title to another's (*donor's*) property for the benefit of a third party (*beneficiary*). Unique to the common law, trusts have an almost infinite number of uses, the most common of which is to provide for the distribution of property to family, either during life or after death. The donor writes a declaration of trust naming a trustee (i.e. the administrator of the trust) and the beneficiaries. The donor is free to spell out almost any condition or instruction he wishes for the distribution of his property. The trustee then has the legal duty to administer the trust according to the donor's instructions.

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Monsanto v. Schmeiser

Expropriation on the Grounds of the Patent Act?

Jan Žamboch

Patents and Weeds

There has always been some degree of resistance against patent laws worldwide, yielding even to the abolishment of patent acts in the Netherlands in 1869 that lasted until 1912. Opponents of patenting claim that patents not only create monopolies, but that they may result in expropriations. Recently, an interesting case concerning herbicide resistant plants took place in Canada.

There are many large agrochemical and biotechnological companies that specialize in manufacturing products to control weeds on the farm and also developing "miraculous" plants that can survive the application of herbicides. Such resistant crops contain an inserted gene that gives it its special properties. Farmers growing this herbicide-resistant plant simply spray their fields with herbicide after the desired crop has emerged, which is, of course, a highly advantageous procedure. Monsanto Company, a manufacturer specializing in biotechnology, developed such a plant and called it Roundup Ready Canola.[1]

Mr. Schmeiser's Sin

Farmer Percy Schmeiser has been growing canola in Saskatchewan, Canada, since the 1950s. He has never planted or helped cause the planting of any seeds of Roundup Ready Canola. He only grew variety of canola known as Argentine canola. Despite this fact, his company Schmeiser Enterprises Ltd. and he himself were sued by Monsanto Company for having Monsanto genetics on his land. However, there was no evidence of Schmeiser obtaining the seed fraudulently. Indeed, all such allegations were dropped at the actual hearing, due to lack of evidence.

As the progeny of Roundup Ready Canola contains the modified gene and is also resistant to Roundup, a glyphosate-based herbicide developed and manufactured by Monsanto, Monsanto developed a licensing agreement to protect its market. As a result this limits the opportunity of a grower, under license, to sell or give seeds to another or to retain them for his own use. The crop is to be sold for consumption to a commercial purchaser authorized by Monsanto.

However, Mr. Schmeiser has never entered into any contract concerning Roundup Ready Canola with Monsanto and someone reported him to Monsanto for growing Roundup Ready Canola on his fields. Yet there are some doubts to this being a sufficient ground for legal action, as there was no breach of contract. Even if Mr. Schmeiser would have planted or helped cause the planting of any seeds of Roundup Ready Canola, which he did not, there could be no good reason for Monsanto to sue Mr. Schmeiser. In case Mr. Schmeiser got the seeds somewhere else it would be the licensee breaching contract that would have to be sued, not Mr. Schmeiser. In fact the seeds most probably contaminated Mr. Schmeiser's fields without his knowledge. A variety of possible sources were suggested, including cross-field breeding by wind or insects, seeds blown from trucks passing by, equipment dropping or swaths blown over from neighboring fields. A couple of witnesses supported these suggestions.

How could Mr. Schmeiser be sued then? The answer is simple. Mr. Schmeiser, when growing Roundup Ready Canola, infringed on the patent owned by Monsanto. The plant containing an inserted gene that protects it from the destructive effects of Roundup is patented in Canada.

