



## 2016 Year in Review

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### - Social Science Evidence -

*Courtesy of*

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## 2016 Year in Review: Social Science Evidence

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This publication catalogues references to survey and other social science evidence in Canadian legal and regulatory proceedings, as well as in expert literature that relates to these types of proceedings. It excludes matters where social science evidence assisted in pre-trial settlement, or was filed but where a decision is still outstanding.

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## Expert Literature on Survey Evidence

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### **1. Breaking the Expert Evidence Logjam: Experts Weigh In; *Annual Review of Civil Litigation* - 2016**

Regularly cited by appellate courts across the country, including the Supreme Court of Canada, the *Annual Review of Civil Litigation* has provided leading edge coverage of new developments in Canadian law for almost two decades. The 16th edition of the authoritative Annual Review of Civil Litigation featured Dr. Ruth Corbin's article "Breaking the Expert Evidence Logjam: Experts Weigh In". The article addresses the perception that expert evidence can be a "problem area" in legal testimony; and focuses on worldwide efforts to improve the process by which valid and reliable expert evidence is delivered to Courts.

To access the full article, [click here](#).

### **2. Eveready and Squirt - Cognitively Updated; *Trademark Reporter* - 2016**

In an update to the previously published *Likelihood of Confusion Studies and the Straitened Scope of Squirt (Trademark Reporter, 2008)*, author Jerre B. Swann further explores the cognitive underpinnings of consumer research through standardized formats of likelihood of confusion surveys used in trademark litigation. Swann declares that an "understanding of those underpinnings—by courts and practitioners—is essential to an appreciation of the proper uses, and...limitations...of consumer research as to likelihood of confusion issues."

To access the full article, [click here](#).

### **3. Guidelines for Survey Sampling in Comparative Advertising Assessments; *CorbinPartners Inc.* - 2016**

This Guidelines document is a companion piece to CorbinPartners' previously-released "Handbook on Preference Claim Substantiation". It is designed to assist firms with design of survey evidence to substantiate advertising claims or to challenge a competitor's comparative claim. It provides a collection of published standards from reputable authorities, including National Advertising Division (NAD) and Advertising Standards Canada (ASC). The guidelines cover sample size, confidence level and geographic scope.

To access the full document, [click here](#).

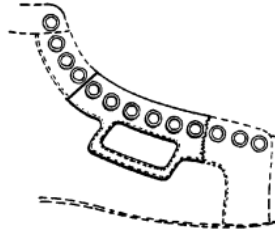


## Applications of Social Science Evidence in Legal Proceedings

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### 1. *Bauer Hockey Corp. v. Easton Hockey Canada, Inc.*, 2016 FC 1373

Bauer Hockey Corp. applied to the Federal Court to overturn a decision by the Trademarks Opposition Board in 2013 wherein the Board expunged Bauer's trademark for its skate's Eystay Design from the Trademark Register.



Easton Hockey Canada Inc. had previously sought expungement claiming that the trademark had fallen into disuse. In that case, the Board was to decide if the Trademark had been used in Canada within the past three years and whether or not it was used in the "normal course of its trade". The Board found Bauer's use of the trademark lacking on both counts, and sided with Easton, having Bauer's trademark expunged.

The Court was now tasked with deciding, among other things, "whether the Trademark *as used* is consistent with the Trademark *registered*."

Bauer submitted that the Trademark as registered and as used were not "so different as to render the Trademark unrecognizable" and that "because of the manner in which the hockey skates are seen by consumers when in use, and subsequently at retail, the public necessarily considers that the Trademark as applied to the [skates] is being used *as a trademark* by Bauer, and that the [additional material] that is superimposed within the Trademark is a separate trademark or trade name that refers to Bauer's name."

Bauer submitted two new affidavits to the Court not seen by the Board at the time of their decision. One of the affidavits was sworn by Dr. Ruth Corbin of CorbinPartners Inc. whose firm "conducted a survey on the perception of the Trademark by consumers".

[The CorbinPartners' survey] of consumers, in which skate purchasers, selected at random in various sports stores across Canada, were given a questionnaire and assigned to one of three groups. Only two of the three groups are relevant for the purpose of this analysis. The first group was shown a plain black hockey skate with the Trademark as registered (i.e. without the "BAUER" additional material). The second group was shown a plain black hockey skate with a white oval patch that had never been applied to hockey skates sold in the marketplace before. The results showed that a statistically significant amount of consumers were able to recognize the source of the Trademark without the addition of the name "BAUER" superimposed on the mark.

Bauer further argued that the changes in their mark were "minor" and did not render it unrecognizable, as Easton claimed.

The Court concluded "the differences are not such that a consumer, from a distance, would not be able to recognize that the hockey skates with the Trademark, as used, are made by Bauer." Along with new evidence brought forth by Bauer, the Court deemed the Board's decision did not meet the standard of correctness. Noting the importance of the additional new information submitted by Bauer, the Court stated the two additional affidavits submitted would have "materially changed the outcome of the Board's decision".

The Court allowed Bauer's application, quashing the Board's previous decision to expunge the Applicant's trademark.

## **2. Credit Union Central of Canada v CCUEFINANCE Consulting Inc., 2016 TMOB 175**

The Credit Union Central of Canada opposed the registration of the following mark by CCUEFINANCE Consulting Inc. in association with "financial services":



The Opponent alleged that the applicant's proposed mark would lead to confusion with their own marks, which all begin with the letters "CU".

