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 the benefits of biotechnology through patents. 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.

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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 biotechnological and environmental context, where they belong. Genetic modification of food is a fiercely debated topic. Proponents tout the prospects of increased crop yields, enhanced nutritional value and greater economic productivity in Canada's agricultural sector. Critics cite the dangers of crop contamination, increased reliance on herbicides and pesticides, loss of freedom for farmers, loss of choice for consumers and, perhaps most importantly, utter uncertainty about its long-term impact.

This case, then, is about the allocation of legal responsibility for the risks of biotechnological innovation. It is about the biodiversity of the Canadian environment and the ability of organic and conventional farming to co-exist. And it is about the role of regulators, the courts and affected citizens in addressing these issues.

Though regulators approved the production and planting of genetically modified canola, our regulatory processes are not designed, and do not purport, to allocate the economic and environmental risks of biotechnological innovation. In the *Geertson Farms, Inc. v. Johanns* decision, a California court has accepted its duty to oversee the regulation of genetically modified crops, because it recognized the irreparable environmental costs of absconding from this responsibility. Canada's Supreme Court ought to do the same.

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Now, the tables are turned. Organic farmers in Saskatchewan have sued Monsanto and Bayer CropScience for contaminating their crops. If *Schmeiser* was about biotech rights, *Hoffman v. Monsanto* is about corresponding duties, not only of inventors and patentees but also of manufacturers and distributors of biotechnological products. *Hoffman* thrusts Canada back into the global debate over genetically modified organisms. Policymakers, commentators, farmers and companies around the world are watching this case very closely.

According to the plaintiffs, the "serious dangers" that Justice Binnie spoke about include uncontrollable and ongoing genetic contamination of canola crops and fields. Alleged damages also include ongoing clean-up costs and economic losses resulting from the inability to meet organic certification requirements.

In a 177-page judgment on the preliminary application for class action certification, Justice Gene 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 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. Dismissing the plaintiffs' application for leave to appeal would foreclose meaningful discussion of these important issues.

Taking on the Hoffman case would allow the court to provide much-needed guidance to lower courts, and to regulators, on how to put these environmental principles into action in the context of biotechnology and biodiversity. The Supreme Court should seize this opportunity to demonstrate its commitment to the ideals it has endorsed.

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