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PERCY SCHMEISER v. MONSANTO

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Percy Schmeiser is a Canadian farmer who was sued by Monsanto after genetically engineered (GE) canola was discovered on his farm. After six years of legal battles in lower courts, a final decision on the case will be released this week by the Supreme Court of Canada, the highest legal authority in Canada. The decision is likely to have far-reaching implications for farmers' rights to save seed and to farm GE-free.

Monsanto is the largest producer of genetically engineered seeds on the planet, accounting for over 90% of the GE seeds planted globally in 2003.

Background

Genetically engineered canola was introduced into Canada in the mid-1990's. Since that time, it has become virtually impossible to grow non-GE canola in Canada. Rampant out-crossing, the easy dispersal and long dormancy potential of seed, and lack of segregation rules have led to massive contamination of non-GE canola with GE canola in Canada. Canada has lost over \$300 million in annual sales of canola to the EU since the mid-1990's, and organic farming of canola has become extremely difficult. Farmers, not Monsanto, are currently responsible for any losses that occur due to genetic contamination.

Most farmers do not have the financial ability or time to fight a protracted legal battle with a corporation like Monsanto. Monsanto is thus able to use legal action, either real, threatened, or perceived, to intimidate farmers into paying technology use fees and damages for doing nothing more than saving and using seed – a tradition that goes back to the beginning of agriculture. This tactic has been used across North America to force farmers into accepting the reality of GE seeds – that they belong to the company, not to the farmer. Monsanto is using similar tactics to collect patent royalties from farmers in Brazil and Argentina, including threatening to test imported soy in US port facilities and levy an import tax on those shipments that test positive for their engineered varieties.

Who is Percy Schmeiser?

Percy Schmeiser is a 72 year-old farmer from Bruno, Saskatchewan. He has been farming with his wife Louise since 1947. For over 50 years, he has been developing his own variety of canola by saving his own seed and planting it from one year to the next. Through this practice, Percy has developed a unique variety of canola that he claims thrives under local conditions. This lifetime of work has been destroyed by GE contamination, and by the court order that makes Schmeiser's seed Monsanto's property.

Since being sued by Monsanto, Schmeiser, a long time community leader and defender of farmers' rights, has been travelling the world speaking out about his fight. The stress and costs of the prolonged legal battle have devastated Percy and family. Despite the help of donations from supportive individuals and organizations, the Schmeisers have gone into debt paying their (and Monsanto's) legal bills.

What is Roundup Ready Canola?

Roundup Ready canola is a strain of canola genetically engineered to be resistant to Monsanto's Roundup (glyphosate) herbicide. In 1993 Monsanto patented the genes, and the cells containing the genes, that give the altered canola this herbicide resistant property.

Farmers who want to use Roundup Ready canola must sign a Technology Use Agreement and pay the company up to \$15 per acre per year. Among the conditions of this licensing agreement are that farmers cannot save their seed to use from one year to the next, and that farmers cannot sue Monsanto if the crop fails to perform.

Monsanto monitors and tests the crops of farmers they suspect of using Roundup Ready canola without a license, and has set up special telephone lines where farmers are encouraged to report others they suspect of using the seed without a license. Despite these measures, Monsanto was never able to prove that Schmeiser had illegally obtained Roundup Ready seed. Initial allegations that he had bought and planted such seeds were withdrawn by Monsanto in court.

Case History

In 1997, Percy Schmeiser discovered, while routinely spraying herbicide along a ditch, that some of his plants had become herbicide-resistant. Since he had never planted Roundup Ready seed, he reasoned that his crops must have been contaminated by wind-borne material. Despite the discovery, he followed his normal practice of saving seed from that year's crop to plant the next year.

In August 1998, Monsanto launched a lawsuit against Schmeiser for patent infringement. Monsanto alleged that Schmeiser had acquired and planted seeds containing the patented genes and cells without a license, and then sold harvested seed, thus infringing the company's patent.

