



2018 Year in Review

- Social Science Expert Evidence -

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2018 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 by advocacy organizations and in published literature. It excludes matters where social science evidence assisted in pre-trial settlement, or matters that had been filed but a decision is still pending.

Table of Contents

Applications of Social Science Evidence in Legal Proceedings4

1. *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58... 4
2. *Clorox Company of Canada, Ltd. v. Chloretec s.e.c.*, 2018 FC 408 4
3. *Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research*, 2018 FC 259 5
4. *Moosehead Breweries Limited v Eau Claire Distillery Ltd.*, 2018 TMOB 24 5
5. *Imperial Tobacco Canada Limited v. Philip Morris Brands Sàrl*, 2018 FC 503 6
6. *Kapoor v. Kuzmanovski*, 2018 ONSC 4770 7
7. *C.C. Jentsch Cellars Inc. v. O*, 2018 FC 875..... 8
8. *Keith v. Canada (Human Rights Commission)*, 2018 FC 645..... 8
9. *Energizer Brands, LLC v. The Gillette Company*, 2018 FC 1003..... 9
10. *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)*, 2018 FC 530..... 10
11. *Institute of Advanced Financial Planners v The Financial Advisors Association of Canada*, 2017 TMOB 164 11

Uses of Social Science Evidence by Regulatory Agencies and Advocacy Organizations.....12

1. FCAC's plans re: Study of Consumer Protection and Oversight 12
2. OSC Staff Notice re: Seniors Strategy 12

¹ The editing assistance of Joana Ayoub is acknowledged with thanks.



3. CFCJ Report on Alternative Dispute Resolution	13
4. Bank of Canada study on house price expectations	13
5. Health Care in Canada Survey – A national survey of health care providers, managers, and the public	14
6. Study on resident health in Grassy Narrows.....	14
7. CRTC decision re: application to disable access to piracy websites.....	15
 Noted Absence of Social Science Evidence	16
1. <i>Advance Magazine Publishers, Inc. v. Banff Lake Louise Tourism Bureau</i> , 2018 FC 108	16
2. <i>Weldpro Limited v. Weldworld Corp.</i> , 2018 FC 312	16
3. <i>Trust v. Navsun Holdings Ltd.</i> , 2018 FC 42	17
4. <i>Quality Program Services Inc. v. Canada</i> , 2018 FC 971.....	17
5. <i>Genentech, Inc. v. Amgen Canada Inc.</i> , 2018 FC 694	18
6. <i>Player’s Company Inc. v Rothmans, Benson & Hedges Inc.</i> , 2018 TMOB 145	18
7. <i>Arterra Wines Canada, Inc. v Diageo North America, Inc.</i> , 2018 TMOB 134.....	19
 Published Literature on Social Science Evidence.....	20
1. <i>“Lessons from Latif: Guidance on the Use of Social Science Expert Evidence in Discrimination Cases”</i> , Ranjan K Agarwal, Faiz M Lalani, Misha Boutilier – Canadian Bar Review (Canadian Bar Foundation).....	20
2. <i>“The (social media) evidence is clear - Litigators need a sophisticated understanding of social media to use it effectively in court”</i> , Elizabeth Raymer – Canadian Lawyer	20
3. <i>“Surveying the field – A gold standard for survey evidence”</i> , Ruth Corbin et al - AIPPI World Congress.....	20
4. <i>“Helping to ensure the admissibility of survey evidence”</i> , John McKeown – Goldman Sloan Nash & Haber	21
5. <i>“Practical Guide to Comparative Advertising: Dare to Compare”</i> , Ruth M. Corbin, Rebecca Bleibaum, Tom Jirgal, David Mallen, Christine A. Van Dongen	21



Applications of Social Science Evidence in Legal Proceedings

1. *Canadian Copyright Licensing Agency (Access Copyright) v. Canada, 2018 FCA 58*

In this Federal Court of Appeal case, Access Copyright applied for judicial review of a 2015 decision of the Copyright Board. In that earlier decision, the Copyright Board certified royalty rates (or tariffs) proposed by Access Copyright on provincial and territorial government staff for the copying of copyright-protected works, such as excerpts from newspapers or books, during the time period 2010-2014. The royalty rate to be paid to Access Copyright was based on results from a Volume Study, negotiated by both parties, that surveyed government staff behaviour over a two-week period and extrapolated the results to derive annual estimates. While the provincial and territorial governments used the royalty rates obtained from this study, Access Copyright chose not to rely on these results, but instead to use rates that had previously been negotiated.

