

File Number: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

BETWEEN:

LARRY HOFFMAN, L.B. HOFFMAN FARMS INC.
and DALE BEAUDOIN

Applicants
(Appellants)

and

MONSANTO CANADA INC.
and BAYER CROPSCIENCE INC.

Respondents
(Respondents)

MEMORANDUM OF ARGUMENT
SUPREME COURT ACT, s. 40(1)

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MEMORANDUM OF ARGUMENT

PART I: INTRODUCTION AND STATEMENT OF FACTS***A. Introduction***

1. This case seeks to ask whether biotechnology companies incur responsibility when their patented GM (genetically modified) seed, pollen and plants infiltrate farmland, causing harm. While *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 (Book of Authorities (“BA”) **Tab 21**) confirmed that these companies have significant exclusive rights to GM seed and plants, the question remains whether they have any corresponding duties. Absent potential intervention from this Court, however, the organic farmers of Saskatchewan will not get an opportunity to ask this important legal question at trial because their potential causes of action were all swept aside by the Saskatchewan courts at the preliminary class certification stage. Furthermore, they were refused class action status.

2. The Applicants maintain that this case deserves leave because it involves legal questions of significant importance to the public, namely liability and rights associated with the development, marketing, sale and dispersal of GMOs, as well as public access to justice through class certification. The prevalence on the Saskatchewan landscape of open-pollinating, GM crops is a matter of significant environmental and public interest. The issues, which transcend provincial or territorial boundaries, are a matter of particular interest to the Applicants who have all but lost organic canola and have sustained continued GMO contamination.

B. The facts as pleaded in the Statement of Claim

3. The facts, as pleaded, are as follows. The Applicants are certified organic farmers from Saskatchewan. The Respondents, Monsanto Canada Inc. (“Monsanto Canada”) and Bayer CropScience Inc. (“Bayer CropScience”), are both Canadian subsidiaries of large, multinational agri-business companies.

4. Organic food production involves growing crops and livestock without the use of

synthetic pesticides, fertilizers and genetically-modified organisms (“GMOs”). Food and fibre products can be labelled “certified organic” only if the production and processing procedures have been verified to comply with accepted organic standards by accredited organic certification bodies. Each of the recognized organic certification bodies practising in Saskatchewan list GMOs as a prohibited substance.

5. An organic field must be managed in compliance with organic standards, typically for a period of at least three years before it is eligible to be certified as organic by the organic certifiers. Certified organic grain production is subject to a system of routine third-party crop inspections to ensure compliance with organic standards. Certified organic products are furthermore subject to testing for the presence of prohibited substances, including GMOs. Contamination of organic produce by prohibited substances, such as GMOs, can result in the rejection of shipments and substantial losses to organic farmers.

6. Certified organic grain production is a fast growing industry, serving a growing and lucrative market. Certified organic grain is sold in the organic grain market at a premium well in excess of the price commanded by non-organic grain.

7. Using genetic engineering, Monsanto’s parent company developed a gene construct that, when inserted in a plant such as canola, renders that plant resistant to glyphosate-based herbicides such as Roundup. Roundup herbicide is produced and sold by Monsanto Canada. The GMO technology allows a non-organic farmer to spray his or her fields with a glyphosate-based herbicide such as Roundup.

8. Bayer CropScience’s predecessor, also using genetic engineering, developed a genetic construct that, when incorporated into a canola plant, confers resistance to glufosinate ammonium-based herbicides. Bayer CropScience produces and markets a glufosinate ammonium-based herbicide under the trade name Liberty.

9. Because Roundup Ready canola and Liberty Link canola were considered to be plants having “novel traits” pursuant to the *Seeds Regulations*, C.R.C. 1978, c. 1400, the Canadian Food Inspection Agency (“CFIA”) required them to undergo “confined” field trials before being approved for the “unconfined release” into the environment. After confined field trials in Canada

between 1990 and 1995, Monsanto Canada and Bayer CropScience were granted approval by the CFIA for unconfined release.

10. Commercialization of Roundup Ready canola and Liberty Link canola commenced in and about 1996. At all times, Monsanto entered into agreements with growers, described as "Technology Use Agreements," ("TUAs") licencing growers to use Monsanto's patented Roundup Ready canola. The TUA at all times asserted that the granting of a licence to use the Roundup Ready gene did not grant ownership of the gene to the grower. Growers entering into the TUA, furthermore, were forbidden to save seed from canola with the Roundup Ready gene for replanting. The commercial production of Roundup Ready canola in Western Canada was, therefore, licensed by Monsanto Canada with ownership of the Roundup Ready gene at all times remaining with Monsanto Canada.

