

## A Legal Perspective of Plant Variety Rights

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### INTRODUCTION

I am going to talk to you today about Plant Variety Rights (PVR) in New Zealand. I will first discuss the eligibility requirements for PVR, then look at who is eligible to apply for PVR. I will take you through an overview of the steps required to obtain PVR, what rights the grant of PVR provides to the grantee, exceptions to these rights, and finish by considering some scenarios which I think may be of interest to you.

### ELIGIBILITY FOR PLANT VARIETY RIGHTS

Plant Variety Rights are governed by the Plant Variety Rights Act 1987. This Act sets out four basic requirements for eligibility for PVR protection in New Zealand:

- 1) The variety must be **new**. The variety must not have been sold in New Zealand for more than 1 year or sold overseas for more than 4 years (or more than 6 years for a woody plant) prior to filing the PVR application at the New Zealand Plant Variety Rights Office.
- 2) The variety must be **distinct**. The variety must be distinguishable in at least one characteristic from another variety of common knowledge.
- 3) The variety must be **uniform**. All of the members of a population of the variety must be substantially uniform and have the same characteristics, and the particular features of its sexual reproduction or vegetative propagation must be considered.
- 4) The variety must be **stable**. The variety must remain true to its description in its essential characteristics over a number of generations or propagations.

### WHO IS ELIGIBLE TO APPLY FOR PVR

The applicant for PVR must be the owner of the variety. The owner is defined as "a person who bred or discovered the variety and includes a successor of that person", e.g., an assignment of rights to a third party makes the third party the owner of the variety. If a person considers that the applicant is not the true owner of the variety, the person concerned can object to the Plant Variety Rights Office either before or after grant.

**What If Two People Independently Both Breed a New Variety?** Under Section 11, the person who first files a PVR application for the variety shall be granted PVR protection.

### HOW DO YOU GO ABOUT OBTAINING PVR PROTECTION FOR A NEW VARIETY?

- 1) File a PVR application at the Plant Variety Rights Office in Lincoln; such PVR application must consist of the following documentation: application form (including proposed denomination

- for the variety), technical questionnaire (specific to each genus/species), photographs showing distinguishing features of the variety, supply of seeds (if applicable), and the official filing fee (there are three levels of fees).
- 2) The Plant Variety Rights Office acknowledges the application, checks that the minimum requirements have been complied with, and accords a filing date and application number. The filing date is important for two reasons. Firstly, because provisional protection commences at the filing date. Thus the PVR applicant can take action for infringement from the filing date. However, if PVR are not granted on the application in due course, then such right is withdrawn. For example, if an injunction is granted by a court to prevent alleged infringement prior to grant of PVR, and the grant of PVR is eventually refused, the aggrieved third party against whom the injunction was awarded, could claim damages for loss suffered from the injunction being imposed. In deciding whether to award a claim for action prior to grant of the PVR, the Court will apply the balance of convenience test and consider the status of the application at the time the action for alleged infringement is commenced. The court may grant an injunction in such circumstances, but is unlikely to grant a claim for damages as it may be preemptive of a valid grant of PVR. The second importance of the filing date, as mentioned previously, is that if the new variety is bred or discovered independently by more than one person, and both file PVR applications, then the PVR application with the earliest filing date is the only one that can proceed to grant.
  - 3) Publication in Plant Variety Rights Journal of variety details, i.e., filing date, application number, proposed denomination, applicant.
  - 4) Organise for objective testing of the variety to occur, e.g., testing of pip and stonefruit varieties at the National Cultivar Centre.
  - 5) Results of the objective testing will be considered by the Examiner at the Plant Variety Rights Office who prepares a technical recommendation of the variety for the Commissioner of Plant Variety Rights. If the variety is shown to be distinct, uniform, and stable, then the Commissioner will advise the applicant that the variety is eligible for protection.
  - 6) Pay issue of grant fee, then a Grant of Plant Variety Rights is issued and an advertisement of grant appears in the Plant Variety Rights Journal. The term of PVR is 20 years for nonwoody plants and 23 years for woody plants from date of grant.
  - 7) During the term of grant, a grantee must ensure reference plants of the variety are supplied to the Plant Variety Rights Office or available upon request, depending on the genus.
  - 8) Renewal fees are payable annually after grant to maintain the grant in force. If a renewal fee is not paid on time, then the grant expires and there is no proviso in the Plant Variety Rights Act for restoration of a grant.

- 9) After grant, any person who sells reproductive material of a protected variety (or a variety that is no longer protected because the term has expired) must use the denomination of the variety when such material is sold. If not, it is an offence under Section 22 of the Plant Variety Rights Act.

### **WHAT RIGHTS DOES A GRANT OF PLANT VARIETY RIGHTS PROVIDE TO THE GRANTEE?**

As mentioned previously, from the filing date of a PVR application, an applicant has the same rights as if a grant has been made, although these rights are reversed if a grant of PVR is refused. A grant of PVR gives to the grantee (and his/her licensee) the right to exclude others from:

- 1) Selling (including offer for sale) or producing for sale reproductive material of the protected variety
- 2) Propagating that variety for the purpose of commercial production of fruit, flowers, or other products of that variety if the variety is a vegetatively propagated fruit producing plant, ornamental plant, or vegetable producing plant
- 3) Propagating, selling, or using imported reproductive material of a protected variety as reproductive material
- 4) Importing plant material of a variety protected in New Zealand from a country where plant variety rights protection is not available for that variety.

