

VICTORY FOR BIOTECH COMPANIES AT THE SUPREME COURT

By

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On May 21st 2004, the Supreme Court of Canada rendered a decision on a case of great importance to the agricultural biotechnology sector and industry. Ending a seven-year court battle between a Saskatchewan farmer and biotech giant Monsanto, the Court ruled that Monsanto's patent on genes and cells related to a genetically modified canola plant was valid, even though the plant as a whole is not patentable.

Percy Schmeiser, a farmer for over fifty years, had never purchased Monsanto's Roundup Ready Canola, nor obtained a licence authorizing him to plant and cultivate the genetically engineered seed and plant. However, tests on his 1,000 acre land revealed that 95 to 98 percent of the farmer's canola crop was composed of Roundup-Ready Canola. Monsanto had therefore accused Schmeiser of violating its patent rights by growing the genetically modified canola without a licence. The genetic modification developed by Monsanto renders the canola plant tolerant to spraying of the herbicide called Roundup.

At first glance, this ruling appears to be a shift when compared to the Supreme Court's 2002 decision on the Harvard mouse which held that a genetically modified mouse was not patentable, the mouse being a higher-life form and consequently non-patentable subject matter. Courts in other jurisdictions like the United States and Europe have upheld such patents on genetically modified mice. However, in the present case, the majority of the Court noted that there was no dispute in the Harvard mouse case regarding the patentability of a fertilized, genetically altered mouse egg and cell culture, regardless of its ultimate anticipated development into a mouse. The

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modified gene and cell for plants at the heart of the Monsanto case are somewhat analogous to the mouse egg in the Harvard case. Consequently, a patent for a gene or a cell containing the gene is valid and the patentee can then seek compensation from parties who cultivate plants incorporating the patented cells containing the patented genes.

Monsanto has encountered problems in other areas of the world related to its portfolio of technologies on genetic modification of plants. Under the pressure from environmentalists, Monsanto announced in June 2004 it is pulling the plug on its research programs into genetically modified canola and wheat crops in Australia. In May 2004, Monsanto decided to cancel the launch of Roundup Ready wheat planned to be sold in Canada. In January 2004, several organisations filed a petition at the European Patent Office challenging the patent rights given to Monsanto on Indian landrace of wheat, Nap Hal.

Nevertheless, given the Supreme Court's ruling, it now seems clear that patents with claims for cells and genes for plants or animals are valid in Canada. This decision gives Canadian biotech companies another tool to use against infringers as they can now claim damages or loss of profits against competitors or parties using or selling plants and animals outside the lab, higher-life forms containing patented genes and cells created inside the lab.