

## Commentary

# Unlabelled: Law, Language, and Genetically Modified Foods in Canada

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“Sometimes, Goliath wins.”

Such was the assessment of journalists Rick Weiss and Justin Gillis on Canada’s 2004 Supreme Court ruling over Monsanto Canada versus Saskatchewan farmer Percy Schmeiser (see Weiss & Gillis, 2004). At the heart of this landmark case pulsed the issue of intellectual property protection and ownership versus individual rights—rights rooted in a long cultural tradition among farmers of saving and recultivating their seeds.

For scholars interested in developments within Canadian jurisprudence, the details of *Monsanto Canada Inc. v. Schmeiser* (2004) will be quite familiar: in 1998, it was discovered that a large percentage of the farmer’s canola crop contained Roundup-resistant seeds—seeds that Monsanto had genetically engineered (and patented) to resist the company’s own Roundup herbicide. Schmeiser surmises that the seeds must have blown onto his property either from passing trucks that had been improperly tarped or from neighbouring farms, five of which had signed Technology Use Agreements with Monsanto. These agreements require farmers to exclusively use Monsanto’s seeds and herbicide, and to also pay a \$15 per acre licensing fee to use the technology. Farmers, furthermore, are not allowed to save any seed for replanting and must buy new Monsanto seed each year.<sup>1</sup> Now, Schmeiser did not purchase Roundup Ready® canola seeds from Monsanto, nor did he sign a Technology Use Agreement—and, in March of 1998, the company warned Schmeiser against planting any Roundup-resistant seed that he might have culled from his own crops. This, Monsanto claimed, would constitute patent infringement. Schmeiser planted his saved seed anyway, setting off a spate of lawsuits and appeals that would eventually reach the Supreme Court of Canada.

In a contentious ruling, and with a slim 5-4 margin, Canada’s Supreme Court found Schmeiser guilty of violating Monsanto’s patent. The details of this ruling, and its profound implications for Canadian patent law, merit a journal article in itself. But the case also presents a different, rather intriguing, opportunity for communication analysis—one that is more limited in scope, and more focused on

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the conceptual (and legal) treatment of genetically modified foodstuffs in Canada. While much could be said about the cultural studies implications of the Percy Schmeiser case, about the different cultural perceptions of novel foods, or about the reception of GM foods by Canadians, the goal of this report is much more modest. It aligns some of the core themes of the Monsanto case with a second prominent controversy related to genetic modification: namely, the legal, policy, and communication issues of labelling genetically modified foodstuffs in Canada.

The Monsanto case provides an excellent segue into labelling because these two puzzles—the Canola case and the labelling of genetically modified foods—stand as some of the most contentious and profiled topics related to genetically modified food and feed within Canada. Monsanto's canola case is particularly intriguing, because it allows one to assess how legal, policy, and communication issues shift conceptually as they become, quite literally, more “processed.” Monsanto's Roundup Ready canola, along with other GM crops, eventually transforms into Mazola Right Blend Oil, President's Choice Balsamic Vinaigrette, and a host of other consumer products. And it is quite fascinating to trace the movement from farm to fork, showing how this “processing” works to repackage the conceptual issues at stake as well.<sup>2</sup>

#### **GM food and the concept of trespassing**

Monsanto's initial lawsuit, in many respects, boils down to the simple case of stealing versus trespassing. Monsanto, owner of Canadian patent No. 1,313,830 for “Glyphosate-Resistant Plants,” argued that Schmeiser essentially “stole” their property by saving and replanting, without Monsanto's permission, Roundup Ready seed that sprouted on his land. Schmeiser, in contrast, framed the seeds as *unwanted trespassers*—they came unbidden onto his land, essentially contaminating his crop, which was GM-free. Yet Canada's Supreme Court set aside this “trespassing” issue because Schmeiser had “actively cultivated” Roundup Ready Canola as part of his business. And even though he did not make any extra profit from this cultivation, Schmeiser denied Monsanto “the full enjoyment of the monopoly” (*Monsanto Canada Inc. v. Schmeiser*, 2004). In making this ruling, the Supreme Court majority determined that Schmeiser committed a crime by replanting seeds that contained Monsanto's “patented” gene regardless of how the seeds came into his possession—in essence, “the burden of coping with GM contamination [was] placed on the farmer rather than the corporate polluter” (ETC Group, 2004).