If a third party performs any of the above acts without the authority of the grantee, or uses the denomination of a protected variety in connection with the sale of another variety, this is an act of infringement which can be actioned by the grantee. The holder of a licence from a grantee shall have the same rights as the grantee to action infringement proceedings, if the actions of the alleged infringer affect the licensee's rights.

### **WHAT ACTION CAN BE TAKEN BY A GRANTEE?**

The grantee (or his/her licensee) can

- 1) Apply for an injunction to prevent further infringement,
- 2) Claim damages for infringement based on: loss suffered or likely to be suffered by the grantee as a result of the infringement, any profits or other benefits derived from the infringement, and the flagrancy of the infringement, and/or
- 3) Apply to Court for authority to seize infringing material of the variety. If it is innocent infringement, i.e., the infringer was not aware and had "no reasonable grounds for supposing" that his/her actions were an infringement of PVR, then damages cannot be awarded (but an account of profits may be). For example, there may have been test sales of a variety in the 1-year period before the filing of a PVR application. In such a case it may be advisable to mark plant material of the variety with a warning that it is intended that PVR will be applied for in relation to this variety in

New Zealand. A grantee should also mark propagating material of the variety or make sure labelling of the variety contains a reference to the fact that the variety is protected under the Plant Variety Rights Act, e.g., “New Tree Variety Plant Variety Rights Grant No. X”, otherwise any alleged infringement may be considered innocent infringement and it may not be possible to claim damages for the infringement.

### **Are There Any Exceptions to PVR Protection?**

It is not an infringement to:

- Propagate, grow or use a protected variety for noncommercial purposes.
- Hybridise or produce a new variety from a protected variety and sell the same, as long as the production of such a hybrid or new variety does not require the repeated use of the protected variety. This is known as the breeders privilege.
- Use reproductive material from a protected variety for human consumption or other nonreproductive purposes.
- Collect and replant seeds on a farm to grow crops for consumption by animals. This is known as the farmer’s privilege.

**What Rights Do Individual Propagators Have to Use Plant Material of a Protected Variety?** They can propagate the variety for non-commercial purposes, e.g. to propagate plants for their own gardens and they can breed new varieties from such material. They can propagate the variety to produce fruit/vegetables for their own consumption. However, they **cannot** sell reproductive material of the variety after they have propagated it, **and** if the variety is a vegetatively propagated fruit-producing plant, ornamental plant or vegetable-producing plant, they cannot propagate the variety for the commercial production of fruit, flowers, foliage, or other products of that variety.

**A Local Body Propagates Plant Material of a Protected Variety for Use on Council Land — Is this Allowable?** Yes, because the local body is not selling or producing for sale reproductive material of the variety, plus is not propagating for commercial production of flowers, fruit, or other products of that variety.

**An Individual Propagates Material of a Protected Variety for Commercial Purposes in Ignorance of the PVR Protection. What Happens Then?** This is still infringement. An injunction can be imposed to prevent further infringement, and a Court could order that the infringing material be seized. But in terms of damages, the grantee can only claim the profits derived from the infringement, not full damages.

**What If a Propagator Started Propagating before PVR Protection Was Applied for?** The propagator will only be liable for infringement from the filing date of the PVR application (i.e., when provisional protection is granted). If the PVR application does not proceed to grant, then any alleged infringement cannot be actioned and any action taken against the alleged infringer will be reversed. Plus, the propagator could potentially oppose the PVR application before the grant under Section 6(3) if plant material of the variety was sold in New Zealand more than 1 year before the filing date (i.e., by arguing that the variety is not new). After grant the propagator could object to the PVRO under Section 15.

**An Individual Propagates Plant Material of a Variety to be Exported for Sale Outside New Zealand, Is this Infringement?** Yes, because it is still producing reproductive material “for sale” under Section 17. Section 17 does not limit “sale” to sale within New Zealand (but there must be propagation for the sale of reproductive material or vegetative propagation under Section 17(1)(b)).

#### **WHAT ARE THE CHANGES TO BE EXPECTED IN THE NEW PLANT VARIETY RIGHTS ACT?**

The breeder’s privilege will be removed, there will be a broader range of infringing activities, the removal of or restriction of compulsory licensing. However, there is not enough time available in this forum to go into these changes in detail.

#### **CONCLUSION**

Plant Variety Rights is something that it is important for propagators such as yourselves to be aware of, to ensure you are not potentially infringing the PVR of a protected variety. However, PVR protection is of limited scope in that it only lasts for a maximum 20 (or 23) years, is a right to exclude others from taking certain action rather than an exclusive right of the grantee, and is subject to all other legislation (such as the Commerce Act, the Fair Trading Act, etc)