11. Liberty Link canola and Roundup Ready canola are prohibited substances within the meaning of the certification standards of the recognized organic certifiers practicing in Saskatchewan and, more significantly, in the organic standards of countries to which Saskatchewan-grown organic grain is primarily shipped. Foreign organic production standards prohibiting GMOs apply to crops grown for sale into such markets.

12. The Respondents' genetic modifications were incorporated into open-pollinated varieties of canola. Pollen from Roundup Ready canola and Liberty Link canola can pollinate (i.e. fertilize) non-GM canola, conferring the genetic modification on the progeny of non-GMO canola. Due to cross-pollination, non-GM canola plants can produce seeds that contain GMOs. These seeds can germinate and produce subsequent generations of canola that contain the genetic material of GM canola, by their own progeny and also by further cross-pollination.

13. Saskatchewan farmers were induced to buy Roundup Ready and Liberty Link canola because of advertised superior weed control, achieved by the spraying of Roundup or Liberty herbicide, as the case may be, on a growing canola crop. Herbicides are prohibited in organic agriculture. The use of GM canola in Western Canada has grown such that by the year 2000 half of the canola grown in Western Canada was either a Roundup Ready or Liberty Link GM variety. By 2003 approximately 70% of all canola grown in Western Canada was either a Roundup Ready

or Liberty Link GM variety.

14. Farmers purchasing either variety of GM canola were never warned about the potential harm to neighbouring crops caused by GM volunteer canola. In particular, no warnings were given to farmers to keep a buffer zone to minimize the flow of pollen to surrounding crops, to ensure that all farm trucks transporting the seed were properly and securely covered, to thoroughly clean seed from all farm machinery before leaving a field where a GM crop was being grown, or to warn neighbours that GM “volunteers” might emanate from the GM crop.

15. Since its introduction into the Western Canada environment, GM canola has widely proliferated and has been found growing on land on which it was never planted nor ever intended to be grown. The contamination has reached a level such that very few, if any, pedigreed seed growers in Saskatchewan using strict seed segregation protocols can or will warrant their canola seed to be GMO free, even if planted with GMO-free seed.

16. As a result of widespread contamination by GM canola, few, if any, certified organic grain farmers are now growing canola in Saskatchewan. The crop, as an important tool in the crop rotations of organic farmers, and as an organic grain commodity, has been lost to certified organic farmers in Saskatchewan. The domestic and foreign market demand for organic canola will consequently be met primarily by foreign organic growers who can warrant their crops to be free of GM contamination.

17. Because of the prevalence of canola as “volunteers” in other crops, and the proliferation of the GM crops of the Respondents, organic farmers in Saskatchewan (even if not growing or attempting to grow organic canola) have and will sustain contamination of their organic fields by Roundup Ready canola or Liberty Link canola “volunteers.”

18. Monsanto Canada at all material times purported to maintain a corporate policy of responding to farmer complaints of contamination by Roundup Ready canola by claiming to be prepared to arrange for the removal of unwanted Roundup Ready volunteers.

19. Because protection of foreign markets is not considered in Canada’s novel plants regulations, the Respondents together undertook to develop their own export procedures in order

to ensure continued access to foreign markets for Canadian non-GMO canola in recognition of the risks to those markets arising from the introduction of their GM canola and the probability of contamination. They introduced their products in 1995 and sold them in 1996 under an Identity Preservation Program (“IPP”) purportedly designed to ensure that no GM canola entered the canola export market, as the Japanese and European markets had not approved the GM canola lines of the Respondents.

20. The Respondents dropped the IPP in 1997 once approvals for the Japanese market were obtained. The Respondents knew that the removal of an IPP (and/or failure to introduce an adequate one), would result in the eventual loss of the European Economic Union market for Canadian canola. Consequently, the European Union market for Canadian canola was knowingly destroyed.

21. The Applicants brought their claim against the Respondents, relying on negligence, nuisance, trespass, strict liability and under environmental legislation in force in Saskatchewan. The Applicants abandoned their claim under strict liability on appeal.

22. *The Environmental Management and Protection Act* (the “EMPA”), *The Environmental Management and Protection Act, 2002* (the “EMPA, 2002”), and *The Environmental Assessment Act* (the “EAA”) of Saskatchewan each have civil liability provisions. The Applicants allege that the genetic modifications were either a “pollutant” within the meaning of the EMPA and/or a “substance” within the meaning of the EMPA, 2002, and sought declarations to that effect. They also alleged that the introduction of the crops into Saskatchewan agriculture was a “development” within the meaning of the EAA, triggering a requirement for provincial environmental assessment. As an environmental assessment was not conducted by the Respondents, they are responsible for all losses sustained by the Applicants and the class that they represent pursuant to a civil liability provision in the Act.

