AIRD BERLIS

SPOTLIGHT
MEDIA, SPORTS AND COMMUNICATIONS LAW BLOG

Aug 05, 2020

Monsanto V. Schmeiser 20 Years Later: The Answer Wasn't Blowin' in the Wind

By L.E. Trent Horne

Intellectual property lawyers have the most interesting bookshelves in their offices; we tend to keep souvenirs of the various cases we work on. Over the years, my bookshelf has come to include things like skin care products, parts for cars and fireplaces, architectural mouldings, and medical devices.

In this varied tableau, while every piece has an anecdote associated with it, the items that always attract the most attention and provoke the most discussion are from Monsanto v. Schmeiser. Often, the first thing I hear is "isn't that the case where someone got sued because seed blew onto his field?" I was recently reminded that it was 20 years ago that the case went to trial. It's remarkable that a case prepared in the shadow of Y2K, and when Who Let the Dogs Out was a staple on top-40 radio, still generates passionate debate and keen interest. The Supreme Court's decision in the case remains the leading authority on the validity and enforceability of patents directed to genes and cells of plants, providing agribusiness with protection for the significant investment to bring new technologies to market. It was also the start of my long-term interest in the business of agriculture.

I've always been interested in how things work, and it's one of the reasons I enjoy practicing intellectual property law. As a junior lawyer, it was fascinating to litigate, and learn about, how the machines that perform laser eye surgery work, and how stents are made. The Schmeiser case was not just an opportunity to learn about plant biotechnology, but to take a deep dive into the public debate over genetically modified crops.

Monsanto had a patent on a genetic modification to plants that rendered them resistant to glyphosate-based herbicides, such as Monsanto's Roundup. Branded as "Roundup Ready", these genetically modified seeds allowed farmers to control weeds with a single pass of Roundup early in the growing season – the glyphosate would kill all plants except for the genetically modified ones. Using a single herbicide generally decreased input costs and increased yields. Roundup Ready seed was sold under a licensing program. Farmers choosing to use it were obliged to purchase new seed every year. One of the terms of the licensing agreement was that farmers could not save part of the Roundup Ready harvest, and re-use it for planting a new crop in subsequent years. This was a departure from other conventional seed which could be saved and re-planted from one year to the next.

Roundup Ready canola was first made commercially available to Canadian farmers in 1996. Initial uptake was limited and cautious, but some were very keen to try it out. Monsanto alleged that Percy Schmeiser, a farmer in Bruno Saskatchewan, obtained the seed without a license in 1997, grew a few acres of it, and used the progeny of that crop to plant 1,000 acres of commercial grade Roundup Ready canola in 1998. Mr. Schmeiser denied any wrongdoing. He said that the seed must have blown onto his land or got there through some other means beyond his knowledge or control. He claimed to have discovered the presence of Roundup-resistant plants when he was doing routine spraying around power poles in 1996. When some of these canola plants survived the spraying that was intended to kill them, Mr. Schmeiser did a test on "a good three acres" to see if more of his canola plants were resistant to Roundup. They were. He and his hired man testified that about 60% of the plants in this test area survived the application of Roundup, most of which were closest to the road, and began to thin as one moved further into the field. Even though he thought these plants were a "contaminant", through a series of coincidences, this seed was separately harvested, stored and used to plant his 1,000-acre canola crop in 1998, his largest ever. In a case filed in the Federal Court in 1998, Monsanto claimed that this saving and re-planting of Roundup Ready seed infringed its patent rights. The case went to trial in June 2000.

Up to and during the trial, the case attracted media attention in Canada and around the world. Nuances of patent law went from a curiosity that nerdy lawyers quarrelled over in relative obscurity to front page news

and dinner table conversation. My parents finally had a recognizable example to give when people asked what kind of work I did. While the safety of genetically modified foods was not an issue for the Federal Court to decide, the availability and ability to control the spread of these crops was hotly contested in the court of public opinion. News cameras were on the courthouse steps throughout the 13-day trial. The gallery was filled to capacity, most quietly backing Mr. Schmeiser. Others were more demonstrative in their support. One day, a woman discreetly brought in a bell, and dinged it when she thought a point was well-made for Mr. Schmeiser.