Losing the Case

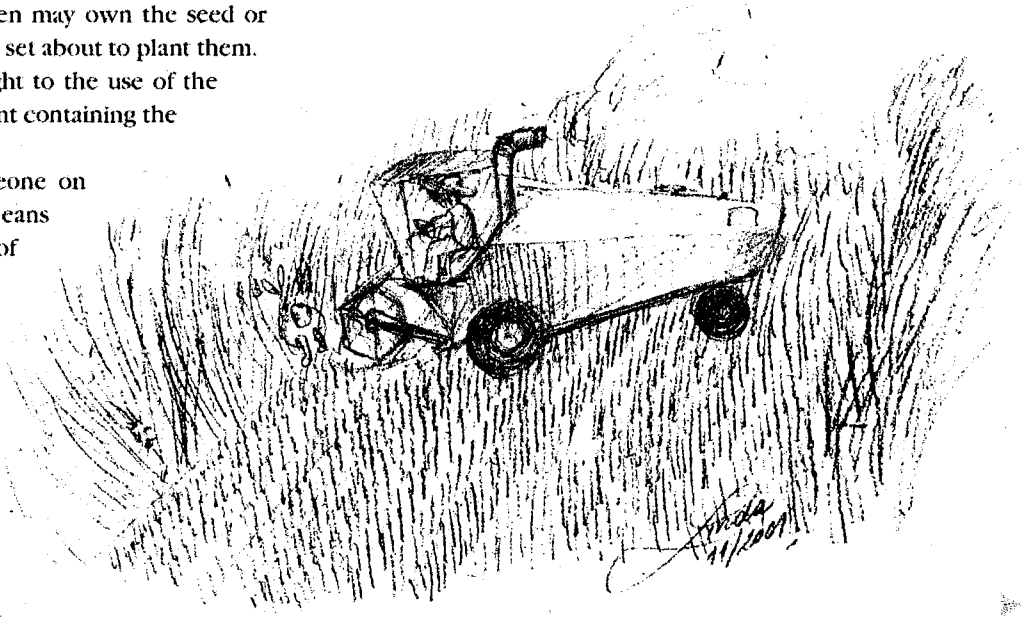
Mr. Schmeiser was trying to defend himself and his company by first submitting that the evidence of most of the tests conducted on various samples to prove he was growing Roundup Ready Canola should not be admitted or con-

sidered by the Court for several reasons. Defendants made this submission despite their acknowledgement that under the common law relevant evidence, however obtained, is generally admissible. Some samples were taken in 1997 and in July 1998 by persons acting on behalf of Monsanto. The defendants urged the fact that these were samples of their products, of their property and that they were taken without their knowledge or approval. The defendants urged that those samples should be excluded if the principle of the **Canadian Charter of Rights and Freedoms** is to be reflected in this civil dispute between the parties. The respective Section 24 Subsection 2 of the Charter provides "where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it would bring the administration of justice into disrepute." The judge concluded that in disputes between parties, in which no agency of government is a party, the Charter does not apply and referred to several precedents. Moreover, in his opinion this was not the case in which the Court should move to evolve principles of the common law in a manner consistent with the principle expressed in the Charter in Section 24 Subsection 2 to exclude evidence in particular circumstances. The judge also stated that if the evidence for the tests could be said to have been improperly obtained by the conversion of the defendant's property without consent, a matter he declined to determine, Mr. Schmeiser would have civil remedies to address that issue.

Secondly, the defendants questioned the validity of the patent, however the Court found the patent valid. The third submission is concerned with the effects of patent rights. The defendants urged that Monsanto had no property interest in its gene, only intellectual property rights. The judge acknowledged "that a farmer whose field contains seed or plants originating from spilled into them, or blown as seed, or even growing from germination by pollen may own the seed or plants on his land even if he did not set about to plant them. He does not, however, own the right to the use of the patented gene, or of the seed or plant containing the patented gene or cell."

Isn't it strange? How can someone on one hand own something, which means to be the full and exclusive master of that thing, and on the other hand be with regard to the same thing subject to someone else's rights? The defendants also urged that their case is part of a larger *law of admixture*, where the property of A introduced by A without B's intervention to the similar property of B from which it is indistinguishable, becomes the property of B. However, the judge declined these kinds of arguments and concluded that "Monsanto did have ownership in its patented gene cell and pursuant to the **Patent Act** it has the exclusive use of its invention." But how can one have exclusive right to use someone else's property without his consent? Isn't it in fact so that Mr. Schmeiser was on the basis of the **Patent Act** expropriated from his property that he would acquire under the common law principles? In addition, patent law is not part of common law and its origins are in contrary with common law principles and it also seems to be not only in its origins.

Mr. Schmeiser knew that canola resistant to Roundup grows in his fields. But he could not be sure that it is just the Roundup Ready Canola containing a patented gene since canola, as a living organism, might have acquired resistance to Roundup simply by natural selection. However, it is of no importance whether he knew or not what exactly he grows. Mr. Schmeiser urged that there was no intention to infringe on the patent. However, the judge concluded that "it is well settled that infringement is any act which interferes with the full enjoyment of the monopoly rights of the patentee as Mr. Justice Rothstein notes in *Lishamn v. Erom Roche Inc.* (1996).... Further, intention is immaterial for 'infringement occurs when the essence of an invention is taken' regardless of the intention of the infringer." Also, the patented subject matter is according to the Monsanto's patent a glyphosate-resistant (i.e. Roundup-resistant) plant cell comprising a chimerical plant gene further described in the patent claims. Since Mr. Schmeiser grew a glyphosate-resistant plant, he infringed on the patent and lost the case. He was ordered to deliver all the canola crops from 1998 containing the patented gene and to pay $19,832 which represented the profit made from the 1998 canola crop plus pre-judgment interests and costs.