23. The Applicants claim damages against the Respondents for: (a) loss of canola as a crop to be used within their regular rotations; (b) loss of opportunity to participate in the certified organic canola market, especially in the Europe; and (c) past and future cleanup costs caused by Roundup Ready or Liberty Link canola volunteers growing on the fields of organic farmers.

C. The Decisions in the Courts Below

24. Under *The Class Actions Act*, S.S. 2001, c. C-12.1 (the “Sask. CAA”) (**BA Tab 27**), as in other class action jurisdictions in Canada, the Applicants were required to meet a five-part test to warrant class certification: (a) that the pleadings disclose a reasonable cause of action; (b) that there is an identifiable class; (c) that there are common issues; (d) that class proceedings is the preferable procedure; and (e) that there is a suitable representative plaintiff.

25. The matter came before Madam Justice G. A. Smith of the Court of Queen’s Bench for Saskatchewan (as she then was). Madam Justice Smith determined that the Applicants had not met the criteria for class certification and dismissed the application (2005 SKQB 225, (**Tab B**)). The Applicants sought and were granted leave to appeal the determination. Mr. Justice Cameron, however, on behalf of the Court of Appeal for Saskatchewan, rejected the Applicants’ appeal (2007 SKCA 47 (**Tab E**)).

26. The decision of the Saskatchewan Court of Queen’s Bench and Court of Appeal will have significant legal ramifications for organic producers. The Applicants contend that the Saskatchewan courts too readily swept aside their causes of action and thereby effectively deprived the Applicants of their day in court. Furthermore, the Saskatchewan courts appear to have taken a rather narrow and restrictive interpretation of the Sask. CAA that will potentially impair the remedial aims of class action legislation in Saskatchewan and elsewhere – particularly involving environmental claims.

PART II: QUESTIONS IN ISSUE

27. Subsection 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, sets out the circumstances that the Court will consider in granting leave to appeal. A proposed appeal must raise important issues of law, or mixed law and fact, and be of sufficient public importance or general significance as to warrant a decision by the Court. The Applicants submit that the present case meets these leave requirements for the following reasons:

- (a) the decision will be an important national and international precedent on the potential liability of biotechnology companies for harm caused by GM crops;

- (b) the decision will have significant impact on organic agriculture in Canada;
- (c) the decision will have significant impact on the ability to certify environmental class actions in Canada;
- (d) the decision will provide guidance to courts on the certification criteria under the Sask. CAA and for jurisdictions having similar legislation.

PART III: STATEMENT OF ARGUMENT

A. The decision will be an important national and international precedent on the potential liability of biotechnology companies for harm caused by GM crops

28. The Canadian Biotechnology Advisory Committee (“CBAC”) in its June 2002 report to the Government of Canada, *Patenting of Higher Life Forms and Related Issues* [BA Tab 2] had this to say regarding liability issues pertaining to GMOs:

In our view, Canadian law already adequately addresses issues of liability and compensation for damages through the common law of negligence and the civil law of obligations, which are based on principles of accountability and responsibility. Specific provisions for damages caused by products of biotechnology, patented or not, are not required.

Given the ease at which the courts below swept aside the Applicants’ claims, the CBAC’s confidence in the ability of Canadian law to adequately address issues of liability and compensation appears to be misplaced. This legal state of affairs ought to be reviewed by this Court.

29. Farmer obligations regarding patented genetic plant material has been addressed by this Court. In *Monsanto Canada Inc. v. Schmeiser*, (*supra*), this Court held that Monsanto Canada’s patent on the genetic modification conferring glyphosate-resistance to a canola plant gave it exclusive rights regarding the cultivation of plants containing the patented gene (see paragraph 42). At paragraph 96 the Court determined as follows:

¶ 96 The appellants argue, finally, that Monsanto's activities tread on the ancient common law property rights of farmers to keep that which comes onto their land. Just as a farmer owns the progeny of a “stray bull” which

wanders onto his land, so Mr. Schmeiser argues he owns the progeny of the Roundup Ready Canola that came onto his field. However, the issue is not property rights, but patent protection. Ownership is no defence to a breach of the *Patent Act*.

