

WHEN IT'S NOT PATENTLY OBVIOUS

by Craig A. Zawada

© 2001 Wallace Meschishnick Clackson Zawada

Percy Schmeiser is Saskatchewan's most famous canola grower. He certainly didn't seek out that fame, and he probably wishes that this kind of celebrity had passed him by. His story, however, provides some lessons on patents, even for non-farmers.

Mr. Schmeiser found himself up against one of the largest agricultural corporations in the world, Monsanto Company. Monsanto has developed a unique type of canola. It is resistant to glyphosate, a herbicide that is marketed under names such as Roundup™. Glyphosate is a non-selective herbicide; it kills virtually any type of vegetation. Monsanto's canola and glyphosate offer a remarkable combination – a crop that can be sprayed with a chemical that kills almost everything else. The advantages in weed control alone are significant.

They are so significant that farmers pay a premium to use Monsanto's canola. But how does Monsanto protect its property so that it can make sure everyone using it properly pays for it?

Monsanto's answer was to combine two staples of intellectual property law. First, Monsanto patented the unique gene that they developed, the one that makes the canola resistant to glyphosate. This gives them a monopoly, with the sole ability to use and produce the gene (more will be said on why they patented the gene, and not the whole plant, later). The second tool used by Monsanto is a licence. Any producer that wants to use the canola must sign an agreement with Monsanto containing strict conditions on how it is grown, where it is delivered, that the seed cannot be re-used, and so on. If the licence is not honoured, or if no licence is signed, Monsanto falls back onto the patent for prosecution.

Mr. Schmeiser's problems began when Monsanto suspected he was growing their canola without a licence. They gathered some samples, determined that the patented gene was present, and sued the farmer for violating their patent. The trial took place in Saskatoon in the spring of 2000. Almost a year later, the Federal Court of Canada ruled that Mr. Schmeiser had indeed violated the patent, and was liable for damages to Monsanto.

Even those of us who are not farmers need to pay attention to this case, because it illustrates the power of patents, but also the problems in relying on them.

When litigation was commenced by Monsanto, it was the law in Canada that living beings, plant or animal, could not be patented. Therefore, the company came up with a clever way to protect their product. They patented the gene, not the canola plant itself.

Since the gene is where all the information that leads to glyphosate resistance is contained, this worked perfectly well. There is a problem, though; glyphosate resistant canola looks exactly the same as any other variety, and only genetic testing can tell the difference. It is possible, therefore, for a farmer to be accidentally growing the protected canola without being aware of it.

Much of the trial involved evidence of intent. Monsanto argued that Mr. Schmeiser knowingly planted the protected canola. Mr. Schmeiser's lawyers, on the other hand, tried to show that the canola had not been purposely introduced by him. In the decision, however, the judge found this argument to be academic. There was no question that the patented gene was found

within canola on Mr. Schmeiser's land. Therefore, according to the court, he had violated the patent by using the gene. End of story.

Most people are surprised that patent infringement can be this automatic, without needing proof of intent to infringe. This is what makes patents so desirable for intellectual property owners. They can be extremely effective in allowing relief, even where evidence of intent may be sketchy.

Unfortunately, this protection comes at a price – literally. Consider the cost to Monsanto of obtaining their patent in the first place. It would have at least been hundreds of thousands of dollars, and perhaps millions. The cost of running the patent infringement suit (I am making a bit of an educated guess here) would have likely subtracted hundreds of thousands of dollars more from their bank account.

A company the size of Monsanto can afford these types of costs. Most individuals and small businesses can not. This is by far the biggest problem with patents in today's world; great inventions are not protected simply because the inventor lacks the resources to do so. Granted, not all patents are as expensive as Monsanto's, but a patent is still the most expensive form of intellectual property protection.

All is not necessarily lost, however. Other forms of intellectual property protection might be available, ones which are less expensive than patent. Trade secret law, for instance, can be an effective and inexpensive solution in some cases. As well, there are creative ways of transferring intellectual property rights so that other parties bear the cost of obtaining a patent. The key is not to limit oneself to only one action track.

The *Schmeiser* case is also a stark reminder to users of patented property. What you can't see can still hurt you.

This article is for general information only and relates only to Saskatchewan law. Specific situations may require different or additional information. Do not act on any information contained in this article without consulting your advisors regarding your specific circumstances. As well, some of the articles are of historical interest only because legislation or case law may have changed.