In the 2018 Appeal, Access Copyright argued that the Volume Study did not sufficiently factor in all applicable copying situations, including those related to digital copies. Access Copyright also argued that the calculation did not take into account the “importance” of any copied works. The Court disagreed with this assessment stating that components of the Volume Study were available to all parties and Access Copyright could have commented at any time on the treatment of certain copying scenarios.

The Court determined that the Copyright Board’s 2015 conclusion was “*acceptable and defensible.*” [89]

2. *Clorox Company of Canada, Ltd. v. Chloretec s.e.c., 2018 FC 408*

Clorox appealed a previous Registrar decision rejecting its opposition to trademark registration by Chloretec for a word mark and design mark with the name “Javelo”, associated with bleach.



Clorox alleged that the “Javelo” marks were not distinctive and would cause confusion in the consumer marketplace with their own “Javex” marks. To show distinctiveness of its own marks, Clorox submitted results of a 2013 survey that assessed the awareness of the “Javex” name relative to other cleaning products. However, as no information was provided on the specific methodology used to measure awareness, nor the person/company used to conduct the research, the survey evidence was not considered in the decision. Justice Grammond commented that “*It is therefore impossible to assess their reliability and relevance to the questions that are at issue here. In fact, such evidence should have been submitted by means of the affidavit of an expert who conducted the survey and who provides sufficient explanations in relation to its methodology.*” [19]

In the end, the Court relied primarily on its finding of a lack of resemblance and insufficient evidence by the Applicant on “*acquired distinctiveness of such a degree that it leads to a finding of confusion.*” [41]

The appeal by Clorox was dismissed.

3. *Hospira Healthcare Corporation v. Kennedy Trust for Rheumatology Research, 2018 FC 259*

Hospira Healthcare Corporation [Hospira] markets a treatment for rheumatoid arthritis [RA] named “Inflixtra”. Kennedy Trust for Rheumatology Research [Kennedy], holds the ‘630 Patent’, which pertains to the use of a specific antibody (Infliximab) and suppressant (MTX) combination to treat RA. This matter addressed the validity of the patent (through a claim by Hospira) and whether Hospira’s Inflectra treatment infringes the existing patent (through a counterclaim by Kennedy).

One of the key factors at issue was the common knowledge, as of the relevant claim date, about use of a combination therapy similar to that used in the 630 Patent. Both parties and the Court agreed that the MTX component was a common treatment for RA, as evidenced by a 1998 Matzel Survey, which showed MTX being used in over two-thirds of patient cases of aggressive RA. However, Kennedy argued that persons of ordinary skill in the art (POSITAs) saw the combination therapy as unproven and made reference to past surveys showing infrequent use of this approach, including a 1995 study showing that only 17% of RA patients were being treated in this way, and a 1996 study that found that less than 1% of RA patients received this form of therapy.

The Court ultimately concluded that the common general knowledge differed from what was claimed in the 630 Patent and that the combination therapy for the relevant time period was not obvious but instead “*risky and uncertain.*” [116] Based on the combined case evidence, it was concluded that Hospira’s request to declare the 630 patent invalid be dismissed and Kennedy’s claim for infringement be granted.

4. *Moosehead Breweries Limited v Eau Claire Distillery Ltd., 2018 TMOB 24*

Moosehead Breweries Limited (“Moosehead”) opposed registration by Eau Clair Distillery Ltd. (“Eau Clair”) for the PARLOUR GIN design mark, claiming likelihood of confusion with their own Moosehead design marks:

[MARK APPLIED FOR BY EAU CLAIR]



[E.G. OF REGISTERED MARK FROM PARLOUR GIN]



Among its evidence, the applicant Eau Clair submitted survey evidence in the form of a “short questionnaire on the subject and had four individuals working as retailers in the liquor industry supply their answers.” [18] Moosehead criticized the survey for being conducted internally by the applicant without impartiality. The TMOB agreed commenting that “any of the statements in the survey with respect to a lack of confusion from the four individuals are inadmissible as they are hearsay.” [19]

Nevertheless, based on the marks having “little resemblance in appearance, sound, and in the ideas suggested by them” [78], the TMOB concluded that Eau Clair proved there is no reasonable likelihood of confusion between the marks and the ground for opposition was rejected.