30. Significantly, Monsanto Canada maintained throughout the proceedings that it had tight control over its patented genetic material. This was reflected in the lower court’s decision (*Monsanto Canada Inc. v. Schmeiser*, 2001 FCT 256 [BA Tab 20]), where Mr. Justice McKay held:

¶ 96 ...With respect, the conclusion the defendants urge would ignore the evidence of the licensing arrangements developed by Monsanto in a thorough and determined manner to limit the spread of the gene. Those arrangements require agreement of growers not to sell the product derived from seed provided under a TUA except to authorized dealers, not to give it away and not to keep it for their own use even for reseeding. It ignores evidence of the plaintiffs’ efforts to monitor the authorized growers, and any who might be considered to be growing the product without authorization. It ignores the determined efforts to sample and test the crops of the defendants who were believed to be growing Roundup Ready canola without authorization. It ignores also the evidence of Monsanto’s efforts to remove plants from fields of other farmers who complained of undesired spread of Roundup Ready canola to their fields.

See: Monsanto Canada Inc.’s Technology Use Agreement [Tab H];
Bayer CropScience’s Statement of Claim [Tab I] admitted into evidence by the Court of Appeal showing that the Respondent, Bayer CropScience also exerts legal control over the use of its patented genetic material.

31. Law scholars have detected an imbalance in judicial recognition of significant patent ownership rights without any apparent corresponding civil liability. Jeremy deBeer, for example, argues that the cases of *Monsanto v. Schmeiser* and *Hoffman v. Monsanto*, juxtaposed, have created a legal “disequilibrium” and urges the recognition of a liability cause of action. He states “As a proposition of fairness and equity, the idea that patent owners have both rights and responsibilities should be relatively non-controversial.”

deBeer, Jeremy, “The Rights and Responsibilities of Ag-biotech Patent Owners” (2007), 40:1 U.B.C.L. Rev [BA Tab 6].

32. Professor Philipson argues that, as a consequence of the decisions in *Monsanto v. Schmeiser* and *Hoffman v. Monsanto*, biotechnology multinationals are being given an easy ride by the courts:

Aside from these questions, the most complicated (and controversial) legal challenge is achieving the appropriate balance between the intellectual property and contractual rights enjoyed by agricultural biotechnology multinationals on the one hand, and the obligations that the enjoyment of these rights should entail on the other. In Canada the manufacturers of GM crop systems possess a significant arsenal of legal rights in relation to their products. However, they appear to be relatively unburdened by legal obligations.

Phillipson, Martin, "Giving Away the Farm? The Rights and Obligations of Biotechnology Multinationals: Canadian Developments" (2005), 16(2) *King's College Law Journal* 362 [BA Tab 22].

33. Other academic commentators have made similar arguments.

See: Farnese, P.L., "Patently Unreasonable: Reconsidering the Responsibility of Patentees in Today's Inventive Climate" (2004), 6 *Tulane Journal of Technology and Intellectual Property* 1 [BA Tab 8];

Glenn, J.M., "Genetically Modified Crops in Canada: Rights and Wrongs" (2003), 12 *J.E.L.P.* 281 [BA Tab 12].

34. A review of the causes of action in particular adds merit to the Applicants' request for leave.

1. Negligence

35. Mr. Justice Cameron, for the Saskatchewan Court of Appeal, made short work of the negligence argument stating, at paras. 59-62, that there were policy reasons for negating a duty of care because the Federal Government had approved the unconfined release of Liberty Link and Roundup Ready canola. He furthermore determined that there could be no proximity sufficient to found a negligence claim because organic standards prohibiting GM canola were introduced subsequent to commercial release.

36. Regarding regulatory approval, it is noteworthy that the Applicants were precluded by an earlier decision from challenging the Canadian review process to adequately address the safety of GMOs to health and the environment. Prior to the certification motion, the Respondents brought an application to strike out an affidavit filed by the Applicants dealing extensively with the dangers of GMOs to the environment and human health because, as the Respondents argued, the Applicants had not put these matters in issue in their pleadings. The chambers judge disagreed, stating that “[p]rima face, these pleadings put in issue the question of whether genetically modified canola is environmentally unsafe.”

Hoffman v. Monsanto Canada Inc., 2003 SKQB 174, at paras. 68, 69 and 71 [BA Tab 13].

37. Ultimately, the chambers judge ordered the affidavit to be struck. She did so, however, not because the affidavit was irrelevant to the pleadings or otherwise inadmissible, but because the issue as to whether GMOs are environmentally dangerous was a matter to be determined at trial. She held that “[t]he certification hearing should not be taken up with lengthy and unhelpful arguments on the merits of this scientific dispute.”

Hoffman v. Monsanto Canada Inc. (supra), at paras. 78 and 83 [BA Tab 13].

