

IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

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

APPELLANTS (PLAINTIFFS)

AND:

MONSANTO CANADA INC.
and BAYER CROPSCIENCE INC.

RESPONDENTS (DEFENDANTS)

BROUGHT UNDER *THE CLASS ACTIONS ACT*

**REPLY FACTUM
ON BEHALF OF THE APPELLANTS**

STEVENSON HOOD THORNTON BEAUBIER LLP
Barristers & Solicitors
#500, 321A – 21st Street East
Saskatoon, Saskatchewan
S7K 0C1

**REPLY FACTUM
ON BEHALF OF THE APPELLANTS**

I. INTRODUCTION

1. While no cross-appeals were filed, the Respondents' factums and arguments have challenged the Chambers Judge's cause of action determinations that were in the Appellants' favour. The Respondents have challenged the determinations that the claimed harms may fall within the scope of nuisance; that there is a possible claim under *The Environmental Management and Protection Act, 2002*¹ ("EMPA, 2002"); and that there is a possible claim under *The Environmental Assessment Act*² ("EAA").

2. During the hearing of the appeal on Dec 11, 2006, this Court granted leave to the Appellants to file a factum in response.

II. SCOPE OF NUISANCE

3. The Chambers Judge at paras. 106-110 concluded it is possible that the alleged harm might fall within the scope of nuisance law. The Respondents challenge this conclusion.³

A. *Property damage has occurred, so both branches of nuisance are applicable*

4. Monsanto asserts the Appellants have not alleged physical damage and therefore suggest only the second branch of nuisance is applicable (i.e. disruption of the Appellants' enjoyment of their property, absent property damage).⁴

¹ S.S. 2002, c. E-10.21.

² S.S. 1979-80 c. E-10.1.

³ Bayer's factum at paras. 150-156; Monsanto's factum at paras. 82-84.

5. Property damage however *is* alleged, through such wording as “contaminating the ... property of certified organic grain growers” and through claimed damages for cleanup costs.⁵ Further, case law recognizes that such property damage supports a claim in nuisance:

- a) The U.S. District Court in *Starlink*⁶ ruled that contamination of the plaintiffs’ corn supply by GM corn is physical injury, even though the plaintiffs still sold their contaminated crops at lower prices for uses other than human consumption. Similarly, in the present case, GM infiltration has contaminated organic grain farmers’ lands and crops, resulting in clean-up costs and, for those who grew or intended to grow canola, loss of canola for crop rotations and decreased revenues due to loss of access to organic markets.
- b) The English Court of Appeal in *Blue Circle Industries v. Ministry of Defence*⁷ held that contamination by radioactive material, even though it was well below levels that posed any risk to health, satisfied the phrase “damage to any property” in the *Nuclear Installations Act 1965*, because “there is some alteration in the physical characteristics of the property ... which render it less useful or less valuable.”⁸ Similarly, in the present case, GM infiltration causes a change in the physical characteristics of organic farmers’ lands and crops, resulting in them being less useful and less valuable.
- c) Infestations of weeds, which are analogous to the alleged infiltration by volunteer GM plants, have been held to constitute damage to land.⁹ In analogy to the alleged cross-pollination, in which bacterial genes added to

⁴ Monsanto factum at para. 83.

⁵ *Amended, Amended Statement of Claim*, at paras. 34, 44(c).

⁶ *In re Starlink Corn Products Liability Litigation, Marvin Kramer, et al. v. Aventis Cropscience USA Holding, Inc., et al.* (2002), 212 F. Supp. 2d 828 (U.S. District Court, N.D.Ill.) (“*Starlink*”) at 842-844 [Appellants’ Book of Authorities (“ABA”) Tab 15].

⁷ *Blue Circle Industries v. Ministry of Defence*, [1998] E.W.J. No. 660, [1998] 3 All ER 385, [1999] Ch 289 (C.A.) (“*Blue Circle Industries*”) [Appellants’ Reply Book of Authorities (“ARBA”) Tab 37].

⁸ *Blue Circle Industries*, at paras. 11-25, 70, 91 [ARBA Tab 37].

canola by the Respondents enter the plants of organic farmers at the sub-molecular level, an English insurance case held that sub-molecular heat damage to a painting constituted physical damage.¹⁰

6. Since the facts supporting both branches of nuisance, namely property damage and loss of use and enjoyment of property, are clearly pleaded, the Appellants' Claim sufficiently pleads a nuisance claim.