5. *Imperial Tobacco Canada Limited v. Philip Morris Brands Sàrl, 2018 FC 503*

Imperial Tobacco Canada Limited [ITL] filed multiple appeals on TMOB decisions related to Philip Morris [PM] registrations for “Rooftop” design marks. The prior decisions rejected ITL’s claim that the marks were confusing with its registered mark “Marlboro”, commenting that the Board found no degree of resemblance and “could not conclude to an intangible association with the graphical component.” [40] This included the finding that previous survey evidence was of no assistance as it was not designed to test consumer reactions to the marks.

The appeals related primarily to additional survey evidence assessing consumer confusion, which may alter the outcomes from previous Board decisions. More specifically, the new evidence came in the form of a national survey of over 1200 daily adult smokers in Canada, and featured images of tobacco products using the applicable design marks, as well as another image acting as a control condition. Based on the results, the expert affidavit highlighted that “Marlboro is statistically significantly more likely to be associated with each of the Rooftop Design marks tested than with the Control Design....” [45] As a result, it was concluded that “the survey establishes a link between the three representative design marks of PM in the format presented to survey participants, taken in isolation, and ITL’s MARLBORO word mark.” [45]

In response, PM filed reply evidence from a survey expert who questioned the survey’s methodology and conclusions, and ultimately its reliability and relevance. The Court ultimately found the survey inadmissible for certain marks, due to the inconsistency between the product context within which the marks were presented in the survey, and the products included in the trademark application. The Court also found the survey inadmissible for other marks as the survey did not test the exact design marks applied for.

However, the survey was found to be acceptable evidence for other Rooftop marks related to “international packages and advertisements” [55] – see applicable marks below.



The Court was satisfied that the survey accurately tested the applicable marks and “*meets the requirements of relevancy and reliability sufficient for it to be admitted as new evidence in this matter.*” [114]

Based on the evidence associated with these marks, the Court concluded that “*the Applicant has produced persuasive evidence establishing as a likelihood that Canadian consumers of tobacco products sufficiently associate the ideas suggested in the degree of resemblance between the four design marks....and the MARLBORO word mark.*” [135] As a result, and only in relation to these marks, the appeal was allowed and the trademark applications refused. For all other marks in the matter, the appeals were dismissed.

6. Kapoor v. Kuzmanovski, 2018 ONSC 4770

This matter involved a civil action by jury pertaining to a motor vehicle accident in Brampton Ontario, and resulting injuries to the plaintiff - Preeti Kapoor. The plaintiff subsequently brought a motion to exclude or challenge potential jurors who drive and pay for automobile insurance, or who have automobile insurance premiums paid on their behalf. The reasoning behind the motion was the belief that there is an “inherent conflict of interest” since court awards/settlements would increase automobile insurance premiums, thereby preventing potential jurors from carrying out their duties as a juror in an impartial manner.

Among the plaintiff’s evidence was an affidavit from a senior law clerk employed by their external legal counsel. The affidavit included articles about auto insurance rates in Ontario, and details of a consumer survey with Brampton residents who drive an automobile and have valid auto insurance. The survey posed questions to measure “(1) the impact of higher automobile insurance premiums on the persons interviewed and (2) whether they would seek to lower their own premiums by limiting the damages awarded in a motor vehicle case or whether they would award damages regardless of the impact it would have on their insurance premiums.” Based on the survey results, almost three-quarters of the participants (73%) indicated they would limit the damages awarded in order to lower insurance premiums.