38. Unfortunately, the lower courts then placed heavy emphasis on the Canadian regulatory decision documents as the definitive authority and the last word on the environmental safety of the Respondents’ GMOs.

39. At this stage of the action, it was premature of the courts below to dismiss the action on the basis of federal regulatory approval, given that the regulatory approval can be demonstrated not to be foolproof, particularly as failing to adopt a precautionary approach or to employ adaptive management once these organisms are released.

See: Chandler, Jennifer, “The regulation of genetically modified plants: Authorization of unconfined environmental release”, as published in the Final Report of the Institute of Environment, University of Ottawa, submitted to SSHRC & Law Commission of Canada, June 2005 – *Practising Precaution and Adaptive Management: Legal*,

Institutional and Procedural Dimensions of Scientific Uncertainty [BA Tab 3];

Madrusiak, B., “Playing with Fire – The Premature Release of Genetically Engineered Plants into the Canadian Environment” (1999), 9 J.E.L.P. 259 [BA Tab 17];

Khoury and Smyth, “Reasonable Foreseeability and Liability in Relation to Genetically Modified Organisms”, in the *Bulletin of Science, Technology & Society*, Vol. 27, No. 3, 215-232 (June 2007) [BA Tab 16].

40. In any event, compliance with regulatory standards does not usually confer immunity from negligence claims in product liability cases.

Willis v. FMC Machinery & Chemicals Ltd. (1976), 68 D.L.R. (3d) 127 (P.E.I.T.D.) [BA Tab 25].

41. In rejecting the negligence claim for want of proximity, the courts below relied heavily on their determination that the organic standards prohibiting GMOs were enacted after commercial release of the GM canola lines in question. Yet the issue of the timing of the GMO prohibitions was the subject of factual controversy in the court below as the Respondent, Bayer CropScience, filed expert evidence on the date of the enactment of the European prohibition in the European Organic Standard to counter what the Applicants stated in their particulars. Consequently, the timing and extent of the prohibition in organic agriculture should have been an issue for trial. Indeed, the Applicants proposed the following as a common issue of fact in the class proceedings:

What is the nature, extent, scope of the prohibitions against GMOs in certified organic grain production in the United States under its National Organic Program (the “N.O.P.”), in the European Union under its EEC No 2092/91 (the “European Organic Standard”), or in Japan under the Japanese Agricultural Standard (the “J.A.S.”) and when did such prohibitions come into effect?

42. Lastly, the analysis is fixed on one point in time — the first commercial release of the products. The pleadings allege that the products were released initially under an identity preservation program aimed at keeping foreign markets open to Canadian canola. It is furthermore alleged that the Respondents greatly expanded the acreages sown to their products

after the organic prohibitions were in place. The principals of adaptive management or continuing to hold the Respondents' responsible for "stewardship" of their GMO's would support a negligence claim against the Respondents' post-commercial release, or at the very least raise issues deserving a trial.

2. Nuisance

43. The potential of nuisance as a source of GMO contamination liability has been the topic of extensive academic debate and warrants the attention of this Court. Professor Rodgers states in "Liability for the Release of GMOs into the Environment: Exploring the Boundaries of Nuisance", (2003) 62 Cambridge L.J., at 371-402 [BA Tab 23], "[t]he decision in *Hoffman Farms* will be eagerly awaited, and may have major implications for plans to license GM crops for commercial exploitation in the UK."

See also: Craik, Culver and Siebrasse, "Genetically Modified Crops and Nuisance: Exploring the Role of Precaution in Private Law", in *Bulletin of Science, Technology and Society*, Vol. 27, No. 3, 202–214 (June 2007) [BA Tab 5]

44. The Court of Appeal was able to sweep aside the nuisance claim simply by adopting the chambers judge's determination that "[t]he implications of holding a manufacturer, or even inventor, liable in *nuisance* for damage caused by the use of its product or invention by another would be very sweeping indeed" (at para. 63).

45. Neither Respondent is a passive manufacturer or inventor. Rather, they exercise tight control and involvement in the individual use of their products. Indeed, Monsanto's TUA is pleaded in the Claim, as well as the allegation that the licensing of Roundup Ready canola was undertaken on the basis that Monsanto would retain ownership of its gene in accordance with its TUA.