B. Organic farming is a protected land use within the scope of nuisance law

7. The Respondents argue they should not be liable for the harms alleged by the Appellants since those harms only came about because organic certifiers adopted standards that banned the use of GMOs, and because organic farmers voluntarily seek to meet such standards.¹¹

8. Overly sensitive land use is a potential defence to a nuisance claim. Potential defences of the Respondents however are not to be considered at this stage of the analysis.

9. While it is not necessary for the Appellants to demonstrate that this potential defence is without merit, it is noteworthy that the courts have recognized that organic farming and adherence to organic standards is not an overly sensitive land use. In *Nippa v. C.H. Lewis (Lucan) Ltd.*¹², Flinn J. took into account the ability of the plaintiff organic farmer to remain certified, and in assessing damages, took into account the importance of crop rotations to organic farmers in finding the owner and operator of a neighbouring landfill liable in nuisance.

⁹ Chambers Judge at para. 108. See, for example, *Anjulin Farms Ltd. v. Calgary (City)* (1978), 10 A.R. 398, [1978] 1 A.C.W.S. 502, [1978] A.J. No. 533 (QL) at paras. 18-19, 23-24 [ARBA Tab 36].

¹⁰ *Quorum A S v. Schramm*, [2001] EWHC 494 (Comm) at para. 90 [ARBA Tab 42].

¹¹ Bayer factum at paras. 153-154; Monsanto factum at para. 84(a).

¹² *Nippa v. C.H. Lewis (Lucan) Ltd.* (1991), 82 D.L.R. (4th) 417, [1991] O.J. No. 1140 (QL) [ARBA Tab 41].

10. As to whether organic agriculture's ban on GMO's is reasonable, this is clearly a matter for trial. As determined by the Chambers Judge in her earlier ruling, the class certification analysis should "not become embroiled in the merits of a scientific dispute that cannot properly be determined on affidavit evidence, and does not, in any case, raise issues to be determined on the certification motion, but at trial."¹³

11. At trial, the Appellants will argue that organic farming is a significant part of the effort to move to sustainable agriculture, and there were legitimate reasons why it proscribed GMOs as a prohibited substance. These include health concerns regarding these products and environmental concerns regarding the potential of genetically engineered traits to be transferred to wild relatives, loss of biodiversity, the encouragement of increased pesticide use, and the uncertainties and potential long latency periods surrounding such potential impacts.¹⁴ Furthermore, banning the use of GMOs in organic farming is consistent with the precautionary principle, which has been recognized by the Supreme Court of Canada.¹⁵

C. Federal approval does not take this claim outside the scope of nuisance

12. The Respondents have raised the defence of statutory authority to argue that it cannot be a nuisance to cause government approved crops to propagate.¹⁶ As argued above, at this stage of the inquiry, we are not to concern ourselves with any potential defences the Respondents may have to a nuisance claim.

13. Furthermore, the defence of statutory authority is only available if the nuisance was an inevitable consequence of the carrying out of the authorized undertaking

¹³ *Hoffman v. Monsanto Canada Inc.*, 2003 SKQB 174, (the "April 10, 2003 Fiat") [ABA Tab 8], at para 83.

¹⁴ See, for example, B. Madrusiak, "Playing with Fire – The Premature Release of Genetically Engineered Plants into the Canadian Environment" (1999), 9 J.E.L.P. 259 ("*Playing with Fire*") [Appellants' Supplemental Book of Authorities ("ASBA") Tab 32].

¹⁵ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 31 [ARBA Tab 35].

¹⁶ Bayer factum at para. 153; Monsanto factum at para. 84(b).

and if the defendant was not negligent.¹⁷ The Appellants have pleaded that the Respondents were negligent, because they failed to take reasonable steps to prevent the spread of their products. Furthermore, the inevitability of the spread of the Respondents' products, absent reasonable steps, is a matter of evidence and therefore a matter for trial.