In support of its case, the Applicant filed survey evidence, conducted by the Applicant itself in 2013, and directed to the Chinese community in Markham, Ontario. The survey addressed the perceptions of a relationship between the Opponent and the Applicant, including their applicable trademarks. The case notes the following

*[The survey] contains questions regarding the meaning of "CCUE" in the Mark, confusion with other CU trade-marks, and whether the Opponent and its trade-marks are "famous". In particular, in reference to a table in which a list of the Opponent's CU trade-marks are reproduced, the survey includes the question: "Will the mark 'CCUEFINANCE' make you confuse[d] with such other marks as 'CUE', 'CCUA', 'CULEAS3E' or 'CU...'?"*

The Opponent argued that a number of factors should make this survey evidence inadmissible, including:

*the fact that the questions were devised by a friend who has no experience in conducting surveys, that the surveys were not administered by independent skilled persons, that the sampling was inadequate and arbitrary as only 18 people who happened to be in Markham were questioned, and that there was no expert verification of the suitability of the questions.*

The Board agreed also noting the lack of relevance to satisfy the Court's requirements.

*The concept of relevance in survey evidence, as described by the Supreme Court in **Mattel, Inc v 3894207 Canada Inc, supra** at 45, includes the following issues: 1) reliability (in the sense of producing the same results if repeated); and 2) validity (in the sense of asking the right questions to the right pool of respondents in the correct circumstances to provide the information sought).*

*In the present case, having reviewed the questions in the survey, and taking into account [the Applicant's] answers during cross-examination regarding the methodology employed, the small number of the sampling size, and the nature of the questions in the survey, I agree with the Opponent that the survey questionnaire does not meet proper standards of relevance and reliability. As such, I am not prepared to afford the survey questionnaire any weight.*

While the Board dismissed the survey evidence, the Opposition was ultimately rejected by the TMOB on other grounds.

### **3. Wenger S.A. v. Travelway Group International Inc., 2016 FC 347**

Applicant Wenger S.A. filed an application with the Federal Court seeking a declaration that Travelway Group International Inc. infringed trademarks belonging to Wenger, as well as a permanent injunction restraining Travelway from infringing Wenger's marks. The Applicant also sought to have the Opponent's trademarks expunged from the register, as well as "an order requiring Travelway to destroy or to deliver to the applicants all products marked with any mark similar to the Wenger Marks, in its possession, power or control...".

Wenger, a Swiss company, and makers of the "Genuine Swiss Army Knife", have a logo, used since the 1970s, comprised of a cross in a rounded quadrilateral, surrounded by a border. They wished to have this logo protected by the Court, stating that the Opponent had since 2008 "engaged in a deliberate and planned scheme to unfairly hijack the reputation of Wenger's Cross Logo, and claim it for itself".



The Opponent manufactured travel-related products, and had a business partnership with a Swiss company, World Connect, for whom they manufactured their "Swiss Travel Products". The Opponents developed two logos at this time, namely the "S in Cross" and the "S in Cross on Triangle"; both had been registered and in use since 2008.



The Opponent maintained that its use of the trademarks was legitimate and that the Applicant had not objected to the use for at least two years after its original registration. Furthermore, the Opponent stated that the Applicant had not met its burden to show that a likelihood of confusion existed.

The Applicants produced evidence of confusion by way of an expert marketing opinion, supported by a mystery-shopping study (referred to as a “survey” in the Court documents) conducted by a third-party expert. The study examined whether luggage salespeople would confuse the Wenger luggage wares with Travelway, and found that 51% of sales people did hold this misapprehension. The marketing opinion observed that confused salespeople risk transmitting their own misapprehension “to hundreds of consumers each day.”

The Court sided with the Opponent in doubting the relevance and necessity of the evidence submitted, and accorded the survey no weight. The Court ultimately concluded that the “average consumer in a hurry” would not be confused so as to infer that the Travelway marks were manufactured and sold by Wenger.

Wenger has appealed this decision.

#### **4. *Boston Pizza International Inc. v TCC Holdings Inc., 2016 TMOB 70***

TCC Holdings Inc. applied to register the trademark “BOSTON BEST” for use in association with food and drink products and services, including restaurant services and food preparation services. TCC Holdings contended the “BOSTON BEST” mark had not been used in Canada. The Opponent, Boston Pizza Royalties Limited Partnership, which owns the BOSTON PIZZA trademark, and Boston Pizza International Inc., its licensee, opposed this application claiming the Mark was confusing with their own trademarks.

The Opponent noted in evidence that there were over 350 Boston Pizza restaurants across Canada, having served over 40 million customers, and with the trademark appearing on signage, menus, advertisements, coupons, etc.

The Opponent submitted into evidence an online survey conducted with over 1,600 Canadians. The survey examined Canadians’ word association with the term “Boston” in a “food service setting”. TMOB noted that survey evidence has been recognized as valid evidence “to inform confusion analysis and its main difficulty is often its reliability and possible invalidity”. In this case, the survey was accepted and considered relevant to the analysis of confusion. However, TMOB did find that certain survey questions were leading and would not be given any weight, including the question “would you perceive that restaurants operated under the name BOSTON BEST and BOSTON PIZZA are operated by the same company or otherwise affiliated?” TMOB also noted that while a majority of survey respondents answered that BOSTON PIZZA comes to mind when thinking about the word “Boston”, it would have concluded the same without survey evidence.