In determining whether the survey was admissible, the Court found numerous flaws. First, as the source of the affidavit was someone with no personal knowledge of the report contents (i.e., a senior law clerk rather than a research expert), the Court held that the evidence in the survey was hearsay at best. Second, the survey did not address whether prospective jurors were capable of setting aside bias if instructed to do so – i.e., “*cleansing by the trial process.*” [29] Third, the survey contained no information on the methodology used, how the survey was constructed and administered, and an analysis/opinion of the survey results. Finally, the relevance of the survey was questioned due to the lack of a random and representative sample of prospective jurors.

The Court concluded the survey did not meet the minimum requirements for expert evidence, and that there was no evidence whatsoever of a widespread bias among potential jury members in Brampton.

Based on the totality of the other evidence submitted, the plaintiff’s motion was dismissed.



7. *C.C. Jentsch Cellars Inc. v. O*, 2018 FC 875

This matter involved a wine named “The Chase” from the Okanagan region of British Columbia, put out by the applicant, C.C. Jentsch Cellars Inc. (“Jentsch”). After the respondents, O'Rourke Family Vineyards Ltd, and Sureway Construction Group Ltd., subsequently put out “The Chase Wines” from their Chase Winery in the Okanagan, Jentsch filed a “passing off” claim.



As part of this action, the respondents brought three motions to the Court, including the filing of affidavit evidence pertaining to a 3rd party online survey. The survey was designed to measure the extent to which wine purchasers were likely to recognize the phrase “The Chase” as being distinctive of C.C. Jentsch Cellars Inc. as its source.

The study found that only 8% of participants claimed to be aware of a wine named “The Chase”, and only 2% identified British Columbia as the location where the wine by that name is produced.

The applicant criticized the survey as being unreliable, primarily based on sample size. The Court also commented on lack of necessity for this specific survey due to other evidence already provided by the applicant related to their reputation and goodwill.

As a result, this new evidence was rejected and the motion dismissed.

8. *Keith v. Canada (Human Rights Commission)*, 2018 FC 645

This was an application for judicial review of a 2017 Canadian Human Rights Tribunal [“Tribunal”] decision dismissed against the Canadian Armed Forces [CAF]. The applicant, Arthur Keith is an American born and trained psychiatrist, recognized in that capacity by the College of Physicians and Surgeons of Ontario, but not accredited by the Royal College of Physicians and Surgeons of Canada [RCPSC], the latter being a requirement of the CAF. The applicant alleged that this CAF requirement discriminated on the grounds of “national origin” and that the RCPSC accreditation is not a “bona fide occupational requirement”.

In the original Tribunal matter, evidence to contradict the applicant’s claims was submitted in the form of a survey of physicians conducted by the Canadian Medical Association. In that study, the respondent pointed to the following key findings...

- ▶ While less than 3% of Ontario physicians were born in the U.S., approximately only 1% of those were medically trained in the U.S.
- ▶ While just over 7% of physicians completed postgraduate training in the U.S., less than 3% of those were born in the U.S.
- ▶ Over 99% of Ontario specialists born outside Canada are RCPSC accredited

The respondent argued that these findings suggest that the applicant’s circumstance is one of a very small minority, thereby failing to support the notion of *“adverse impact discrimination.”* [107] Based on this evidence, the respondent put forward that one could not conclude that being *“born and educated outside of Canada leads to discrimination having an adverse impact and therefore automatically protected under the CHRA.”* [72]

While the applicant argued that the CMA survey should not be relied upon due to bias and inaccuracy, the Court disagreed and accepted the Tribunal’s decision to take the survey into evidence.

Based on all the evidence submitted, the Court found the original Tribunal decision reasonable and dismissed the application.

9. *Energizer Brands, LLC v. The Gillette Company, 2018 FC 1003*

Duracell filed a motion for summary judgement to strike allegations made by Energizer that two “on-package” Duracell claims – *“the next leading competitive brand”* [3] and *“the bunny brand”* [3], infringe certain subsections of Trademarks Act.