D. GM canola is not natural, but rather is significantly different to non-GM crops

14. The Respondents argue that since their products disperse themselves via pollen and seed dispersal, they are "natural" and therefore cannot be an unreasonable interference under nuisance law.¹⁸

15. GM crops are not natural. To assert otherwise belies the fact that both Respondents have sought and obtained patent protection for their engineered genes. To obtain a patent, the Respondents were required to satisfy the Patent Office that their engineered genes were a "new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter."¹⁹

16. In *Pioneer Hi Bred Ltd. v. Canada (Commissioner of Patents)*²⁰ the Supreme Court of Canada noted that case law has never recognized that new plant varieties obtained through traditional breeding techniques (such as hybridization and selection) that "obey the laws of nature" meet the requirements of an "invention" under the *Patent Act*.²¹ However, the court has recognized that genetic engineering techniques such as those employed by the Respondents to make GMO canola to be "human intervention of a high order."²² GM canola is thus far from 'natural', and finding that GM cross-pollination or GM volunteers are actionable in nuisance would not imply that non-GM

¹⁷ Klar *et al.*, *Remedies in Tort*, looseleaf (Toronto: Carswell, 1987) at 17-52 para. 55 [ARBA Tab 48].

¹⁸ Bayer factum at paras. 152-153; Monsanto factum at para. 84(b).

¹⁹ "Invention" as defined by section 2 of the *Patent Act*, R.S.C. c. P-4.

²⁰ [1989] 1 S.C.R. 1623.

²¹ *Supra*, at para. 18 [ARBA Tab 42].

²² Binnie J. in dissent in *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, 2002 SCC 76 at paras. 27-30 [ARBA Tab 39].

pollen flow or volunteers would also be actionable. Using such distinctions is not new to the law of nuisance – cases have denied liability for the natural flow of water from a defendant’s to a plaintiff’s land, for example, but have found liability when such natural flow is artificially altered in quantity or quality by the defendant.²³

III. EMPA 2002

17. The Chambers Judge determined that GM canola could meet the definition of ‘substance’ under s. 2(bb) of EMPA 2002, that each of the Respondents could meet the definition of ‘person responsible for a discharge’ under s.2(w), and that the Respondents are therefore potentially liable under s. 15(3).²⁴ The Chambers Judge held at para. 168 that it is not plain and obvious the Appellants claim could not succeed.

18. The Respondents argue that the Chambers Judge was in error and that s. 15(3) should be interpreted so that it only applies to discharges that are prohibited under s. 4, or in the alternative that paramountcy applies.²⁵

19. The relevant parts of sections 4 and 15 read as follows:

PART III
Protection against Unauthorized Discharges and Pollution
DIVISION 1

Unauthorized Discharges

Prohibition on discharges

4(1) No person shall discharge or allow the discharge of a substance into the environment in an amount, concentration or level or at a rate of release that may cause or is causing an adverse effect unless otherwise expressly authorized pursuant to:

(a) this Act or the regulations;

(b) any other Act, Act of the Parliament of Canada or the regulations made pursuant to any other Act or Act of the Parliament of Canada; or

(c) any approval, permit, licence or order issued or made pursuant to:

²³ *Remedies in Tort (supra)* at 17-26 para. 25, 17-31 para. 28 [ARBA Tab 48].

²⁴ Chambers Judge at para. 135.

²⁵ Bayer factum at paras. 185-197; Monsanto factum at para. 98.

- (i) this Act or the regulations; or
 - (ii) any other Act, Act of the Parliament of Canada or the regulations made pursuant to any other Act or Act of the Parliament of Canada.
- (2) No person shall discharge or allow the discharge of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly authorized by an Act, Act of the Parliament of Canada, approval, permit, licence, order or regulations mentioned in subsection (1).

DIVISION 3 Civil Liability for Discharges

Civil liability

15(1) In this section, “loss or damage” includes:

- (a) personal injury;
 - (b) loss of life;
 - (c) loss of use or enjoyment of property; and
 - (d) pecuniary loss, including loss of income.
- (2) The amount of any costs and expenses incurred with respect to an investigation taken pursuant to section 8 is a debt due to and recoverable by the Crown in right of Saskatchewan from the persons responsible for the discharge.
- (3) Subject to subsections (4) and (5), any person, including the Crown in right of Saskatchewan or in right of Canada, has a right to compensation from:
- (a) the person responsible for a discharge for loss or damage incurred as a result of:
 - (i) the discharge of a substance;
 - (ii) neglect or default in the execution of a duty imposed pursuant to section 4; or
 - (iii) an investigation or action taken pursuant to section 8 or 52; and
 - (b) any person to whom an environmental protection order has been issued for loss or damage incurred as a result of the execution or intended execution, or neglect or default in the execution, of the environmental protection order without proof of fault, negligence or wilful intent.
- (4) No person responsible for a discharge is liable pursuant to subsection (3) if that person establishes that:
- (a) the person took all reasonable steps to prevent the discharge of the

substance; or

(b) the discharge of the substance was wholly caused by all or any combination of the following:

(i) an act of war, civil war or insurrection, a terrorist activity or an act of hostility by the government of a foreign country;

(ii) a natural phenomenon of an exceptional, inevitable and irresistible character not reasonably foreseeable.

