COMMENTARY: the SCC should step up to the environmental plate

By Jeremy de Beer and Heather McLeod-Kilmurray

By granting leave in the Hoffman v. Monsanto case, the Supreme Court could open the door to much-needed debate about who is responsible for the social, economic and environmental risks of biotechnological innovation.

Five years ago, Justice Binnie began his judgment in the so-called Harvard Mouse case by pointing out that the biotechnology revolution "presents potential and serious dangers as well as past and future benefits." (Harvard College v. Canada (Commissioner of Patents), (2002) S.C.J. No. 77)

That case considered whether genetic engineers could capture through patents the potential of biotechnological products. A 5-4 majority of the Supreme Court rejected the argument that higher life forms, including plants, are patentable inventions.

A few years and a few new judges later, the court had swung the other way. In Monsanto Canada Inc. v. Schmeiser, (2004) S.C.J No. 29 five judges ruled that while life isn’t patentable, its building blocks are. So Saskatchewan farmer Percy Schmeiser was guilty of patent infringement for saving and replanting canola seeds containing Monsanto’s engineered gene. The court was clear that Monsanto is entitled to the full benefit of that biotechnological monopoly.

Ann Smith ruled out nearly all of the plaintiffs’ arguments because it was "plain and obvious" they had no "reasonable prospect of success." (Hoffman v. Monsanto [2005] S.J. No. 304). Though that decision directly contradicts the findings of the Canadian Biotechnology Advisory Committee about the ability of the law to deal with these circumstances, the Saskatchewan Court of Appeal upheld her ruling after a cursory review (2007) S.J. No. 182.

The plaintiffs have sought leave to appeal to the Supreme Court. Canada’s highest court now has an opportunity to scrutinize the questionable reasoning of the lower courts. But more than that, the Supreme Court can properly put these issues in a broader context of the environmental and economic responsibilities for remedying contamination for which they are responsible. (Imperial Oil Ltd. v. Quebec (Minister of the Environment), [2003] S.C.J. No. 59).

The court has also suggested the class action procedure can be useful in environmental cases such as this, with "[t]he rise of mass production... the advent of the mega-corporation, and the recognition of environmental wrongs." (Hollick v. Toronto (City) [2001] S.C.J. No. 67).

As matters stand, lower courts are apparently unwilling to open the door to debate about the allocation of responsibility for the social, economic and environmental risks of biotechnological innovation.

The court has already acknowledged that "stewardship of the environment" is a "fundamental value in Canadian Society." (Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031) and that courts have a role to play in its protection. To encourage sustainable development, the court has affirmed the "polluter pays" principle, which "assigns polluters the responsibility for remedying contamination for which they are responsible." (Imperial Oil Ltd. v. Quebec (Minister of the Environment), [2003] S.C.J. No. 59).

The Supreme Court should seize this opportunity to demonstrate its commitment to the ideals it has endorsed.

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