the field of plant breeding and the seed trade.
- (9) Where the Court is satisfied that the grounds on which any licence granted under this section have ceased to exist or that its owner has failed to comply with the conditions under which it was granted it may on the application of any interested party terminate such licence.

#### **51. Legal proceedings by licensee.**

- (1) Any licensee under a contractual or compulsory licence or a licensee of right may request the licensor to institute legal action necessary to obtain civil remedies or criminal penalties in respect of any infringement of the breeder's right indicated by the licensee.
- (2) Where the licensor refuses or neglects to institute the said legal action within three months after the request has been made, the licensee may institute such action in his own name, without prejudice to the right of the licensor to intervene if such action is civil in nature.

### **PART XV—GENERAL PROVISIONS**

#### **52. Regulations.**

- (1) The Minister may make regulations for any matter required to be prescribed by this Act.
- (2) Without prejudice to subsection (1), regulations made by the Minister under this section may provide for the following —
- (a) the procedure of the Office in respect of the receiving and handling of applications, the conduct of the examination of varieties and of

- variety denominations, the handling of oppositions, the grant of breeders' rights, and the refusal of applications;
- (b) the invalidation or forfeiture of breeders' rights, the assignment of an application or the transfer of a breeder's right to the owner of the variety and the cancellation of variety denominations;
  - (c) the maintenance and conservation of samples, the cooperation with germ-plasm banks or other institutions for the conservation of genetic material;
  - (d) the establishment and maintenance of a variety register and the receiving and filing of any document concerning breeders' rights;
  - (e) the amounts and the collection of all fees provided for under this Act;
  - (f) the making of additional rules to prevent the use of the same or confusing denominations for more than one variety and to regulate the relationships between variety denominations and trademarks;
  - (g) the administration of the Register provided for under section 4 including the determination of the facts to be registered;
  - (h) any other matter necessary for giving effect to the purpose of this Act or relating to the administration of this Act.
- (3) In compiling the list of genera or species required to be published under this Act, the Minister may exclude all varieties of that genus or species which are not characterised by a particular manner of reproduction or multiplication or by a certain end-use.
- (4) Where a genus or species is deleted from the list of genera and species to which this Act applies with effect from a given date, the deletion shall not affect the rights of applicants who have filed applications for the protection of varieties of that genus or species before that date.

## **OBJECTS AND REASONS**

This Bill seeks to provide for the protection of new varieties of plants.

Part I deals with preliminary matters. "Variety" is defined to mean a plant grouping within a single botanical taxon of the lowest known rank which grouping can be defined by the expression of the characteristics resulting from a given genotype, distinguished from any other plant grouping by the expression of those characteristics and considered as a unit with regard to its suitability for being propagated unchanged. (Clause 2).

The Intellectual Property Office maintained under section 3 of the Patents Act will be responsible for the day to day administration of the Act. The Registrar of the Office is required to maintain a Register to be known as the Register of Plant Breeder's Rights in which will be entered the grants of breeders' rights. (Clause 4).

Part II deals with breeders' rights.

A right to be known as a breeder's right will be granted in respect of plant varieties of certain genera or species where the variety is new, distinct, homogenous, stable and given a variety denomination. (Clause 5).

A variety will be considered to be new if the propagating or harvested material of the variety has not been sold or disposed of to others with the authorisation of the plant breeder or his successor in title in The Bahamas for longer than one year before the date on which protection is applied for and outside The Bahamas for longer than 6 years in the case of trees or vines or longer than 4 years in the case of other plants before the filing date on which protection is sought. (Clause 6).

A variety will be considered to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing the application for protection. (Clause 7).

A variety will be considered to be homogenous if its plants show the same expression of the same characteristics. (Clause 8).

A variety will be considered to be stable if its characteristics remain unchanged after repeated propagation. (Clause 9).

Part III deals with the entitlement to protection.

The breeder of a variety is entitled to apply for protection of his variety under the Act. (Clause 10).

An application for the grant of a breeder's right may be filed by the owner of a variety who is a national or resident of The Bahamas, a Contracting Party or any State which grants reciprocity treatment to The Bahamas. (Clause 13).

"Contracting Party" is defined in clause 2 to mean a State which is a party to the relevant Acts of the International Convention for the Protection of New Varieties of Plants.

Every person whose ordinary residence or principal place of business is outside The Bahamas must be represented by a counsel and attorney who is resident and practising in The Bahamas. (Clause 14).

Part IV deals with the assignment and transfer of the application or the breeder's right.

An application for the grant of a breeder's right or the right may be assigned or otherwise transferred. The assignment or transfer must be in writing, signed by the parties and registered in the Register. (Clause 15).

Part V deals with the scope and duration of the breeder's right.

The following acts in respect of the propagating material of a protected variety will require the authorisation of the holder of the breeder's right, that is, production or reproduction, conditioning for the purpose of propagation, offering for sale, selling or marketing, exporting, importing and stocking. (Clause 17). Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of somaclonal variant, the selection of a variant individual from plants of the initial from plants of the initial variety, backcrossing, or transformation by genetic engineering.