The concept of *unwanted trespassing* is particularly helpful for dealing with genetically modified foodstuffs in Canada, for, from a regulatory and policy standpoint, GM ingredients are treated as merely “unwanted trespassers” within our box of Cocoa Puffs, our Lean Cuisine, and some 30,000 other processed foodstuffs found on our grocery store shelves (Chua, 2004). More than 60 genetically modified foods have been approved for sale in Canada (Health Canada, 2004), and these foods have found their way into an estimated 80% of the country's processed-food products (Canadians applaud, 2003). And the key point about these unwanted trespassers is that, like all trespassers, the communication surrounding

their arrival is deliberately muted. Here it is muted because Canada has adopted a policy of *voluntary* labelling when it comes to genetically modified foods or ingredients within food products. Unlike the European Union, Japan, Australia, and New Zealand, which all have legislated mandatory labelling, in Canada manufacturers selling GM produce or creating packaged-food products for Canadian consumers can *choose* whether or not to announce this “novel trait” on the label. According to the 2002 report on GM food labelling by the Standing Committee on Agriculture and Agri-Food, the “voluntary labelling” policy was adopted because of the costs of implementing a tracking program for GM foodstuffs moving along the processing chain, and also because mandatory labelling “might give the impression that existing measures to ensure food safety are not adequate” (Canada, Standing Committee, 2002, para. 17).<sup>3</sup>

The upshot of this decision is that GM foodstuffs, like Monsanto’s Roundup Ready seeds, sneak into our personal property (in this case our bodies) without our knowledge or consent. And for those skeptical about the long-term safety of or ethical issues surrounding GM foodstuffs, it seems as if the burden of coping with GM “contamination” is placed on the individual—just as with the Monsanto case.

Conceptually, we might even push this further, for in law there is the concept of *trespass ab initio*—literally, trespass from the beginning—and this is a form of trespass that occurs when a person is given the authority by law to enter land (to search for stolen goods, for instance) “and subsequently commits an act that is an abuse of that authority. The authority is cancelled retrospectively and the entry is deemed to have been a trespass from the beginning” (Martin, 2002). Monsanto’s detractors would argue that this *trespass ab initio* occurred with Schmeiser *without the subsequent cancellation of authority*. (The point here is that Monsanto’s seeds constitute a “trespass from the beginning.” In contaminating Schmeiser’s crops, there is clearly a violation/abuse—and yet the courts have upheld the right to the trespass.) And in the case of GM food products, from a consumer perspective, there is the equal sense of a trespass that has been sanctioned by law—and one often viewed as an abuse of that authority—whether on ethical, moral, religious, or health grounds—or simply on the grounds of consumer preference.

What is interesting about *Monsanto Canada Inc. v. Schmeiser* is that the courts demanded absolute transparency in the dealing with GM crops. Schmeiser did notice that some of his canola plants were not harmed by herbicide, and the onus remained on him to alert Monsanto to this fact. But further down the food manufacturing chain, cultivators of GM products are not required to provide the same communication. This may seem particularly odd—since the point of a food product label is to communicate, not merely brand status, but also provide mandatory information regarding product content. The label is mute when it comes to GM ingredients because in the eyes of policymakers, GM potatoes, GM soy, or GM flax are “substantially equivalent” to their unmodified counterpart. But according to a series of national surveys conducted by the University of Calgary, consumers quite pointedly *do not* consider GM foods to be substantially

equivalent—“Canadians are hardly enthusiastic about them and a substantial minority—about four in ten—are definitely uncomfortable about it” (Canadians applaud, 2003). Other polls, conducted by Environics and Greenpeace Canada, reveal that anywhere from 80% to 95% of Canadians want GM foods to be labelled (Chua, 2004; Most want labels, 2004). And in the poll conducted by Leger Marketing, more than 9 in 10 Quebeckers wanted the federal government to make the labelling of GM produce mandatory (Most want labels, 2004).

#### **Language and consumer choice**

Here, then, is a situation in which the language on the label does not necessarily communicate the product within the package. Canadians want transparency when it comes to GM foodstuffs, a desire that seems decidedly at odds with a regulatory position that pivots on voluntary disclosure. Yet the policy documents surrounding this issue repeatedly suggest that the communication *is* transparent. In April 2004, for instance, Canada adopted the world’s first standard for the voluntary labelling of GM foods. Five years in the making, the standard details (among other things) the acceptable claims that can be made when the product contains GM fare. Thus “this corn oil is a product of genetic engineering” is outlined as an acceptable claim, as is the claim that squash, in a multi-ingredient food, is drawn from “mixed non-GE and GE sources” (Canadian General Standards Board, 2004, pp. B1, B2). The standard mandates that a single-ingredient food can claim to be a product of genetic engineering *only when* “more than 95% of the source of the single ingredient” is a product of genetic engineering (2004, p. 4). (For example, canola oil is a “single ingredient food,” but might be comprised of a GE/non-GE blend of canola.) It mandates that claims about containing a mixture of GM *and* non-GM sources “shall be made only when 5-95% of the source of the single-ingredient food is a product of genetic engineering” (2004, p. 4). Similar mandates are made for multi-ingredient foods. These regulations on the exact amount required to *advertise* GM status are quite ironic; for, in light of the current Canadian attitude toward GM foodstuffs, it is unlikely that producers and manufacturers will be tripping over themselves to voluntarily communicate the presence of GM within their products! But the important item of note in this document lies in its central claim that the standard “was developed to provide consumer choice” (2004, p. iii). This was reaffirmed by Dr. Peter Phillips, co-chair of the Canadian Biotechnology Advisory Committee on GM foods, who, in April 2004, publicly lauded the standard for its potential to deliver consumer choice “efficiently and effectively” (Phillips, 2004).