3. Trespass

46. The Court of Appeal tossed out the cause of action in trespass, inferring a requisite element of direct interference could not be met (para. 64). The Applicants argued that the

requirement for direct interference, if it exists, was either satisfied or should be held not to apply to trespassing genetic material that was introduced into the environment and owned by the Respondents. The argument is based on the ownership rights to the trespassing material and the intrinsic nature of the trespassing articles in issue – they do not simply trespass on the fields of farmers and sit there, they take root, grow, propagate and spread. The Applicants argue that the biological nature of the trespassing article deserves special consideration as recognized in the “stray bull” cases, which do not require that the owner of the bull directly put his bull on to his neighbor’s property before there is liability. Liability in trespass should be a consequence of the commoditization of genetic material from which the Respondents have handsomely profited. If the Respondents assert ownership rights over all GM canola progeny, then there ought to be nothing repugnant in law in holding them responsible to remove such progeny from farmer’s fields where it is an unwelcome “volunteer”.

47. The need for the tort of trespass to adapt to these modern challenges has not been missed by academic commentators. Indeed, Professor deBeers argues that a tort of “biotresspass” potentially applies to the circumstances of this case.

See: deBeer, Jeremy, “Biotresspass” (2007), in *Bulletin of Science, Technology and Society*, forthcoming, (August 2007) [BA Tab 7]

4. EMPA and EMPA, 2002

48. Both pieces of legislation provide statutory causes of action for damage caused by the discharge of a “pollutant” in the case of the EMPA, and a “substance” in the cause of the EMPA, 2002. The chambers judge found that there was no cause of action under the EMPA and a limited cause of action under the EMPA, 2002 to support a class action. The Court of Appeal adopted the lower court’s reasoning for its determination that there was no cause of action under the EMPA and added that there was also no cause of action under the EMPA, 2002.

49. While the chambers judge was satisfied that the pleadings sufficiently alleged, or were reasonably capable of amendment to allege, that the genetic modifications in question were a “pollutant” within the meaning of the EMPA, she was not satisfied that the pleadings could

sufficiently disclose a cause of action because the case as pleaded did not disclose that the Respondents could be responsible for the discharge on the basis that they neither owned nor controlled it at the time of “first discharge”. According to the chambers judge, “it is difficult to see how either of the defendants who sold seed to farmers to cultivate, could be said to fit either of the relevant definitions [for ownership or control at the time of first discharge]” (at paras. 154-155) [Tab C]. Such analysis neglects, however, the “first” act of the Respondents of incorporating their engineered “pollutant” into a proliferating and invasive biological agent and then releasing it into the environment. Of note is the definition of “release” in s. 107 of *The Seeds Regulations*, which is defined as “any discharge or emission of seed into the environment or exposure of seed to the environment and includes the growing and field testing of plants” [BA Tab 28].

50. Therefore, the first discharge into the environment took place as early as the field plot testing, an act for which the Respondents are plainly responsible. Jodi McNaughton makes precisely this argument in “GMO Contamination: Are GMOs Pollutants under *The Environmental Management Protection Act?*” (2003) 66 Sask. L. Rev. 183 [BA Tab 19]. She argues that there has been a continuous discharge ever since.

5. *The EAA*

51. Pursuant to s. 8 of the EAA, the proponent of a “development” must obtain provincial ministerial approval before proceeding with the development. Provincial ministerial approval normally triggers an environmental assessment. In this case, the Respondents proceeded with their “development” without obtaining ministerial approval. Section 23 of the EAA contains a civil liability provision. “Development” is defined in s. 2(d) as including any project, operation or activity likely to “(iii) substantially utilize any provincial resource and in so doing preempt the use, or potential use, of that resource for any other purpose; (iv) cause widespread public concern because of potential environmental changes; (v) involve a new technology that is concerned with resource utilization and that may induce significant environmental change; or (vi) have a significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment.”

52. The Court of Appeal mistakenly noted that the chambers judge found only one of these grounds potentially to apply — widespread public concern. In fact she found two grounds that potentially applied — widespread public concern and significant impact on the environment. Nevertheless, the Court of Appeal held that “there is more to the matter than this, given the remaining indicia of what constitutes a development within the meaning of the *Act*, so it may be something could be made of this cause of action.” Professor Glenn argues there are at least four grounds that apply in this case.

See: Glenn, J.M., “Genetically Modified Crops in Canada: Rights and Wrongs” (*supra*) at p. 299 [BA Tab 12];

53. The Applicants argue that this cause of action, in and of itself, warranted class certification. The proposed class not only would have a common interest in the liability potential of the Act, but also in ensuring GMO crops are put through a provincial environmental assessment, where organic farmers would have an opportunity to voice their concerns. Notably, in a recent case, the United States Court for the Northern District of California issued an injunction halting the commercial release of Roundup Ready alfalfa because the federal regulatory review agency failed to consider the economic effect on organic and conventional farming.