In March 2001, the Federal Court of Canada ruled that Schmeiser was liable for having infringed Monsanto's patent. While the court found no evidence that Schmeiser had deliberately contaminated his crops with Monsanto seed, it ruled that the fact that Schmeiser had planted seeds containing the patented genes and cells meant Schmeiser had violated Monsanto's patent, regardless of how the genetic material got into the farmer's crops. Therefore, because he knew or he ought to have known that the seed was genetically engineered, he shouldn't have planted it.

Schmeiser appealed the decision, and in May 2002 his case was heard in the Federal Court of Appeal. The Court of Appeal upheld the lower court's decision, unanimously finding in favor of Monsanto.

Schmeiser appealed again, and in January 2004 his case went to appeal before the Supreme Court of Canada. A decision is expected in May 2004.

Issues Deliberated at the Supreme Court

The three main issues deliberated at the Supreme Court are as follows:

1) The Validity and Scope of Genetic Patents.

Schmeiser argued that Monsanto's patent of genes and cells found in canola effectively gives the company rights over the entire canola plant; and that since plants are unpatentable subject matter, Monsanto's patent is invalid. This argument is based on the Harvard Mouse (or Oncomouse) Case, a 2002 case in which the Supreme Court ruled that higher life forms, that is, animals and plants, cannot be patented in Canada. Greenpeace was an intervenor in the Harvard Mouse case.

2) What Kind of Use Constitutes Infringement?

If the court finds that Monsanto's patent is valid, then it must determine what kind of use of the patented material constitutes an infringement of the patent. Specifically, it must determine whether infringement should cover all instances in which the invention is used, or whether it should be restricted to those circumstances in which the patented invention is being deliberately exploited.

In this case, Schmeiser argued that since he didn't exploit Monsanto's invention, he didn't infringe Monsanto's patent. Schmeiser never sprayed his plants with Roundup, and thus never took advantage of their herbicide resistance and never benefited in any way from the presence of Monsanto's patented material in his crops. Monsanto countered by arguing that in planting, growing, and harvesting the modified seed Schmeiser had used the company's patented invention, and this use constituted an infringement.

3) *The Innocent Bystander Problem.*

If Monsanto's wider definition of infringement (i.e., infringement through use rather than exploitation) is accepted, then a serious problem arises for 'innocent bystanders' like Schmeiser who end up using the patented material through no fault of their own.

Schmeiser argued that where patented material passively and inadvertently mixes with personal property, the property holder should not be held accountable to the patent holder. Instead, in such cases the innocent bystander should be protected by an implied license from the patent holder. Monsanto countered by maintaining that no special exceptions to infringement should be applied in this case. According to Monsanto, Schmeiser knowingly used modified seed, and in so doing infringed Monsanto's patent.

Implications of the Case

The outcome of this case will have widespread implications for patent law, for farmers, and for the future of the biotech industry in Canada. Depending on how the Court chooses to address the questions raised, its decision may determine whether life can be patented; where responsibility lies for GE contamination; and whether farmers' rights or patent rights reign supreme.

For farmers, the outcome will determine whether they can continue their traditional practice of saving seed without risking lawsuits, and to what extent they will be forced to depend on biotech companies like Monsanto. For biotech companies, the outcome will determine whether they will be able to continue patenting genetically engineered genes and cells, and whether the environmental release of products like Roundup Ready canola is worthwhile in light of the inevitable contamination that will result.

Resources and Related Links

Percy Schmeiser's website: www.percyschmeiser.com

Canadian Broadcasting Corporation Feature on Percy: <http://tv.cbc.ca/national/pgminfo/canola/>

Canadian Organic Farmer Lawsuit Against Monsanto: www.saskorganic.com

ACRES Interview with Percy: <http://www.percyschmeiser.com/AcresUSAstory.pdf>

Legal Documents Filed and Related Materials:

http://www.canadians.org/browse_categories.htm?COC_token=coc_token&step=2&catid=267&iscat=1