Based on all the evidence, TMOB found that both marks had a “considerable degree of resemblance” and that the Applicant failed to establish evidence of use or reputation within Canada. “Further, having a view to the acquired distinctiveness of the BOSTON PIZZA trademark, a consumer familiar with the BOSTON PIZZA restaurant chain who encounters a BOSTON BEST restaurant may find that the Mark suggests the idea of food services or goods affiliated with BOSTON PIZZA due to the shared first component BOSTON.” TMOB rejected the application.

## **5. *Restaurant Development Group LLC v Vescio Group Inc., 2016 TMOB 82***

Restaurant Development Group LLC opposed the registration of the trademark “BurgerFi” by Vescio Group Inc. Restaurant Development Group is the owner of the BurgerFi chain of restaurants located mainly in Florida, but with locations in other parts of the U.S. as well. Vescio Group’s application was filed based on proposed use in Canada.

The Opponent filed into evidence an affidavit from BurgerFi’s Director of Operations. The affidavit claimed Canadians have been exposed to the U.S. chain based on reviews of the restaurant on the Internet (on restaurant review websites such as Yelp, Urban Spoon and Trip Advisor). The affidavit also noted that BurgerFi staff had conducted surveys at three restaurant locations in Florida to determine how many patrons were guests from Canada. Cashiers asked customers: “Do you mind telling me where you are from?”, and if the guest answered “Canada”, the cashier then asked “Where in Canada?” and “How many people are in your party today?” Based on this study, a total of 1, 142 guests from Canada visited the locations over a one-month period in 2014.

The Opponent also submitted evidence of the number of Canadian web users visiting the U.S. chain’s “BurgerFi.com” website from February 2011 - April 2013. Using Google Analytics, they determined over 4,000 Canadian web users visited the chain’s website.

Vescio Group countered that they had conducted surveys outside specialty burger restaurants around the Greater Toronto Area to determine if BurgerFi was known to individuals in Canada. Of the 290 participants asked if they “had ever heard of BurgerFi”, only one said “yes”. The Opponent contested the survey as it did not meet any of the required criteria of acceptable survey evidence, namely that it was in fact an “in-house questionnaire” and not a market research survey of public opinion supported by the opinion of an expert, and should thus be disregarded.

The Board found that the online reviews about the Opponent’s chain of restaurants were not persuasive, nor were the statistics on web hits without other reputational evidence. The Board also found that while the Opponent’s survey did meet sufficient standards of relevance and reliability, it would not afford it any weight, mainly because it was conducted outside of the relevant time period.

The TMOB rejected the opposition, finding the Opponent’s evidence insufficient to conclude the ‘BurgerFi mark(s) had become known to “some extent at least in Canada to negate the distinctiveness of the Mark, and that its BurgerFi mark(s) reputation in Canada was substantial, significant or sufficient as of the material date.”’



## **6. *Air Miles International Trading B.V. v Air China Limited, 2016 TMOB 105***

This case concerned two travel-related companies and the registration of trademarks pertaining to travel-related wares. Air China is an airline with international operations and routes, including into Canada. Air China Limited applied to register the trademark “Guo-Hang-Zhi-Yin” (in Chinese characters which translate to English as "Best friends of Air China") and “PhoenixMiles”. Its application was for air transport services, as well as the operation of a frequent flyer rewards program.



The application was opposed by Air Miles International Trading, which owns trademarks and trade-names "consisting of or incorporating" AIR MILES. Air Miles similarly operated as a frequent flyer rewards program with services similar to that of the Applicant, for example, booking seats for travel. The Opponent alleged there would be a likelihood of confusion between its "well-known family" of AIR MILES marks and name and the Applicant's proposed mark.

In support of its opposition, Air Miles submitted social science evidence to support its claims of a likelihood of confusion. Among the evidence were three affidavits, covering surveys conducted between 2001-2011 by 3<sup>rd</sup> party marketing research firms, on behalf of Air Miles. The purpose of the surveys was to "track levels of awareness and of membership in various rewards programs and credit card programs in the Canadian market".

As related to the AIR MILES mark, the Board found that the Opponent had gained considerable reputation, and that the Mark remained the Opponent's "strongest case for a likelihood of confusion". The Applicant bore the burden of establishing no reasonable likelihood of confusion. On the matter of inherent distinctiveness and extent to which the Marks have become known, the Board found in favour of Air Miles as a result of the "substantial acquired distinctiveness". With regards to the degree of resemblance, the Board favoured the Applicant, stating the parties' marks were quite different in appearance and sound, with the only common element being the word "MILES".

TMOB found the "degree of resemblance between the parties' trade-marks in this case is so low, that as a matter of first impression, I do not consider it likely that a consumer would confuse the source of the parties' services. I therefore find that the Applicant has succeeded to establish on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's AIR MILES trade-mark."

## 7. *Bell Canada v Cogeco Cable Canada, 2016 ONSC 6044*

Bell Canada (Bell) and Cogeco Cable Canada (Cogeco) directly compete for Internet customers in Ontario. Bell sought an injunction against Cogeco in connection with an advertising campaign it considered to include "two allegedly false and/or misleading representations". Bell specifically was contesting Cogeco's use of the phrase "the best Internet experience in your neighbourhood" as well as the rebranding of Internet service packages to include the prefix "Ultra" (examples cited include "UltraFibre 15" or "UltraFibre 250").

The Courts applied the usual test for an injunction, starting with a determination of whether a serious issue existed. The Court noted that "the general impression conveyed by the advertisement must be considered. A representation is misleading in a material respect if an ordinary citizen would likely be influenced by that impression in deciding whether or not to purchase the product or service."

