Court File No. A - 367-01

FEDERAL COURT OF APPEAL

PERCY SCHMEISER and
SCHMEISER ENTERPRISES LTD.

Appellants

– and –

MONSANTO CANADA INC. and
MONSANTO COMPANY

Respondents

NOTICE OF APPEAL

(Court seal)

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellants. The relief claimed by the Appellants appears on the following pages.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellants. The Appellants requests that this appeal be heard at Saskatoon, Saskatchewan.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a Notice of Appearance in Form 341 prescribed by the *Federal Court Rules, 1998* and serve it on the Appellants' solicitor, or where the Appellants are self-represented, on the Appellants, WITHIN 10 DAYS of being served with this Notice of Appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a Notice of Cross-appeal in Form 341 prescribed by the *Federal Court Rules, 1998* instead of serving and filing a Notice of Appearance.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

JUN 19 2001

June _____, 2001

Issued by: Cynthia Ritchie
Registry Officer
Agent du Greffe
(Registry Officer)

Address of local office: 520 Spadina Crescent East
Saskatoon SK S7K 2H6

TO: **SIM HUGHES ASHTON & McKAY**
Barristers & Solicitors
330 University Avenue, 6th Floor
Toronto ON M5G 1R7
Solicitors for the Respondents

I HEREBY CERTIFY that the above document is a true copy of the original issued out of the Registry of The Federal Court of Canada the 19th day of June A.D. 2001.
Dated this 19th day of June 2001.
C. Ritchie
Registry Office

APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the judgment of McKay J. dated May 23, 2001 by which judgment the Court

1 declared Canadian Letters Patent No. 1,313,830 (the "Patent") to be valid as between the parties;

2. found that the Appellants infringed the Patent;

3. enjoined the Appellants from infringing the Patent in the future;

4. ordered the Appellants to deliver up all canola seed that they know or ought to know contain the Respondents' patented gene;

5 ordered the Appellant, Schmeiser Enterprises Ltd., to pay to the Respondents $19,832.00 representing the profit that Schmeiser Enterprises Ltd. made from the 1998 canola crop, with pre-judgment interest and costs.

THE APPELLANT ASKS that the judgment of McKay, J. dated May 23, 2001 be set aside in its entirety, a judgment of non-infringement be substituted thereon, and the Appellants be awarded their costs throughout.

THE GROUNDS OF APPEAL are as follows:

A. That the learned Trial Judge erred in law and/or fact and/or mixed law and fact in:

determining that a farmer whose field has canola seed or plants in it that possess the genetic modification described in the Patent, has no right to grow, cultivate, harvest or sell any such seeds or plants, even if such seeds and plants originate from seed spilled by passing trucks or machinery, blown into the field from swaths from a neighbour's land, or from pollen carried into the field by wind, insects or birds;

2. determining that a farmer, who knows or ought to know that there are such genetically modified canola seeds or plants in the farmer's crop, will infringe the Patent, if the farmer saves and re-uses canola seed derived from that crop;

3 wrongly construing the Patent such that the mere act of growing, harvesting or selling canola plants that the farmer knows or ought to know have the genetic modification described in the Patent is an act of patent infringement;

4. failing to properly construe the Patent to require that a farmer must use or take advantage of the patented gene by in-crop spraying with a glyphosate based herbicide such as Round-Up in order to be found to have infringed the Patent;

5. determining that the Respondents had not waived their Patent rights by unleashing an "invention" into the environment they cannot control and/or determining that the measures taken by the Respondents to control the spread of the "invention" were adequate;

6. finding that there was "no evidence" that the canola seed used by the Appellants to seed the 1997 canola crop included seed from a field that had swaths and pollen carried into it from an adjacent field where a neighbour was growing the Respondents' genetically modified canola;

failing to give sufficient weight to the fact that the Respondents had withdrawn the allegation that the Appellants "obtained" canola seed from one or more of their licensed users;

8. although determining that it ultimately did not matter how the Appellants came into possession of the patented gene, putting the onus on the Appellants to prove that they came into possession of the patented gene by contamination and/or failing to find that the presence of the Round-Up resistant canola found on the Appellants' lands was caused by contamination;

9. giving undue weight and significance to the internal sampling and testing done by the Respondents and insufficient weight to the independent testing done on behalf of the Appellants;

10. finding that the samples taken of the 1998 canola crop were properly representative of the fields in question when there was no expert testimony to support such a conclusion;

11 relying on results from testing of samples from the 1998 canola crop where such samples had spoiled;

12. relying on results from testing of samples from the 1998 canola crop where there was evidence that the samples had been improperly tampered with by the Respondents;

13. admitting evidence that ought to have been excluded because it was improperly and/or illegally obtained;

failing to properly apply the *Charter of Rights and Freedoms* to exclude such improperly and/or illegally obtained evidence;

determining that the Respondents were entitled to the profits made by the Appellant, Schmeiser Enterprises Ltd., from Schmeiser Enterprises Ltd.'s entire 1998 canola crop without any finding as to the degree to which the crop contained canola possessing the genetic modification described in the Patent;

16. determining that the Respondents were entitled to the entire net profit to the Appellant, Schmeiser Enterprises Ltd. from the 1998 canola crop without considering that the Respondents had not proved that their gene added any commercial value to the crop;

17. issuing an injunction that would impair the Appellants from engaging in the traditional farming practice of saving and re-using canola seed during the term of the Patent.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 19th day of June, 2001

Priel, Stevenson, Hood & Thornton
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