Memorandum and Order in *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, unreported, (U.S.D.C., N.D. Cal.) [BA Tab 10]

Judgment in *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, unreported, (U.S.D.C., N.D. Cal.) [BA Tab 11]

6. Conclusion on the national importance of the causes of action asserted by the Applicants

54. Absent in the cause of action analysis in the courts below was any consideration of the “precautionary principle” in environmental law that this Court endorsed in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, at paras. 31-2 [BA Tab 1]. The cause of action approach in the courts below was not precautionary, it was pre-emptive — depriving these causes of action of their day in court. The pre-emptive strike appears to have been fuelled by a predetermination that, because GM canola has been adopted and was approved

by the federal government, it cannot possibly be environmentally harmful or the subject of any liability claims. A precautionary approach would have at least allowed these claims to proceed to trial to challenge this preconception.

B. The decision will have significant impact on organic agriculture in Canada

55. Depriving the Applicants of their day in court was a significant blow to organic agriculture in Canada. The dismissive approach was furthermore unwarranted given its growing importance to the agricultural economy and increasing consumer demand. Organic farming has been recognized as a model for sustainable agriculture.

F. Forge, "Organic Farming in Canada: An Overview" (2001), Parliamentary Research Branch, online at <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0029-e.htm>>. [BA Tab 9]

56. Recognition of the importance of organic agriculture is furthermore underscored by the recent enactment of the *Organic Products Regulations*, SOR 2006/338 under the *Canada Agricultural Products Act*, S.C. 1985, c. 40 [BA Tab 26] that recognizes the Canadian National Standard (which has a GMO prohibition). There is also a growing legal recognition of the rights of organic farmers when considering to allow GM crops (*Geertson Seed Farms v. Johanns*, (*supra*) [BA Tab 10]).

57. Indeed, a national agricultural disaster was avoided when the Respondent, Monsanto Canada, bowing to pressure from groups, such as the Canadian Wheat Board and organic farmers, agreed to shelve its plans to introduce genetically-modified wheat. The Applicants' claim initially sought an injunction from the Court to block Monsanto Canada's plans. The Applicants had filed evidence that the potential introduction of genetically-modified wheat in Saskatchewan would cause a staggering \$85 million in damages. The past and future economic gross loss caused by the introduction of genetically-engineered canola was itself estimated at \$14 million. Even Bayer Cropscience's own expert (Dr. Phillips), in spite of his affidavit, co-published a peer-reviewed article [Smyth, S. et al., "Liabilities and economics of transgenic crops" (2002), *Nature Biotechnology* v.20, n.6 [BA Tab 24]], finding that the introduction of

GMO canola destroyed the growing, although limited, market for organic canola causing between \$100,000 to \$200,000 in annual losses.

C. The decision will have significant impact on the ability to certify environmental class actions in Canada

58. As stated by Justice L’Heureux-Dubé in *Spraytech (supra)* [BA Tab 1] at para. 1:

The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: “Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in, and what quality of life we wish to expose our children [to]” ((1993), 19 M.P.L.R. (2d) 224, at p. 230). This Court has recognized that “[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment ... environmental protection [has] emerged as a fundamental value in Canadian society”: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17.

59. Class actions offer an important means by which protection of the environment can be achieved by enabling victims of pollution to join together to bring a claim where individually they would lack sufficient resources. In this regard, class proceedings accomplish one of the three core aims of the Act — access to justice, behaviour modification and judicial economy. As stated by Professor McLeod-Kilmurray in “Hoffman v. Monsanto: Courts, Class Actions, and Perceptions of the Problem of GM Draft”, *Bulletin of Science Technology & Society*, Vol. 27, No. 3, 2007, 188-2001, at p. 197 [BA Tab 18]:

Refusing to certify a case a class action has very serious consequences. The certification decision is not purely procedural, as the motions judge said it was; in fact, it has significant substantive effect. It prevents the attainment of the three goals of class actions: access to justice, judicial economy, and behaviour modification in case of widespread harm. Although technically the case can still go forward as an individual claim, the complexity and cost of arguing the scientific and economic issues mean access to justice would be out of the reach of the individual farmer. In terms of behaviour modification, even if each of the class members could successfully sue individually, the award would not be an aggregate one, and the message would not have the power of a collected action. If environmental cases are repeatedly refused

certification, the potential threat of group action is reduced, leaving those who might inflict widespread harm undeterred.