20. The Appellants are claiming under s. 15(3)(a)(i) of EMPA, 2002. With regard to s. 15(3)(a)(ii), section 4 imposes two basic duties: if unauthorized, not to discharge a substance causing adverse effects; and if authorized, not to exceed authorized levels of discharge. Any person that is in default of one of these two duties may be liable under s. 15(3)(a)(ii). If, as the Respondents argue, s. 15(3)(a)(i) is interpreted to only apply when s. 4 has been violated, then s. 15(3)(a)(i) becomes unnecessary since any such action will also fall under s. 15(3)(a)(ii). This would violate the statutory interpretation presumption against tautology – as noted in *Sullivan and Dreidger on the Construction of Statutes*, “courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.”²⁶

21. A literal and broad interpretation of s. 15(3)(a)(i) is therefore appropriate. Further support for such an interpretation includes:

- a) Section 15(4) provides suitable limitations on the breadth of s. 15(3)(a)(i), including a due diligence defence in s. 15(4)(a). Such limitations were recognized as significant in *R. v. Churchbridge*²⁷ in that they show the legislature was alive to the need to limit application of a provision down to only that required to obtain its objectives.

²⁶ R. Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed (Markham: Butterworths, 2002) at 159 [ARBA Tab 50] (“*Sullivan and Dreidger*”).

²⁷ *R. v. Churchbridge (Rural Municipality)*, [2005] S.J. No. 746 (QL), 2005 SKQB 524 [ARBA Tab 44] (“*Churchbridge*”) at para. 20.

- b) The courts have recognized the need for environmental legislation to take a broad and general approach, in part because it is not always possible to anticipate environmental harms.²⁸
- c) The polluter pays principle requires all parties up the chain of ownership or control to be considered when determining which parties were most responsible for pollution (as recognized in the definition of “person responsible for a discharge” in s. 2(w) which explicitly includes manufacturers, sellers, etc). Further, the polluter pays principle requires internalization of environmental costs regardless of whether an offence has been committed.
- d) The placement of s. 15 in its own separate Division 3 under Part III of EMPA 2002, together with use of the word “unauthorized” in the heading of Division 1 but not in the heading of Division 3, shows a legislative intent for s. 15 not to be restricted to offences under Division 1.
- e) In interpreting similar legislation in British Columbia, the B.C. Court of Appeal held that a similar cost recovery provision “creates a new civil cause of action, entire unto itself.”²⁹
- f) Hansard quotes are not very helpful here given the limited debate on EMPA 2002 in the Legislature. Nevertheless, in contrast to the quotes in Bayer’s factum at paras. 193-194 suggesting that, except for water, only minor changes were intended in moving from EMPA to EMPA 2002, other quotes indicate a contrary intention:

The Honourable Ms. P. Lorjé (then Minister of the Environment): This Act is broad in scope... Provisions with regard to contaminated sites and liability for those sites are being clarified and made consistent with department policy. The end result of the proposed amendments is a

²⁸ *Churchbridge* at paras. 15, 23 [ARBA Tab 44].

²⁹ *Workshop Holdings Ltd. v. CAE Machinery Ltd.* (2003), 12 B.C.L.R. (4th) 236, 2003 BCCA 56 at paras. 66, 68, 70 [ARBA Tab 47].

province that will continue to be justifiably proud of its natural environment, its diversity, its clean water, air, and land...