Choice, however, cannot be truly served when the communication is optional—and it is particularly intriguing that the advisory committee evaluating the standard recommended that “five years after the labelling standard is implemented on a voluntary basis, it should be evaluated to determine if it is effective in providing choice to consumers” (Canadian Biotechnology Advisory Committee, 2004). If it does not satisfactorily address consumer choice, then mandatory labelling “should be considered.” For some, “choice” does not equate to waiting well over a decade to be informed of the GM percentage in their food. The wait time may in

fact be even longer, since the standard notes that voluntary claims regarding GM foods cannot be made until a suitable verification and audit tracking process is first developed and put in place (Canadian General Standards Board, 2004).

### **Evaluating the communication of choice**

Ironic about this whole situation of voluntary disclosure is that Section 5(1) of the Food and Drugs Act (1985) and Section 7 of the Consumer Packaging and Labeling Act (1995) dictate that all labelling and advertising of foods must be accurate and not misleading. “No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety,” affirms the Food and Drugs Act (1985, Sec. 5.1).

Why, one might legitimately wonder, is it *not* “misleading” to veil the existence of GM foods within our products? The logic, again, is rooted in issues of communication: the language of the label is dictated by the language of the legal. And Canada’s legal system is particularly unique, for it is the only country that regulates according to “novelty” rather than “process.” This means that the novel or unfamiliar attributes of both food and plants are regulated *regardless of how* the novel traits were introduced in the first place. Genetic modification is considered a novel trait. But *in this context of novel traits*, regulatory agencies in Canada have treated GM foods exactly like conventional crops, by “rolling them up” in the term mentioned earlier, *substantial equivalence* (Royal Society of Canada, 2001, p. 180)—which is why it is not misleading to replace a conventional tomato with a GM one without announcing it.

*Substantial equivalence* works solely as a conceptual tool for food producers and government regulators—it is not a scientific formulation, and it fails to specify the type or “amount of testing needed for new foods” (Royal Society of Canada, 2001, p. 179). This means that an interesting communication paradigm applies—a type of “semiotics of the tomato” whereby if something looks like a tomato, is used like a tomato, and nourishes like a tomato—then it *is* a tomato (or at least should be treated as one).

Health Canada’s decision documents accepting the marketing and sale of GM foods provide an excellent illustration of this fact. Consider, for instance, the following claims made on the decision document for Monsanto’s Lepidopteran Species Resistant Tomato, which was approved by Health Canada in October 2000:

The Bt tomato line 5345 is intended to be used in raw form or in a variety of processed forms, in the same manner conventional tomatoes are used . . . .

The modification of this tomato will not result in a change in *consumption* patterns for this product. Dietary exposure of Canadians to this tomato will be the same as for other tomatoes . . . .

Based on studies of total solids, protein, ash carbohydrates, calories, vitamin A, vitamin C and folic acid, there is no *apparent* difference between the composition of the tomato line 5345 and traditional tomatoes. The use of these

tomatoes *should* have no significant impact on the nutritional quality of the Canadian food supply. (Health Canada, 2000, italics added)

Procedurally speaking, if a GM tomato is classified as “substantially equivalent” to other non-GM tomatoes, then the department of Health Canada waives all requirements to test the vegetable for unanticipated characteristics. If it communicates “tomato-ness” by disclosing the same appearance and similar nutrients and encouraging the same use and consumption—if “on its face” it “appears equivalent—there is no need to subject it to a full risk assessment” (Royal Society, 2001, p. 181).