In support of its case, Cogeco argued that the "best experience" reference was validated by its own May 2016 customer survey, ranking factors of satisfaction:

*In that study, customers ranked as their top "satisfaction driver" "overall Internet service satisfaction" which is obviously general and would include many factors including speed and performance. The isolated factor of upload and download speed was ranked sixth. However, in relation to the five key Internet service "acquisition drivers", ranked first was better value for money, which would necessarily include speed and performance, ranked second was faster speed and ranked third was improved upload/download capacity.*

Bell agreed that many factors impact customer experience but countered that speed and reliability were the most critical factors. It claimed that Cogeco could not provide the "best Internet experience" without offering the best speed and reliability in all neighbourhoods (which Cogeco did not, said Bell).

Cogeco "concede[d] that it cannot claim that it provides the fastest Internet service in every neighbourhood it offers services in, or the highest Internet performance on other measures. However, it submits that its representations are qualitative only, rather than quantitative representations on matters such as speed, and bring to bear many factors other than speed such as customer service."

The Court found that Cogeco's advertised claims could be false or misleading and granted an injunction against the use of the "best Internet in your neighbourhood" phrase. However, it denied the injunction against the rebranding, since the word "Ultra" was non-specific and was presented alongside the actual speed of service.

## 8. *Richtree Market Restaurants Inc. v Mövenpick Holding AG, 2016 FC 1046*

This case concerned an Appeal brought by Richtree Market Restaurants/Richtree Restaurants du Marché (the Applicant) of a 2015 TMOB decision to reject Richtree's opposition to a Mövenpick Holding AG trademark application for the following design (in association with restaurant services):



The Federal Court appeal was in direct relation to the Board's rejection of the ground of opposition that the proposed Mark was not distinctive. While filing their notice of appeal, Richtree submitted two additional affidavits, including one from Mr. James Meadway, who had previously conducted a "study of restaurants, grocery stores and other Canadian businesses which contained the words 'market' or 'marché' in their names; he also contacted and attended at some of these businesses and provided photographs of the storefronts of some of these businesses." The new affidavit included, again, "sworn evidence and photographs of various businesses that use the word 'Market' or 'Marché' in their name ..." Richtree contended the new evidence would have made a great deal of difference to the decision brought down by TMOB. Mövenpick argued that the new evidence before the Board did not make any difference, and noted that the new evidence was prepared "more than four years after the material date for assessing the distinctiveness of the Mark."

In determining whether the Board's decision was justifiable, the Federal Court decided the new Richtree evidence was "merely repetitive or supplementary" and would not have "materially affected the Board's findings of fact or the exercise of its discretion with respect to the 'not distinctiveness' ground of opposition".

The Court, in its decision stated the following:

*Whether a trade-mark is distinctive is a question of fact that is determined by reference to the message it conveys to the ordinary consumer of the goods or services in question when the trade-mark is considered in its entirety as a matter of first impression [...] In this case, even if the word "Marché" may not be in and of itself immediately or inherently distinctive, the Board's decision finding that Richtree had failed to show that the term lacked distinctiveness was reasonable. The Board clearly considered the arguments made by Richtree, yet was not satisfied that it had met its initial evidentiary burden to show that either "marché" or "market" is "a term commonly used by third parties in the trade to describe the applied for services." Although the Board did find that there were numerous businesses that use the word "market" or "marché" in their name and that the word element was the dominant portion of the Mark, it also found that the majority of these businesses were not restaurants. It was open to and reasonable for the Board to conclude that the evidence offered by Richtree was not sufficient to show that the Mark, comprised of the dominant word portion and the design element, lacked distinctiveness such that it was incapable of functioning as a source identifier for Mövenpick's services.*

The Court denied the appeal.

## **9. *Wonderful Citrus LLC v Sunkist Growers Inc.*, 2016 TMOB 108**

In 2012, Sunkist Growers, Inc. filed an application for the trademark THE ULTIMATE DIET DRINK, for proposed use in Canada, including “fresh lemons and lemon water”. In 2014, Wonderful Citrus LLC (who has sold fresh fruit in Canada in association with the Mark ULTIMATE since 1987) filed an opposition to this application, claiming the Mark was not registrable and was confusing with its own trademark, ULTIMATE. To assess the extent of confusion, the Board stated the pertinent question would be whether an individual would conclude that the Applicant's "goods and services are manufactured, sold, leased hired or performed by the Opponent."

In order to establish the state of the register and marketplace, the Applicant submitted evidence "to show that ULTIMATE is a component of the trade-marks which currently co-exist on the trade-mark register for various food and beverage related products." The Applicant submitted applications or registrations for trademarks within Canada which contain the phrase ULTIMATE. These marks were then researched on the Internet and located on websites. The printouts of these located marks were submitted in support of the Applicant's case. The applicant argued that only a few of the examples covered “fresh fruit”, while the other marks relate to other food and beverage products.

The Board commented that the websites submitted by the Applicant were not all Canadian. They also noted that conclusions from the existence of these websites could not be made "regarding the extent to which consumers have accessed them or the extent to which the trade-marks featured on them have become known". However, they did agree to give the evidence some “limited weight”, as they found that other marks in the state of the register were relevant, and although small in number, the evidence "supports an inference that at least some of the marks are in use."

TMOB ultimately rejected the opposition, commenting...