The breeder's right will not extend to acts done privately and for non-commercial purposes, acts done for experimental purposes and acts done for the purpose of breeding other varieties. (Clause 18).

A breeder's right will not extend to acts concerning any material of the protected variety which has been sold or otherwise marketed by the breeder in The Bahamas. (Clause 19).

The holder of a breeder's right is under an obligation throughout the period of protection to provide the Registrar with propagating material capable of producing plants which correspond to the characteristics defined for the variety when the right was granted. (Clause 20).

The breeder's right in respect of vines, forest trees, fruit trees and ornamental trees including their rootstocks will expire 25 years after the grant. Protection for all other genera or species will expire 20 years after the grant. (Clause 21).

The holder of a breeder's right must, every year during the period of protection, pay to the Registrar the annual prescribed fee payable before January 31 in each year. (Clause 22).

Part VI deals with termination, invalidation and forfeiture of the breeder's right.

The breeder's right will terminate before the term expires where the holder of the right renounces it by written declaration addressed to the Registrar. (Clause 23).

The Registrar will invalidate a breeder's right at the request of an interested person where it is established that the variety is not new or distinct or the holder of the right is not the owner of the variety. (Clause 24.)

The Registrar will declare the breeder's right forfeited where the holder of the right is no longer in a position to provide the Registrar with requested materials or does not pay the renewal fee. (Clause 25).

Part VII deals with the procedure in cases of requests for invalidation and forfeiture.

An application for the invalidation of a breeder's right may be filed by any interested person. The application must be in writing and filed with the Register. (Clause 26).

Where the Registrar accepts the application, he will hear the holder of the breeder's right. Where he finds the application not justified, the Registrar must reject it. Where he finds the application justified, the Registrar must declare the breeder's right null and void. (Clause 26).

Proceedings for forfeiture of a breeder's right may be commenced by the Registrar in certain specified cases or by the Registrar or a third person in certain other specified cases. (Clause 27).

Part VIII deals with applications for the protection of varieties.

Application for the protection of a variety must be made to the Registrar in the prescribed form accompanied by the prescribed fee. At the request of the Registrar, the applicant must, on the date and place fixed by the Registrar, submit the amount of propagating material requested by the Registrar. (Clause 28).

Part IX deals with variety denomination.

The applicant for a breeder's right must within 3 months of the filing of the application propose a variety denomination. A variety denomination may consist of one word, a combination of not more than 3 words, a combination of words and figures, of words and letters or of letters and figures. (Clause 32).

Any person who offers for sale or markets propagating material of a variety protected in The Bahamas must use the registered variety denomination. (Clause 33).

Part X deals with the examination of the application.

The Registrar will examine the application to determine whether it fulfils the requirements for application under the Act and whether the required amount of propagating material has been submitted on the due date and the proper place. (Clause 37).

Where the examination shows that the application satisfies the requirements of novelty, distinctiveness, homogeneity and of stability and that the proper denomination

of the variety can be registered, the Registrar shall grant a breeder's right. (Clause 39). Where the examination shows that the variety is neither distinct, homogenous nor stable, the Registrar shall reject the application.

Part XI deals with opposition.

Within 3 months of the date of publication of the grant of a breeder's right, any interested person may on payment of the prescribed fee file with the Registrar an opposition against the grant of the right on the ground that the applicant is not the owner of the variety, the variety is not new or distinct, it is neither homogenous or stable or the variety denomination is inadmissible for registration. (Clause 41).

Part XII deals with rules on proceedings before the Intellectual Property Office.

The Registrar is empowered to hold hearings in proceedings concerning the assignment of an application, the transfer of a breeder's right or the invalidation or forfeiture of a breeder's right. (Clause 43).

Part XIII deals with appeals and enforcement proceedings.

Any person aggrieved by a decision of the Registrar may appeal against that decision to the Supreme Court. (Clause 44).

Infringements of the right of the holder of a breeder's right are actionable in the Supreme Court at the suit of the holder of the right. (Clause 45).

Any person who wilfully offers for sale or markets propagating material of a variety protected in The Bahamas is guilty of an offence punishable with a fine not exceeding fifteen thousand dollars. (Clause 46).

Part XIV deals with licences and legal proceedings by licensee.

The applicant for or the holder of a breeder's right may grant to any person a licence relating to all or any of the holder's rights. The licence contract must be registered with the Registrar. (Clause 47).

Any holder of a breeder's right or any applicant for the grant of a breeder's right may declare that any person prepared to pay a royalty is entitled to use his variety. (Clause 51).

At any time after the expiration of 3 years from the date of the grant of a breeder's right any interested person may apply to the Supreme Court for the grant of a compulsory licence in respect of any breeder's right on the ground that it is necessary to safeguard the public interest in the Bahamas. (Clause 52).

Part XV deals with general provisions.

The Minister is given power to make regulations for any matter required to be prescribed by the Act.