There are, quite obviously, some difficulties with this logic.<sup>4</sup> But there are also some linguistic difficulties at work, since the regulation of GM foods under Novelty appears to logically contradict the “designation of ‘equivalence’ ” (p. 181). Under both the Seeds Regulations and Feeds Regulations administered by the Canadian Food Inspection Agency, a novel trait introduced into cultivated seed or into animal feed is one that, compared to conventional feed or seed, “is *not* substantially equivalent in terms of its specific use and safety for both the environment and for human health” (p. 181, italics added). *Novel traits have potential safety implications for both the environment and human health*. But *substantial equivalence* suggests that we view the seed or food as equivalent, and therefore just as safe, as a conventional crop. This leads us to a “logical impasse” (p. 181). As the Royal Society of Canada explains:

If a novel trait can be demonstrated to have *no* safety implications . . . “for both the environment and human health” [then it] implies that the genotypes being compared must be “substantially equivalent” and that there is, in fact, no “novel trait” at issue. Conversely, if two genotypes are deemed to be “substantially equivalent”, then no “novel trait” as [it has been] defined . . . can be present. (2001, p. 181)

Despite this contradiction, when it comes to regulating GM foods, *substantial equivalence* dominates. If foods like Monsanto’s Bt tomato line provide adequate tomato impersonations, then they are exempted from a third, seminal, regulatory step—a full environmental safety assessment (p. 182).

### **Communicative implications**

It is constructive to set aside these legal and linguistic gymnastics to briefly address some of the communication issues at play when dealing with genetically modified food in general, and labelling more specifically. From a legal point of view, communication and cultural studies scholars such as Kembrew McLeod and Rosemary Coombe have drawn attention to some of the dangerous tendencies of intellectual-property law in allowing for the plundering of biological diversity, what McLeod calls the “common heritage of humanity” (McLeod, 2001, p. 159). Extending this, embedded in patent struggles over seed (including the 2004 ruling made by Canada’s Supreme Court) lies the potential for the GM variant of Coca-Colonization—*Canola-Colonization*, in which mega-corporations like Monsanto forge and maintain unprecedented (and intractable) power over not merely the

Percy Schmeisers of the world, but the world's seed supply, traditional farming practices, indigenous knowledge, trade relations, and biodiversity *writ large*.

Yet this is only part of the picture, because when we scrutinize Canada's regulatory process for GM foods and their subsequent "voluntary" labelling, what we find is more of a language game at play—in which only certain players are privy to the rules of the game. Ideas of the "right of informed choice" for consumers drive most of the calls for mandatory labelling—but this "right to know" is motivated by myriad concerns related to GM foods—religious and ethical concerns, health and safety concerns, philosophical and political concerns. In this context, Claude Levi-Strauss' dictum that "food is good to think" takes on an entirely new significance, for the meaning of the Monsanto tomato or canola crop *is* reworked, even though it is "cooked" into what appears to be a standard spaghetti sauce. From the perspective of the Canadian public, the movement from farm to fork matters. And while GE/non-GE tomatoes may *look* the same, an identical-looking signifier does not translate into a uniform signified.

As a whole, what remains most fascinating (and perhaps troubling) about this entire issue of GM food labelling is that, while it embraces so many different questions and issues of communication they are bracketed off in favour of discussions on ownership rights and thresholds for substantial equivalence. Government-initiated research into GM food and communication tends to emphasize risk communication—particularly, how to frame or discuss GM foods so they become acceptable to a skeptical public. Silenced, then, are some of the more meaty issues pertaining to communicating, not least of all the responsibility inherent in (quietly) changing the rules while consistently voicing that the system is "transparent."

### Notes

1. Canada's Supreme Court summarized the Technology Use Agreement as follows:  
Monsanto requires a farmer who wishes to grow Roundup Ready Canola to enter into a licensing arrangement called a Technology Use Agreement (TUA). The licensed farmers must attend a Grower Enrollment Meeting at which Monsanto describes the technology and its licensing terms. By signing the TUA, the farmer becomes entitled to purchase Roundup Ready Canola from an authorized seed agent. They must, however, undertake to use the seed for planting a single crop and to sell that crop for consumption to a commercial purchaser authorized by Monsanto. The licensed farmers may not sell or give the seed to any third party, or save seed for replanting or inventory. (*Monsanto Canada Inc. v. Schmeiser*; 2004, Sec. III. 11)
2. The concept of tracing GM foods "from the farm to the fork" has been drawn from the strict labelling and tracing laws adopted by the European Union in April 2004. Under these new rules, products containing more than 0.9% genetically modified ingredients must be labelled as such.
3. This observation is upheld by Laurie Currie, vice-president of public policy and scientific affairs for the Food and Consumer Products Manufacturers of Canada. Recent research found that "40% of Canadian consumers treat GM labels as a warning, while 25% are turned off by products labelled GM and aren't likely to add these items to their shopping carts" (Fitzgerald, 2002, p. 13).
4. This logical inconsistency (from which my argument is drawn) is articulated and discussed in the Royal Society of Canada's report *Elements of Precaution: Recommendations for the Regulation of Food Biotechnology in Canada* (2001, pp. 179-183).

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