*I therefore have difficulty with the Opponent's submission that upon seeing the Applicant's Mark, namely, THE ULTIMATE DIET DRINK, a consumer having an imperfect recollection of the Opponent's trade-mark would assume from the word "ultimate", that the Applicant's goods and services originate from the Opponent. Rather, I think it more likely that such a consumer would simply view it as a laudatory part of the Mark as a whole. I am therefore of the view that the differences between the parties' marks are sufficient to enable consumers to distinguish between them.*

## **10. *Acer Incorporated v OTG Experience*, 2016 TMOB 16**

OTG Experience, LLC, a company in the airport restaurant and bar business, had begun to integrate technology into its customer experience (e.g., adding tablet computers to restaurants for menu displays and customer use). It applied to register the trademark ACER in association with restaurant services for use in Canada. The Opponent, Acer Incorporated, is a hardware and electronics corporation formed in 1976 with offices around the world. The Opponent's ACER trademark is registered in relation to many computer-related goods and services, including tablet computers and displays.



The Opponent filed a statement of Opposition to the Applicant's application, based on several grounds, including a lack of distinctiveness. In its defence, the applicant filed state of the marketplace evidence collected from the Wayback Machine, including print-outs of archived pages "from at least 11 third party websites using ACER in association with various goods and services."

While the TMOB deemed some of the evidence noteworthy, it questioned the relevance of many examples either because it referred to a business in a different industry or referred to a business that did not contain the actual word "ACER". It stated that "While state of the register evidence can be useful to assess the commonality or distinctiveness of a trade-mark or portion of a trade-mark in relation to the register as a whole, it is only relevant insofar as inferences may be made with respect to the state of the marketplace, and inferences about the state of the marketplace can only be drawn when a significant number of pertinent registrations are located".

In conducting its assessment, TMOB recognized the Opponent's international reputation,

*As noted by the Supreme Court of Canada in Mattel Inc v 3894207 Canada Inc (2006), 2006 SCC 22 (CanLII), 49 CPR (4th) 321, famous brands are deserving of a broader ambit of protection and in some cases, the courts have emphasized that a significant dissimilarity in goods or services is no longer fatal for a finding of confusion. However, while the Court agreed that a relatively strong trade-mark can leap vast product line differences at a single bound, it is implicit in this statement that the product line will generally represent a significant obstacle for even a famous mark to leap over [Mattel, supra at 355-356]. The Court further stated that in some circumstances, the difference in goods or services will carry greater weight than the other surrounding circumstances [Mattel, supra at 354].*

TMOB ultimately sided with the Applicant, finding that the reputation of the Opponent would not necessarily extend to the services of the Applicant. "In my view, an ordinary consumer who attends the Applicant's restaurant and is presented with the Applicant's menu on a tablet would not, as a matter of first impression and imperfect recollection, likely mistakenly infer that the source of the restaurant services is the Opponent."

## **11. *Walter v Western Hockey League*, 2016 ABQB 588**

Lukas Walter, the representative Plaintiff, played hockey in the Western Hockey League (WHL) for the Tri-City Americans. Walter represented a number of players involved in a class action against the Western Hockey League and its umbrella organization, the Canadian Hockey League. The class action raised the issue of whether or not WHL players are employees and should "receive a paid salary in accordance with employment standards legislation". The WHL and CHL consider their players "student-athletes" and pay them a stipend rather than a salary. In this case, the Plaintiff argued they are legally employees and should be paid a full salary. For not complying, the Plaintiff claimed, the WHL and CHL were in breach of employment standards legislation.

This case included preliminary decisions on the admissibility of evidence in support of the Plaintiff's case and related to personal interviews with current or former CHL players. Both an affidavit and declaration were submitted and challenged.

The affidavit, which included interviews with eleven players, was based on a Master of Arts thesis on the experiences of CHL players. The Court found this evidence inconsistent and biased, and argumentative opinion given by a non-expert. It ultimately found the evidence inadmissible.

The declaration was submitted by an expert in industrial/organizational psychology and included interviews with 13 current or former players. This evidence was accepted by the Court as it found the "survey questions were logically structured to allow the expert to opine on the degree of similarity of the players' experience in the CHL."<sup>1</sup>

The case is still pending.

## **12. *Bennett v Bennett*, 2016 ONSC 503**

Facing criminal charges in the United States, the Plaintiff John Anthony Bennett (Bennett), sought funds from Bennett Environmental Inc. (BEI), of which Bennett was a former officer and director, for payment of legal fees. It was established by the Court in 2010 that BEI would be required to advance the funds. The Court set a protocol for payment and decided BEI would pay the portion of the legal fees it found to be "reasonable". The Court decided "either party was then free to bring a motion to determine the disposition of the remaining amounts." BEI challenged the legal fees, arguing that \$825,000 of the \$2.8 million in fees were unreasonable. It sought a credit for this amount, and also sought a cap on future legal fees.

Bennett's counsel presented an expert legal opinion on the reasonableness of his legal fees. BEI countered with a witness who had "considerable expertise in providing opinions to American courts regarding fee disputes". The witness challenged many of the items in Bennett's legal fees, including charges stemming from a polling study conducted for Bennett's jury selection. Bennett's team had retained a firm to assist in choosing the jury in the criminal trial, one which "specialised in pretrial research activities to gauge the likely consequences of specific arguments on a jury". Bennett's witness noted that polling prior to jury selection is common in criminal defence cases, calling it a "standard practice" to hire a jury consultant for these purposes. The witness further testified that jury consultation firms' "surveys can be extremely valuable in jury selection".

The Court deemed the charges stemming from jury consultation and surveys to be reasonable, stating the services met the established standard of providing a service which was "thought prudent and appropriate in the good faith judgment of professional counsel." The Court did not order Bennett to reimburse BEI for these services, however BEI was reimbursed for other legal fees incurred by Bennett's team deemed to be unreasonable.