Mr. Weekes: Mr. Speaker, there's many other issues in this Act. The minister spoke about rolling the ozone amendments or Acts from other areas into this. And so it's fairly lengthy and I think that our critic for the environment will need time to study this Act.³⁰

22. Bayer Cropscience at para. 197 of its Factum raises the issue of paramountcy. As recently described by the Supreme Court of Canada, the doctrine of federal paramountcy dictates that provincial legislation does not apply if it makes it impossible to comply with federal legislation, or if it displaces or frustrates Parliament's legislative purpose.³¹

23. There is no such impossibility of dual compliance or frustration here. Nothing in the regulatory approvals granted to the Respondents either required the Respondents to release their products into the environment or exempted them from provincial liability laws should they do so.

24. Furthermore, governance of the environment often engages dual federal and provincial powers. For instance, the proponents of the project involving the damming of the Oldman River in Alberta were required to undergo both provincial and federal environmental assessment.³² Similarly, proposed uranium mines in Saskatchewan undergo both federal environmental assessment under the *Canadian Environmental Assessment Act* and provincial environmental assessment under *The Environmental Assessment Act*.³³

³⁰ Legislative Assembly of Saskatchewan, *Hansard* (12 June 2002) at 2006-07 [ARBA Tab 49].

³¹ *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13 [ARBA Tab 45] at paras. 11-14.

³² *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [ARBA Tab 38].

³³ *Inter-Church Uranium Committee Educational Co-operative v. Canada (Atomic Energy Control Board)*, 2004 FCA 218 [ARBA Tab 40].

25. Moreover, the Supreme Court of Canada recently addressed a similar issue in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*.³⁴ In *Spraytech*, the Town of Hudson, near Montreal, Quebec, enacted a bylaw restricting the use of pesticides within the municipality. Citing the need to have all levels of government involved in the protection of the environment,³⁵ the majority found no operative incompatibility between the bylaw and the *Pest Control Products Act*³⁶ even though the pesticides in issue were approved under the federal legislation.³⁷ In that case, and in this one, simply because the products were approved federally did not prevent their restriction locally. Therefore, any restrictions placed on the use of GMOs in the Province of Saskatchewan by the EMPA 2002 does not offend federal paramountcy principles.

IV. EAA

26. The Appellants seek a declaration that the Respondents' testing and commercial release of GM canola is a 'development' under s.2(d) of EAA.³⁸ Such a declaration will enable the Appellants to seek compensation under s.23 of EAA for clean-up costs for all organic grain farmers and, for organic grain farmers who grew or intended to grow canola, for the loss of canola in crop rotations and for the loss of access to markets.³⁹

27. Significantly, under s. 23, the Appellants will not have to prove negligence on the part of the Respondents to recover or that the Respondents intended to cause loss, damage or injury. Even more significant, however, is the reverse onus provision in s. 23(2). This provision will require the *Respondents* to prove that they *did not* cause the loss, damage or injury claimed by the Appellants.

³⁴ *Supra* [ARBA Tab 35].

³⁵ *Spraytech, supra*, at para 3.

³⁶ S.C. 2002, c. 28.

³⁷ *Spraytech, supra*, at paras 34 and 35.

³⁸ *Amended, Amended Statement of Claim*, at para. 45(b).

³⁹ *Amended, Amended Statement of Claim*, at para. 41.

28. The Respondents argue the Chambers Judge took an overly generous approach in finding that the definition of ‘development’ was met.⁴⁰ That definition reads:

“development” means any project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to:

- (i) have an affect on any unique, rare or endangered feature of the environment;
- (ii) substantially utilize any provincial resource and in so doing preempt the use, or potential use, of that resource for any other purpose;
- (iii) cause the emission of any pollutants or create by-products, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
- (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;

29. The Chambers Judge at para. 191 held that subclauses (iv) and (vi) might be met. The Respondents challenge the Chambers Judge’s positive finding under subclause (iv). The Appellants submit that not only might (iv) and (vi) be met in this case, but also (ii) and (v), as does Professor Glenn in her paper, “Genetically Modified Crops in Canada: Rights and Wrongs”.⁴¹

30. The Appellants claim that the release of GMOs into the Saskatchewan environment was a “development” within the meaning of the Act. Consequently, the Respondents were required to submit a provincial environmental assessment to the Minister. The Respondents failed in that regard. Consequently, the Respondents are liable

⁴⁰ Bayer factum at paras. 199-204; Monsanto factum at para. 98(f)-(i).