60. The challenge associated with environmental class actions is that the harm is normally diffused geographically and temporally making an “identifiable class” difficult to define with exacting precision. In such circumstances an enormous environmental harm may be spread wide enough to have caused a little harm to a lot of people. Class certification should be easier in such circumstances, not more difficult. If the lower court’s decisions are followed, it will be very difficult to certify an environmental class action in Canada,

61. While the chambers judge had no difficulty determining that the Applicants’ proposed class definition met the “criteria that permits objective identification of potential class members” (para. 200 [Tab C]), she required that each class member fully share a cause of action which, to her, meant participation in any damages recovered. The chambers judge then asked herself, at para. 214 of her Reasons for Judgment [Tab C], “What evidence is there, then, on this application, that members of the proposed class have, in common, suffered the losses claimed?”

62. The test appears to go beyond what this Court stated in *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21 [BA Tab 15] where the Court held that the requirement is not onerous. Everyone in the class is not required to have the same interest in the resolution of the common issues. However, the class ought to be defined as narrowly as possible without arbitrarily excluding some people having an interest in resolving the common issue. In other words, the task ought to have been to determine whether the class definition could have been defined more narrowly, not whether there may be persons within it who did not share the same damages. In this regard, the Saskatchewan Court of Appeal’s certification standard differs from other jurisdictions such as Ontario (*Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 50 [BA Tab 4]).

D. The decision will provide guidance to courts on the certification criteria under the Sask. CAA and for jurisdictions having similar legislation.

63. In granting leave to appeal (2005 SKCA 105 [BA Tab 14]), the Saskatchewan Court of Appeal recognized that this case “stands as the seminal authority in the Province on class

actions.” Yet the approach of the court reflected in its ultimate decision appears to represent a judicial cold reception to class actions that will impair the aims of class action legislation in Saskatchewan and other provinces choosing to follow its lead.

64. For instance, the Court of Appeal was moved to adopt a test for class certification in regard to whether the pleadings disclose a cause of action that would require the Applicants to show that the pleadings disclose an “authentic” or “genuine” cause of action, as opposed to the “plain and obvious” test employed elsewhere (2007 SKCA 47 [Tab E], paras. 53-54). Justice Cameron was persuaded to do so because of the protection from costs that the Act provides absent litigation misconduct (para 46). This is in spite of s. 7(2) of the Sask. CAA, which provides that an “order certifying an action as a class action is not a determination of the merits of the action.” Furthermore, costs protection was obviously aimed at encouraging class actions, not at making them more difficult. There is an obvious need for protection from usual court costs given most representative plaintiffs would be highly reluctant to come forward with a group complaint where they may face financial ruin for the litigation costs incurred by large multi-national companies in fighting them.

65. The lower courts’ approach to identifiable class has been commented on above. In regard to common issues, the chambers judge’s determination on the cause of action impacted significantly her determination of what would be appropriate common issues. Her analysis shows, however, that there were **8** common issues that she approved given her cause of action analysis, and **11** additional common issues that she would have been approved if she was in error in her causes of action analysis. Changing the approved causes of action therefore would have a cascading effect on the remainder of the class certification review. Even so, the preferability analysis was undertaken by the courts below without being mindful that the Applicants were proposing a split between liability and individual assessment of damages as they were permitted under the Sask. CAA, or that the Act did not require that common issues predominate over individual ones when determining whether class action is the preferable procedure.

66. The Court will also be able to address the conflict between group rights and individual rights reflected in the restrictive approach employed by the courts below. As Professor McLeod-Kilmurray argued in “Hoffman v. Monsanto: Courts, Class Actions, and Perceptions of the

Problem of GM Draft” (*supra*) at p. 198 [BA Tab 18]:

Beyond this, refusals to certify environmental cases raise broader questions about the nature of environmental law and the role of courts and citizens within it. If Yeazell (1987) is correct that the moment of certification “enables one to see the state as it confronts and reflects on the role of groups” (p. 3), *Hoffman* suggest a distinct disinclination to empower groups, at least in situations involving government regulation and large-scale, ongoing risks of environmental pollution. The refusal to certify denies affected groups the right to act collectively and to speak in the way they feel is most appropriate for responding to the kinds of harm imposed on them.

E. Conclusion

67. The proposed appeal raises significant legal issues and will have a considerable social and economic impact. It therefore warrants consideration by the Supreme Court of Canada.

PART IV: SUBMISSIONS IN SUPPORT OF THE ORDER SOUGHT CONCERNING COSTS

68. The Applicants do not seek an order for costs against the Respondents by reason of s. 40 of the Sask. CAA.

PART V: THE ORDER SOUGHT

69. The Applicants seek an order that leave to appeal be granted, but do not seek costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 25th day of July, 2007.



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