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<sup>1</sup> See Also [Walter v Western Hockey League: Admissibility of Survey Evidence and Pre-Certification Disclosure Requirements; Canadian Class Actions Monitor: Stathakos, Theodore and Manley, Anna-Marie.](#)

### 13. *Allard v. Canada*, 2016 FC 236

This case involved a Charter challenge to the medical marijuana regime under the Marijuana for Medical Purposes Regulations (MMPR). This regime was enacted in 2013, and is substantially different from its predecessor, the Marijuana Medical Access Regulations (MMAR). The Federal Court stated that the case is about “access to marijuana for medical purposes by persons who are ill, including those suffering severe pain, and/or life-threatening neurological conditions. Such persons also encompass those in the very last stages of their life.”

The Plaintiffs were four individuals who required access to marijuana for medical purposes to deal with physical conditions which they suffered. “Their lives [had] been adversely impacted by the imposition of the relatively new regime to control the use of marijuana for medical purposes.” The Plaintiffs were disputing the government’s (that is, the Defendant’s), regulation of marijuana for medical purposes and the barriers to accessing the drug. The plaintiffs argued these restrictions were contrary to their s7 rights under the Canadian Charter of Rights and Freedoms, which state “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

At issue were the adverse effects regulations have on the Plaintiffs and Canadians who require marijuana for medical purposes. Those restrictions including method of consumption, and access as impacted by dosages, strains, cultivation, cost economics, etc.

It also includes the impact to affordability. While the Defendant claimed affordability was not an issue, the Plaintiffs disagreed, bolstering their argument with the testimony of Dr. Zachary Walsh, an Assistant Professor at the Department of Psychology at the University of British Columbia. Dr. Walsh conducted a study, the *Cannabis Access for Medical Purposes: Patient Characteristics, Patterns of Use and Barriers to Access*, otherwise known as the CAMPS study, “which involved drafting a detailed survey and collecting the results from 628 medical cannabis patients.” The results of the study were analyzed in depth, most notably evidence regarding affordability, access, and the overall impact on quality of life for patients. The Court noted:

While the study was designed to characterize medical cannabis users and their experience accessing medical cannabis, it is the largest study of medical users in Canada to date. The rationale for the study rested in part on the observation that rates of registration in the MMAR were well below estimates of medical cannabis use. The researchers felt that this discrepancy reflected factors that warranted further examination and highlighted potential barriers to access. Overall, those with the worst health had greater levels of barriers related to affordability. Financial saving was among the most widely noted motives for self-production.

*Importantly, Dr. Walsh assessed affordability in the CAMPS survey in two categories: (1) the patient’s ability to pay for the amount of cannabis that he or she needed to address his or her medical needs; and, (2) the extent to which people had to choose between their medicine and the other necessities of life. During examination, Dr. Walsh stated that affordability is not an absolute ability to afford based on the amount of money one has – it would be the type of choices and lifestyle constraints that would be implied by the cost.*





*Amongst other conclusions, the CAMPS survey indicated that the lowest income groups have the most difficulty affording medicine. A large number of those people choose between obtaining their medicine and other necessities. The people with the poorest health have the greatest difficulty affording their medicine and are the most likely to choose between their medicine and other necessities. This would make those with the poorest health the most vulnerable to the unregulated pricing regime under the MMPR.*

Based in part on the social science evidence provided, the Court decided the Plaintiff's s7 Charter rights to liberty and security were contravened by the access restrictions imposed by the Marihuana for Medical Purposes Regulations. In its decision, the Court concluded "[t]he appropriate resolution, following the declaration of invalidity of the MMPR, is to suspend the operation of the declaration of invalidity to permit Canada to enact a new or parallel medical marihuana regime. As this regime was created by regulation, the legislative process is simpler than the requirement for Parliament to pass a new law."

#### **14. 2326169 Ontario Inc. v The City of Toronto, 2016 ONSC 6221**

In 2015, the City of Toronto passed a by-law prohibiting the use of hookahs (water pipes) in city establishments. Hookah lounges are common in the Middle East and Asia, where patrons will gather to socialize and smoke shisha (an herbal product that does not contain tobacco) from the hookah. The Applicants in this case operated hookah lounges around the city. The Applicants claimed the nature of the by-law would shut down their businesses, and the City acted in bad faith by passing the by-law.

In its decision, the Court stated the by-law protected the health and safety of residents, and should be seen in the context of the City's broader anti-smoking campaign. It referred to a 2014 report to City Council from the City's Medical Officer of Health, Dr. David McKeown, in charge of Toronto Public Health. His report stated that hookah smoke was a health hazard regardless of what was smoked. The report referred to some of the hazards of hookah smoke, noting that hookah "smoke includes some of the same cancer-causing chemicals associated with tobacco", with some types of shisha have higher levels of cancer-causing chemicals than tobacco. The report also stated that hookah used in "enclosed spaces ...exposes staff and patrons to hazardous levels of air pollution".

Dr. McKeown's report included survey evidence that referred to the impact of a potential prohibition, if the by-law is enforced.

