

context effects on validity of response: lessons from focus groups and complacent frogs



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THE PURSUIT OF VALIDITY

The pursuit of validity is the search for truth. Do given survey measurements really capture what they claim or intend to measure? That question is the essence of assessing validity. But the boundaries for exactly what is being assessed under the rubric of validity should be established up-front.

In 2006, the Supreme Court of Canada identified validity as one of three main criteria for survey evaluation.¹ The court was careful to make the distinction between validity and relevance. Questionnaire measurements could be valid—they might capture people's true opinions or behaviour. But whether such measurements are relevant to the interpretation and application of the law is a different question. For example, a valid survey might show that Barbie dolls are brought to mind by the name "Barbie's." But (as illustrated in

this column in September) such a survey would not necessarily be relevant to a legal test of trade-mark confusion between a doll and an adult restaurant/bar named Barbie's.

Relevance in law is best assured through a well-defined mandate. It is the lawyer's responsibility, in setting a mandate for evidence to be collected, to ensure that a sound and defensible connection exists between his burden in law and his instruction to his experts. Relevance depends on that connection. Validity does not. Strictly speaking, validity of a survey should be assessed only against its well-defined mandate.

That would be where the story of validity starts, except for one more delineating factor. Validity requires that people tell the truth in answering survey questions. The survey industry operates on the assumption that people are, for the most part, willing to tell the

truth to non-leading, non-loaded, clear, objective questions. Although certain selected survey topics have been shown to have a built-in social desirability bias (such as charitable giving²), truth-telling in volunteer surveys is a plausible assumption for valid questionnaires. Market research analysts Dupré and Scott provide reassurance on this point. "All those years of research have made it clear to us, that as long as we respect the privacy of information people share with us, and use it appropriately, they will share honestly. Sounds corny, but we've got the data to back it up."³ Citing their own validity statistics, they observe a theoretical basis in the social sciences to support the view that social and ethical norms in western societies have evolved to facilitate truth-telling in surveys.⁴

In summary to this section, validity is a necessary condition for assuming truth-telling by respondents, and argu-

ing for relevance to the ultimate issue. But for complete satisfaction on truth-telling and relevance, one needs to look beyond just validity of survey design. With that understanding, we can then proceed to set down guidelines for assessing validity.

VALIDITY IS ABOUT THE QUALITY OF OPERATIONALIZATION

Validity may be assessed by asking whether the concept which requires measurement is accurately and fully captured by the test questions. If not, what is being captured? Is it an acceptable surrogate for the necessary evidence?

Survey questions, by their nature, operationalize the measurement of human attitudes, perceptions and intentions. They are self-report surrogates of qualities which are not directly measurable by current practical technologies. Quantitative data arising from the questionnaire questions are comparable to rulers measuring linear physical properties.

It is easy to state the guiding principle for validity: design questions which accurately and fully capture the legal concept of interest, or which measure a surrogate acceptable in law or defensible in social science! But that is about as detailed a guideline as possible until the “legal concept of interest” is identified, and the context is known. Generalizations are difficult. Unlike reliability, which pertains to sampling and quality controls across any kind of survey, validity is highly customized to the issue and its context, and relies on expertise in the social sciences. What areas of expertise? A study of hundreds of surveys considered by courts of law around the world, have helped us to tease out those aspects of attitudes, perception and behaviour which are relevant to legal applications, and have figured into the weight which surveys have been accorded. The remainder of this article deals with one of them, a most fundamental aspect of human brain processes: the context-dependence of perceptions, attitudes and inferences.

OUR PERCEPTIONS FREQUENTLY DEPEND ON CONTEXT

People rely on surrounding cues to make sense of the stimuli that go to the brain, and to form perceptions, attitudes or inferences. There are countless examples of how context can make a difference. Whether you see a B or a 13 in the diagrams below depends on whether you are shown the row or the column.



Whether you find your swimming pool hot or cold depends on the outside temperature. You can feel poor in Toronto, and feel rich when you travel to Bangladesh. People’s opinions in focus groups are well-known to be shaped by other people in the group. Context effects are often summed up with the boiling frog syndrome: place a frog in hot water and it will jump out to safety, but put the frog in cool water and heat it slowly, and the frog will allow itself to boil to death. Although perceptual context effects (like optical illusions, and complacent frogs) are the most intuitively clear in their description, there is

much literature to demonstrate that context effects extend to a wide range of attitudes and social perceptions as well.⁵

CONTEXT EFFECTS DO NOT MEAN THAT SIMULATIONS OR FIELD OBSERVATIONS ARE PREFERABLE TO SURVEYS

When presented as expert evidence, surveys are expected to live up to standards of scientific rigour. They are controlled studies which build new knowledge. They are not poor cousins to real-life. On the contrary, they should be removed, at least in part, from everyday living situations in order that a researcher can exercise appropriate quality controls over administration. The majority of our reliable knowledge of human behaviour is built on laboratory studies removed from everyday life. Just as an audiologist would not conduct a hearing test at a music concert, so there is no expectation that a survey researcher should conduct a consumer survey while consumers are shopping in a store. Stores contain too many uncontrolled variables and too much visual noise to be able to isolate variables of interest. Such research need not be ruled out, however, from producing results of interest to a court of law. Field experiments, observational studies, simulations, mystery-shopping—all may have a credible role to play in expert evidence. But controlled scientific surveys are their own well-established genre.

Given that scientific surveys are removed from the context of everyday life, how do we then apply the principle of context dependence of perception, and still expect to emerge with valid data? Survey researchers only need to ensure that they do not remove from the survey context any cues which might be determinative of a relevant attitude or perception. That is, people’s attitudes and perceptions do not necessarily change from context to context. They would only change if certain essential perceptual cues were removed, or if distorting cues were added. Examples in percep-

tion were given earlier. Examples from courtroom evidence are given next.