⁴¹ J.M. Glenn, “Genetically Modified Crops in Canada: Rights and Wrongs” (2003), 12 J.E.L.P. 281 [ASBA Tab 31] at 299.

under s. 23 for Saskatchewan's organic grain farmers' losses, damages and injuries. While the pleadings do not particularize which of the six grounds in the definition are relied upon by the Appellants for a "development", such a defect, if it is a defect, is easily remedied by particulars that the Respondents evidently did not require.⁴² Otherwise, to go further – to require the Appellants to prove any of the enumerated six grounds – clearly requires delving into the merits, and that requires a trial.

31. In any event, grounds (ii), (iv), (v), and (vi) will be addressed in more detail.

Ground (ii) – substantially utilize any provincial resource and in so doing preempt the use, or potential use, of that resource for any other purpose.

32. Two provincial resources are relevant here: farmland and the canola gene pool:

- a) The Appellants allege that as a result of the Respondents' development and marketing of GM canola, 70% of all canola grown in western Canada was one of the Respondents' GM varieties by 2003.⁴³ The Respondents' activities were therefore likely to result in substantial utilization of a provincial resource, namely farmland, and their ongoing sales of GM canola continue to do so. The Appellants allege that as a result, organic grain farmers are now significantly restricted, or simply unable, to use their farmland for growing canola.⁴⁴ The Respondents' activities have therefore pre-empted the use, or potential use, of farmland for other purposes, namely organic canola farming.
- b) The canola genome has been developed over many years in Saskatchewan. It is an important component of Saskatchewan's agricultural resources as well as a crowning achievement of Saskatchewan's plant breeders. The Appellants allege that the Respondents used this canola 'gene pool' resource by adding

⁴² The Respondents sought and were provided with extensive particulars of the Appellants' claim, **AB** Vol. 1 pp. 15-86.

⁴³ *Amended, Amended Statement of Claim*, at paras. 23-24.

⁴⁴ *Amended, Amended Statement of Claim*, at para. 27.

their engineered genes and then commercializing their resulting GM canola varieties.⁴⁵ The Appellants allege that this genetically engineered addition through adverse proliferation has, in effect, hijacked canola. Now there are few, if any, pedigreed seed growers or grain farmers in Saskatchewan will warrant their seed to be GM free.⁴⁶ The Appellants allege that the Respondents knew or should have known that such spread would occur without adequate safeguards, and that organic farmers are now significantly restricted, or simply unable, to use the genetic resources of canola.⁴⁷ The Respondents' ongoing activities were therefore likely to substantially utilize this important 'gene pool' resource, and they have pre-empted the use of it by organic farmers.

Ground (iv) – cause widespread public concern because of potential environmental changes

33. There has been, and continues to be, widespread public concern because of potential environmental changes that might be induced by the commercial release of GM canola. The Appellants have alleged such concerns by alleging that the organic community has prohibited the use of GMOs, and that Europe and Japan have closed their doors to GM canola imports.⁴⁸ Indeed, Monsanto acknowledges there is global debate “concerning the acceptability of genetically modified organisms.”⁴⁹

34. On the issue of timing, a careful consideration of when and whether public concern became widespread is necessarily a factual exercise, which is best left to trial.

Ground (v) – involve a new technology that is concerned with resource utilization and that may induce significant environmental change

⁴⁵ *Amended, Amended Statement of Claim*, at paras. 12-20.

⁴⁶ *Amended, Amended Statement of Claim*, at para. 26.

⁴⁷ *Amended, Amended Statement of Claim*, at paras. 27, 34.

⁴⁸ *Amended, Amended Statement of Claim*, at paras. 7-10, 29, 36(a).

⁴⁹ Monsanto factum at para 14.

35. GM canola is clearly alleged to be new technology that is “concerned” with resource utilization (in particular farmland and the canola gene pool, as discussed above). Further, the Appellants have alleged that the release of GM canola may induce significant environmental change, such as by alleging that GM canola cross-pollinates with non-GM canola (meeting the definition of ‘environment’ in s.2(e)(ii)) and that the release of GM canola has virtually crippled the organic farming of canola in Saskatchewan (meeting the definition of ‘environment’ in s.2(e)(iii)).

Ground (vi) – have a significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment;

36. For the reasons already stated, the Appellants agree with the Chambers Judge that the first part of subclause (vi) (i.e. “likely to ... have a significant impact on the environment”) is also satisfied.