*Toronto Public Health conducted surveys of hookah lounge patrons and operators during the consultation process. Dr. McKeown's report noted:*

*(a) The intercept interviews indicate that nearly half of the patrons (46%) would still visit these establishments even if hookah use was not permitted;*

*(b) In Toronto, looking at all known businesses, approximately half of the hookah establishments are restaurants, bars or nightclubs and clearly rely on revenue from other sources such as food and*

*alcohol. For the other half, hookah use appears to be the [main] activity and likely is a more important source of revenue;*

*(c) All 14 interviewed operators stated that approximately 70%-90% of their revenue comes from hookah use. Almost all of the operators stated that a prohibition on hookah use would result in the closure of their business.*

However, Dr. McKeown's report also highlighted a conclusion from the survey evidence that "many people incorrectly perceive hookah smoking as less harmful than tobacco". Dr. McKeown and Toronto Public Health ultimately recommended prohibition of indoor smoking at commercial establishments in the City, with the subsequent by-law a result of this recommendation.

The Court found the decision to enact the by-law was based on the finding that hookah smoke is harmful. While it was acknowledged that the majority of the Applicant's business comes from renting hookahs and selling shisha to clients, it was also determined that the city has the power to prohibit this business, that no conflict is created by the by-law, and there is no evidence of bad faith by the City of Toronto.

*Council therefore made a policy choice. The by-law was passed by an overwhelming majority of city councillors. It was an exercise of democratic decision-making. It is no part of this Court's function to overturn the will of elected officials by, in effect, second-guessing their policy decisions*

*...I have a great deal of sympathy for the Applicants. They run modest businesses that are otherwise lawful and compliant with pertinent regulations and by-laws. They make an important contribution to the diversity that makes life in our city so culturally rich and vibrant. It is unfortunate for them that Council chose to prohibit rather than regulate hookah use in establishments licenced by the City to carry on business. That was a policy decision by elected officials. It is my duty to determine whether the by-law is legally valid, not whether it is good policy or bad policy.*

The Application was dismissed by the Court.

## **Other Uses of Social Science Evidence by Regulatory Agencies and Judicial Inquiries**

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### **1. Canadian Study on Legal Process Outsourcing**

While the Legal Process Outsourcing market is valued at some \$3 billion, and growing internationally, little was known about the state of this industry in Canada. To remedy this, Taran Virtual Associates, a legal outsourcing network, conducted a survey of practicing Canadian lawyers, to assess the extent of Legal Process Outsourcing across the country and its potential growth. More specifically, the study aimed to track existing usage, to identify motivations and barriers to trial, to highlight gaps between need and availability, to obtain input on best practices, and to discover key areas of improvement.

With assistance from the Canadian Bar Association and provincial law bodies, the study received a notably high rate of participation from practicing lawyers in law firms, corporations and government departments.

The study found that Legal Process Outsourcing has potential to become a game changer, with more than one-third of lawyers currently outsourcing a portion of their legal services.

To read more about the study, click [here](#).

### **2. Public Consultations conducted by the Government of Canada**

The Government of Canada has continued to leverage social science methodologies in consulting public opinion ahead of imposed regulations. As part of its commitment in the Regulatory Transparency and Openness Framework, the Government aims to maximize the information made available to citizens and, in turn, provide ample opportunity for input and feedback on government policies and priorities.

In 2016, there were several examples of Government initiatives that led to public input using social science. Notable examples are as follows:

#### **Consulting Canadians on the regulation of self-care products in Canada**

Health Canada regulates self-care products (vitamins, probiotics, sunscreens, cosmetics, moisturizers, deodorants, etc.) that are purchased without prescription by Canadians. These products are used often on a daily basis to “care for themselves and their families, for improving appearance, maintaining health and treating minor ailments”. Health Canada establishes the regulations that set the rules manufacturers must follow in order for their products to be sold to the Canadian public. In an effort to re-examine their approach to these regulations, and to create a simpler and more straight-forward decision process for Canadians when purchasing self-care products, Health Canada conducted an overview of the current regulatory system.



As part of this endeavour, Health Canada conducted public opinion research in April 2016, by surveying some 2,500 Canadian consumers on how they perceive and use self-care products. The survey “revealed that the Canadians surveyed do not consider themselves well-informed when purchasing self-care products.” This includes less than a quarter of Canadians when purchasing natural health products and fewer than 4 in 10 Canadians when purchasing non-prescription drugs.

Health Canada will be using this information as a baseline for other social science research planned moving forward. For more on the consultations, [click here](#).

### **Perception of plain packaging on cigarettes**

The Government of Canada sought public opinion on their regulation to require generic packaging for cigarette and other tobacco products for sale in Canada. The Government announced it would hold three months of public consultation on the matter. Under the proposed regulation, all tobacco products would appear the same (no branding, logos, colours) with the product name appearing in “mandated uniform small print”.

JTI, a tobacco company, believe the government’s consultations with the public were inadequate and failed to show “arguments or evidence against the plain packaging”. JTI retained a market research firm to conduct a national online survey of over two thousand Canadians in the summer of 2016 to further explore the matter.

Per the research findings:

*With under a month to completion, fewer than 1 in 10 Canadians knew about the government’s consultation on plain packaging (had heard about and could explain the government’s consultation to a friend or family member).*

*When asked, the majority of all Canadians think the introduction of plain packaging is unnecessary (54%). Almost twice the number (30%) who think it is necessary.*

*When asked, the majority of all Canadians (56%) think the introduction of plain packaging is not a good use of government resources. More than twice the number (27%) who thought it was a good use of government resources.*

Note: The proposed Tobacco and Vaping Products Act, introduced last November, continues to support the government’s plan to implement plain packaging. For further results of the JTI survey, [click here](#).