EXAMPLE: "GO GREEN WITH CANADA TRUST"

Before Canada Trust and Toronto Dominion Bank ("TD") merged in early 2000, they had battled over the use of the word "green" in advertising. TD had used the colour green in connection with its business since the 1960's, had registered several trade-marks containing the word "green" by the late 70's, and had famously named its banking machines of the 1980's and 1990's "Green Machines." In January 1991, Canada Trust launched an advertising campaign inviting their customers to participate in an environmental campaign. In return for certain business transactions, Canada Trust would donate money to environmental causes. The slogan of Canada Trust's campaign was "Go Green with Canada Trust," accompanied by t-shirts and posters that featured trees and wildlife. The slogan was sometimes shortened to "Go Green", though always shown in the context of an advertisement for Canada Trust, or inside a Canada Trust branch. Canada Trust's application of the word "green" to environmental activism was rather new-age at the time.

TD sued for trade-mark confusion, asking the court for an immediate injunction to have Canada Trust stop the infringement. TD commissioned a survey in which interviewers intercepted people in malls, and showed them a simple white card with black letters saying "GO GREEN."

GO GREEN

Respondents were asked with which financial institution they associated that slogan. A significant percentage said "TD Bank." TD presented the results as evidence of trade-mark confusion.

The survey came under criticism by an opposing expert for the fact that the stark black-and-white rendition of "GO GREEN" had been taken right out of the context in which it was being used by Canada Trust. The court displayed its own skepticism about the missing contextual cues. "Few people [encountering Canada Trust's actual use of that slogan] are likely to be confused as to whether they are in a Toronto-Dominion bank or a Canada Trust branch." The court also noted that Canada Trust's use of the word green made no allusion to a colour trade-mark (as TD was using it), but rather "as a meaningful description of accounts related to the environment." TD's request for an injunction was refused. The rest is history: it bought the offending company.

SIMILAR FINDING IN THE ALCOHOL SECTOR

The Go Green decision was reminiscent of an earlier finding in the Federal Court of Canada, an appeal of a decision by the Trade-marks Opposition Board.⁶ The Trade-marks Opposition Board had permitted Seagram Real Estate Company to register its name and a design logo (a stylized house) as a trade-mark.



Joseph E. Seagram & Sons Ltd. and the House of Seagram, purveyors of alcoholic beverages, appealed the registration. Survey evidence by the appellant established that a small but significant percentage of consumers, presented with the name Seagram Real Estate, said that they thought that the company with that name made alcoholic beverages.

The court was not persuaded by the survey, expressing concern "that the questions and responses were given in an artificial environment which can hardly be described as reflective of reality. Those questioned were shown a card with the design mark of the appellant including the trade-mark SEAGRAM REAL ESTATE LTD., but they were not shown the marks as used by the [real estate company], in the form of a sign, stationery or advertisement."

CONTEXT ISSUES IN JURY SELECTION

The search for an unbiased jury is often supported by a survey of the surrounding community to determine whether an unbiased jury can be found, or whether the court should resort to alternatives like change of venue, trial by judge alone, or challenge for cause. As early as 1981, social scientist Neil Vidmar recognized the problem of out-of-context survey responses by potential jurors:

"After all, survey interviews, whether obtained over the telephone or face-to-face, are conducted under conditions dissimilar to the courtroom. For example, in the former instance, the respondent is at home, the interviewer is not a legal authority figure, consent to the interview is voluntary, the respondent is not under oath, and answers are given under conditions where jury duty is not imminent. Thus critics of survey evidence have argued that respondents' answers are only hypothetical and perhaps frivolous, given in the belief that by expressing prejudice they can avoid possible jury duty."

His recommended solution was for surveys of potential jurors to include specific and direct questions about intended behaviour in the courtroom. His advice has been adapted for use in trade-mark and advertising surveys, which now frequently include instructions inviting consumers to put themselves in the frame of mind for shopping, reading newspapers, etc. It is not a perfect



substitute, but it is a plausible strategy to the extent that people are the best experts about their own frame of mind in different circumstances of their everyday lives.

LESSONS FOR LITIGATION SURVEYS

The assessment of validity can be carefully circumscribed, to be separate from philosophical concerns about truth-telling, and to be separate from legal concerns about relevance. Validity is about whether the right things are being measured in the right way. While assessment of validity is highly customized to any given survey mandate, there are recurring principles that have emerged in case law, regarding issues of importance for dispute resolution. This article has dealt with one of those principles: the context dependence of attitudes, perceptions, and inferences.

Surveys are necessarily taken out of the context of everyday life. It is still okay to anticipate that attitudes, perceptions and inferences can be validly mea-

sured for evidentiary purposes. One of the reasons, relevant to trade-mark law, is that the law requires evidence not of confusion, but of likelihood of confusion. This means that any measurement which plausibly predicts people's experience is acceptable. Another reason is that attitudes, perceptions and inferences can remain undistorted in any setting, as long as the context does not rob people of essential cues that they would use to draw inferences in their everyday life. The context should also not add extraneous, distracting cues that might change people's judgments.

Three lessons for survey researchers thereby emerge:

1. In designing a survey to collect evidence, ask yourself if you have left out anything essential to people's judgments, when framing questions to evaluate trade-marks, messages, advertisements, potential biases as a juror, or other matters for dispute resolution.

2. In designing a survey to collect evidence, ask yourself if you have included any discretionary, superfluous, or selective information which would distract respondents or bias their views.

3. Though a survey is physically removed from the real-life context, create an environment which plausibly allows respondents to put themselves in a frame of mind appropriate to what they would experience in their everyday lives.

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