37. Finally, the purposes of EAA, as described by Sherstobitoff J.A. in *S.A.F.E.*,⁵⁰ would be well served by a finding that the definition of ‘development’ is met in the present case, and that a provincial environmental assessment should therefore have been carried out. For example:

- a) A provincial environmental assessment could have added an important level of assessment in addition to the federal approval, with special attention paid not only to the physical and biological environment of Saskatchewan, but also to its “social, economic and cultural conditions” (see EAA s.2(e)(iii)) such as Saskatchewan’s organic farming industry.
- b) Public concerns could have been heard and considered.

⁵⁰ *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety)* (1992), 97 Sask. R. 135, [1992] S.J. No. 3. (QL) (C.A.) [ARBA Tab 46] (“*S.A.F.E.*”).

- c) The provincial Minister could have ensured the imposition of appropriate terms and conditions, such as requiring the Respondents to ensure Growers are properly warned to take measures to minimize GM infiltration.

38. Therefore, the Appellants submit that the Chambers Judges determinations in the Appellants' favour under nuisance, the EMPA 2002 and the EAA should be upheld.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan this 3rd day of January, A.D. 2007.

STEVENSON HOOD THORNTON BEAUBIER LLP

Per: 

Solicitors for the Appellants
LARRY HOFFMAN, L.B. HOFFMAN FARMS LTD.
and DALE BEAUDOIN

S:\SABRA\WORK\TJZ\SOD-34904000\APPEALS\APPEAL OF CERTIFICATION DECISION\REPLY FACTUM FINAL.DOC

This document was delivered by: STEVENSON HOOD THORNTON BEAUBIER LLP, Barristers and Solicitors, 500-321A 21st Street East, Saskatoon, Saskatchewan S7K 0C1; Address for Service: Same as above; Lawyer in Charge: Terry J. Zakreski (File No. 36038000); Telephone: (306) 244-0132; Fax: (306) 653-1118.

V. TABLE OF AUTHORITIES

	TAB
CASES	
<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)</i> , [2001] 2 S.C.R. 241, 2001 SCC 40	35
<i>Anjulin Farms Ltd. v. Calgary (City)</i> (1978), 10 A.R. 398, [1978] 1 A.C.W.S. 502, [1978] A.J. No. 533 (QL)	36
<i>Blue Circle Industries v. Ministry of Defence</i> , [1998] E.W.J. No. 660, [1998] 3 All ER 385, [1999] Ch 289 (C.A.)	37
<i>Friends of the Oldman River Society v. Canada (Minister of Transport)</i> , [1992] 1 S.C.R. 3.....	38
<i>Harvard College v. Canada (Commissioner of Patents)</i> , [2002] 4 S.C.R. 45, 2002 SCC 76.....	39
<i>Inter-Church Uranium Committee Educational Co-operative v. Canada (Atomic Energy Control Board)</i> , 2004 FCA 218.....	40
<i>Nippa v. C.H. Lewis (Lucan) Ltd.</i> (1991), 82 D.L.R (4th) 417, [1991] O.J. No. 1140 (QL)	41
<i>Pioneer Hi Bred Ltd. v. Canada (Commissioner of Patents)</i> , [1989] 1 S.C.R. 1623	42
<i>Quorum A S v. Schramm</i> , [2001] EWHC 494 (Comm)	43
<i>R. v. Churchbridge (Rural Municipality)</i> , [2005] S.J. No. 746 (QL), 2005 SKQB 524.....	44
<i>Rothmans, Benson & Hedges Inc. v. Saskatchewan</i> , [2005] 1 S.C.R. 188, 2005 SCC 13.....	45
<i>Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety)</i> (1992), 97 Sask. R. 135, [1992] S.J. No. 3. (QL) (C.A.).....	46
<i>Workshop Holdings Ltd. v. CAE Machinery Ltd.</i> (2003), 12 B.C.L.R. (4th) 236, 2003 BCCA 56	47
BOOKS AND ARTICLES	
Klar <i>et al.</i> , <i>Remedies in Tort</i> , looseleaf (Toronto: Carswell, 1987).....	48

	TAB
Legislative Assembly of Saskatchewan, <i>Hansard</i> (12 June 2002) at 2006-07.....	49
Sullivan, Ruth, <i>Sullivan and Dreidger on the Construction of Statutes</i> , 4 th ed (Markham: Butterworths, 2002).....	50