## **Toward the legalization, regulation and restriction of access to marijuana**

Between June and August 2016, the Government's Task Force on Cannabis Legalization and Regulation sought input from Canadians on the legalization, regulation, and restriction of access to marijuana in Canada in the form of an online consultation. The Task Force was created by the Government of Canada in order to aid in their commitment to legalizing marijuana. The Task Force's main objective was to see the views of Canadians "on issues that are key to the design of a new system".

The online consultation was based on a discussion paper split into five topics, with each requesting a questionnaire to be filled out by participants. It led to a detailed report (sent to the Minister of Public Safety and Emergency Preparedness, the Minister of Justice and Attorney General of Canada, and the Minister of Health) with a wide range of recommendations on how to promote and protect public health and safety.

For more information on the public consultation, results and recommendations, [click here](#).

## **Survey of Canadians on Privacy**

The Office of the Privacy Commissioner of Canada (OPC) is mandated by Parliament to act as "ombudsman and guardian" of privacy in Canada. As a result of its mandate, the OPC conducts research on public opinion and knowledge every two years to understand "the extent to which Canadians are aware of and understand their privacy rights and various privacy issues". In 2016, the OPC commissioned a private research company to conduct a telephone survey with 1,500 Canadians. The survey explored privacy issues related to the OPC's four strategic privacy priorities "economics of personal information; government surveillance; reputation and privacy; and the body as information".

Based on the survey results, Canadians consider themselves knowledgeable about privacy rights but are "increasingly concerned about privacy protection", with growing concern over how personal information is used online. More than 9 in 10 Canadians have concerns about protection of their personal privacy, with more than a third being "extremely concerned".

For more detailed findings on the OPC survey, [click here](#).



## Noted Absence of Social Science Evidence

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### 1. *Maltz v. Witterick, 2016 FC 524*

The Applicants in this proceeding produced and directed a documentary film, *No. 4 Street of Our Lady*, which told the story of Francizka and Helena Halamajowa, a mother and daughter living in Nazi-occupied Poland who hid Jewish families during the World War II. The film was based in part on the diary of Judy Maltz's (one of the applicants) grandfather, Moshe Maltz, who was hidden by the Halamajowas. The Applicants contend Jennifer Witterick, and her publisher Penguin Canada Books Inc., infringed their copyright and moral rights as her novel, *My Mother's Secret*, copied from their documentary.

The Applicants submitted evidence to the Court on the making of their documentary, including information on the screenings of the film, one of which Witterick attended prior to writing her book. Witterick admitted she was inspired by the story of the Halamajowas to write a fictionalized version in her book. She also admits that some of the names of characters and the town where the story takes place were taken from the documentary, however, the style of the book differs from that of the documentary and the remaining characters used were fiction, created by Witterick.

The Applicants' claim of copyright infringement ultimately did not succeed as the Court found the "only copyright in Mrs. Halamajowa's story lies in the Applicants' *expression of it and not in its facts*".

In this case the Court also sought to determine whether or not the Applicants' moral rights had been infringed. Although the Applicants submitted expert witness testimony in this case, the witness' scope did not address the matter of moral rights. "...In addition to an author's own subjective evidence as to how his or her honour or reputation has been affected: "the assessment of whether a distortion, mutilation or other modification is prejudicial to an author's honour or reputation also requires an objective evaluation of the prejudice based on public or expert opinion."

The Court noted there was a lack of relevant evidence to show how the Applicants' "honour and reputation" was affected by the book, and that "although an author has the right to be associated with his or her work, there is no evidence of prejudice to the honour or reputation of the Applicants..."

"Moreover, there is no expert or public opinion evidence in the record which would satisfy the objective aspect of assessing whether the Applicants' moral rights have been infringed or otherwise violated. The Applicants' claim for infringement of moral rights fails on this basis alone."

Without expert evidence or public opinion evidence, the Applicants were unsuccessful in their claims of copyright and moral rights infringement. The Court did not grant them damages, but decided the Respondents were entitled to the costs of the proceeding "in such amount as may be agreed to by the parties".

## 2. *Placements 1360 inc. c. J. Benny inc., 2016 QCCS 4185*

This case, heard in the Superior Court of Quebec, involves two cousins whose fathers were brothers and the descendant of William Benny. Both the Applicant and the Defendant operate restaurants with the “Benny” name in communities throughout Quebec.

The Plaintiff, Pierre Benny, has operated three restaurants under the name “Les Rôtisseries Benny” since 1980. The Plaintiff has asked the Court for an injunction that would force the Defendant, Jean Benny, to stop operation of his own restaurants under the name of Benny & Co. (registered in 2000, with more than a dozen locations), to no longer use the name in “connection with goods and services in the field of fast-food restaurants for roast chicken” and to discontinue activities which cause confusion with the Plaintiff’s trademarks.

One of the issues before the Court in settling this matter was determining whether “Benny & Co trademarks cause or are likely to cause confusion with the marks of the Plaintiff based on the criteria established by law and jurisprudence”. In its analysis, the Court referred to an earlier decision on this matter where the Judge noted there was “no expert evidence” and the evidence available “speaks against the existence of confusion”. Furthermore, “without expert opinion or survey results from consumers, the differences between the marks appear to be sufficient to distinguish them effortlessly. The jurisprudence teaches us that even small differences to distinguish them may be sufficient”.

The Quebec Superior Court found that the evidence submitted on the matter of confusion lacked scientific expertise and in some cases, was simply anecdotal. The Court found there was no confusion between the two trademarks, and dismissed the Plaintiff’s claims.

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