The witnesses were unlike other patent trials. Truckers were called to give evidence that they did not drive loads of genetically modified seed beside Mr. Schmeiser's property at the material time, and in any event, always drove with tarps on their loads to prevent the seed from blowing out. A mechanical engineer testified about the aerodynamics of a canola seed, and that it was incapable of travelling into a field as far as Mr. Schmeiser described the test area, even under optimal conditions. While there was detailed scientific evidence as to how genetic modifications are made, much time was spent on whether or not the seed could have blown onto Mr. Schmeiser's land and account for what was growing on his fields in 1997. Many of the things I learned during the trial didn't show up on the transcript. Once, when I got up to cross-examine a witness, the senior counsel leading the team literally pulled me back into my chair by the back of my robe. He was right – cross-examination of that witness was not necessary. Some lessons are never forgotten. Roger Hughes was a terrific mentor, and I'll always be grateful for the opportunities he gave me to be on my feet as a junior lawyer in a high profile case.

In a decision released the following March, Justice MacKay found for Monsanto. He concluded that none of the sources suggested by Mr. Schmeiser could reasonably explain the concentration or extent of Roundup Ready canola on his fields. More importantly for the broader agricultural community, the Court ruled that Monsanto's patent was valid and infringed. Even though the patent was directed to modified genes and cells which required sophisticated laboratory techniques to create, a person who did no more than plant and cultivate a patented seed would infringe. The trial decision was upheld by the Federal Court of Appeal in 2002, and later by the Supreme Court of Canada in a 5-4 decision released in 2004. None of the courts made an express finding as to the source of the seed that grew to plants in Mr. Schmeiser's test area in 1997.

It was a real highlight to be on the team that went to the Supreme Court. The Supreme Court building has two Federal Court courtrooms off the lobby. The first trial I worked on, which was taking place at almost the exact same time as Mr. Schmeiser's 1997 harvest, was in one of them. Coming in and out of the Supreme Court building during that trial, I hoped that one day I would be walking up the centre stairs to the main courtroom. It was great to see that realized.

Even though the trial decision squarely addressed the merits of the "blowin' in the wind" defence, many observers remained unconvinced, and continued to support Mr. Schmeiser. Opposition to GMOs continued, with the Schmeiser case acting as a lighting rod for the issue. In social situations, intellectual property lawyers do not often discuss the cases they work on other than at a very high level. In addition to restrictions based on maintaining confidentiality and solicitor-client privilege, a detailed discussion of whether (for example) a machine has a top that is "flat" and "planar" does not make for sparking cocktail conversation. Schmeiser was different. I was often asked how Mr. Schmeiser could have been found liable for infringement when the seed blew onto his land by accident. My answer was simply to reiterate what the judge heard and what he decided. The seed industry certainly has no shortage of consumer critics.

The case and the outcome captured public imagination for years. A play (Seeds) was first staged in 2005, the script based on trial transcripts and numerous interviews. I went to see it with a good friend, Arthur Renaud, who also worked on the Schmeiser case. It was apparent during the first act that we knew the case well – so much that the playwright caught up to us at intermission to ask who we were. We wound up having drinks with her and the cast afterwards. It was surreal to see the case brought to the stage, and remarkable to hear the details of her interviews with people in and around Bruno. Years later, films are still being made about what happened in Bruno in the late 1990's. In 2018, it was reported that Christopher Walken was in Winnipeg to portray Mr. Schmeiser in a film about him and the case. Other documentaries were produced in between. With the possible exception of Flash of Genius (a 2008 film about an inventor's dispute with Ford over intermittent windshield wipers), it is difficult to think of a patent case that has made for such compelling storytelling.

For agribusiness (including the burgeoning cannabis sector), the importance of the Schmeiser decision far exceeds the documentaries and films it inspired. Agriculture is a sophisticated and multi-billion dollar business. These intellectual property holders invest great resources into protecting their innovations through patents and plant breeders rights, and continuing to refine licensing and compliance programs. Of course, no right is complete without a remedy. No one wants to sue their own customers, but there are circumstances where litigation is necessary to ensure individual compliance, and also the integrity of the licensing program as a whole.

Over the years, I went from the most junior member on the team to a leading role in a number of ‘saved seed’ cases for Monsanto that determined patent infringement and the associated monetary consequences. Each one had a successful outcome. I also worked on cases involving a dispute between seed companies on who was entitled to patent rights involving genetic modifications to render plants resistant to insects, and for other clients involving machines that put seed and fertilizer in the ground with great precision. It’s been fascinating. Little did I know that a case in June 2000 at the Saskatoon courthouse would lead an urban lawyer to years of rewarding work with agribusiness in Canada and beyond.

This article was originally published by The Lawyer's Daily, (www.thelawyersdaily.ca) a division of LexisNexis Canada.

Author

L.E. Trent Horne
Partner
T 416.865.3428
thorne@airdberlis.com