To Be Continued

On June 19, 2001, Mr. Schmeiser appealed from the judgment at the Federal Court of Appeals. As we can read in the Notice of Appeal, his appeal will be heard by the Court at a time and place which will be decided by the Judicial Administrator. Unless the Court decides otherwise, the place of hearing will be as requested by the appellants. The appellants request that this appeal be heard in Saskatoon, Saskatchewan.

[1] Canola is a kind of a rape seed.

[2] *RWDSMU v. Dolphin Delivery Ltd.*, (1986) 2 S.C.R. 573, pp. 593-604, 33 D.L.R. (4th), *City of Mascouche v. Houle et al.* (1999), 179 D.L.R. (4th) 90 (Que. C.A.).

[3] We need to add that the gene itself was not invented by Monsanto. Inventing new genes is far beyond anyone's capabilities. Monsanto only inserted known gene into the genomic structure of canola.

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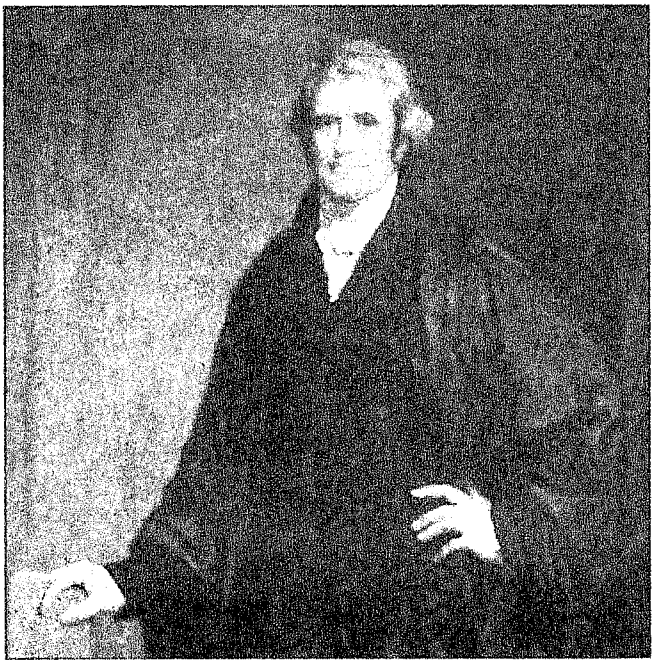
Marbury v. Madison

The Birth of Judicial Review in the USA

Michal Bobek

The power of judicial review upon the acts of other branches of government is nowadays understood as an indispensable component of modern constitutional theory. It entrusts the "least dangerous branch" of the government[1] with the power to examine acts of the executive or legislative branches regarding their conformity with the constitution and to declare them void if found inconsistent. The impact of this prerogative is immense.[2] We will take a further look at the establishment of this principle in the United States in the case of *Marbury v. Madison*.[3] First, it is essential to examine the setting of the case in its historical and political background. Second, the judgment itself will be discussed in depth followed by a historical evaluation of its importance. Finally, the impact of the decision on the American constitutional system will be addressed.



John Marshall (1755 - 1838)

Historical and Political Background

We find ourselves in the autumn of 1800. The Federalist Party, which was in control of the national government since the adoption of the **U. S. Constitution**, was defeated by the Republicans. Although the Federalists were facing the end of their era of power, the Federalist administration headed by president Adams remained in office until the end of their term on March 4, 1801.[4]

Being afraid of loss of their political influence, the Federalists decided to create a fortress for Federalist principles against those "dangerous radicals-freethinkers in matter of religion, friends of French revolution,"[5] which would last for a long time following their departure from power. Accordingly, the Federalist-controlled Congress passed in February 1801 the **Judiciary Act of 1801**, which gave president Adams, *inter alia*, the power to nominate 16 new federal judges. Moreover, two weeks later, Congress passed an act providing that the President might appoint for the District of Columbia as many justices of the peace as he thought necessary.

A busy two weeks followed in the Adams *"lame duck"* administration.[6] President Adams filled these newly created vacancies with loyal Federalists. These appointees received their confirmation only two days before Jefferson was to take office and thus became known as *"midnight judges."*[7] Federalists justified these appointments on the grounds that