In agreeing to resolve these issues at this early pre-trial stage, Justice Brown structured a core issue in the following words... *“Would a consumer who sees the terms “the next leading competitive brand” or “the bunny brand” used on Duracell’s batteries make any link or connection to Energizer’s mark.”* [60]

As part of its evidence related to the former claim, Duracell provided results of an independent marketplace investigation, conducted at thirteen stores across the Greater Toronto area, to illustrate examples of products using a similar claim. Energizer countered that there were only a limited number of examples provided, including those that did not display an association between the two leading brands in their respective industries, such as the current case of Duracell and Energizer.

Based on the full set of evidence submitted, the Judge accepted there may be valid claims against Duracell but was not convinced the term “*the next leading competitive brand*” would create the mental association with Energizer, especially without any expert marketing research that would provide the necessary statistical detail comparing the two companies.

However, as it related to “*the bunny brand*” claim, while Energizer does not have a registered trademark for such a phrase, the Court was persuaded that given the Energizer Bunny trademark and accepting that it had become a famous mark, a consumer would make a link between the claim and the registered trademark.

As a result, Duracell’s motion to strike the claim related to “*the next leading competitive brand*” was struck while the claim related to “*the bunny brand*” was dismissed. The remaining issues were to be heard by the Trial Judge.

10. *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)*, 2018 FC 530

Fédération des francophones de la Colombie-Britannique (“FFCB”) filed an application claiming that Employment and Social Development Canada (“ESDC”) violated the rights of the French-language community in BC by not providing equivalent employment benefits and support, as required by the Official Languages Act (OLA). This case more specifically dealt with interpreting the OLA as would pertain to “*a transfer payment agreement between the federal government and a provincial government for the administration of employment support services to help workers re-enter the work force.*” [5]

The FFCB evidence included a reference to a survey conducted by the Commissioner of Official Languages of Canada (Commissioner), acting in an intervenor capacity in this case. The survey was conducted using multiple channels including online, telephone, and in person. Based on the survey results, the Commissioner concluded that those looking to obtain French-language services dealt with language barriers not present for those using the equivalent English-language services.

While the Court expressed empathy for the situation, it countered that the facts presented by the survey were based on occurrences that took place only after the initial complaint was filed by the FFCB with the Commissioner. As pointed out by the Court....

“... a complainant cannot raise concerns, fears or apprehensions about possible noncompliance with the OLA as evidence of the existence of such noncompliance with the OLA at the time the complaint was filed with the Commissioner, when these fears became factual realities only after

the date of the complaint. This is easy to explain: how could a court sanction a federal institution for breaching or failing to comply with the OLA at the time of the complaint when the facts that underlie the breach or noncompliance have not yet occurred?” [81]

Regardless of the Court’s opinion on the survey evidence, the Court ultimately decided to dismiss the FFCB application, primarily due to employment assistance falling under the provincial umbrella (rather than federally), and the measures already put into place to improve the situation.

**11. *Institute of Advanced Financial Planners v The Financial Advisors Association of Canada, 2017*
TMOB 164**

The Institute of Chartered Life Underwriters of Canada applied to register the trademark “The Institute for Advanced Financial Education and Design” in association with educational goods/services related to wealth management. (The application was subsequently assigned to The Financial Advisors Association of Canada.) The Institute of Advanced Financial Planners, an organization that educates, sets standards and awards professional designations for the financial planning industry, opposed the application alleging confusion with a registration it holds in its own name.

Among the evidence presented by the applicant was online market reconnaissance to demonstrate the state of the marketplace. This included example of active websites (and archived versions from the ‘archive.org’ internet archive) using the word FINANCE and/or INSTITUTE, based on company names found in a NUANS pre-search.

While the Court commented on the lack of information related to the reputation of the companies/organizations highlighted, it did award some weight to this evidence stating *“it seems clear that third parties have been active under trade-marks and trade-names that incorporate the words FINANCE and INSTITUTE (or variants of these words) in the general field that the parties operate within.” [38]*

However, based on the totality of the evidence submitted, the Court determined that there is significant overlap in the marks and nature of services offered, and that the applicant failed to establish that confusion is not likely. As a result, the application was rejected.



Uses of Social Science Evidence by Regulatory Agencies and Advocacy Organizations

1. FCAC's plans re: Study of Consumer Protection and Oversight

The House of Commons of Canada includes a 'Standing Committee on Finance'. Their mandate is to study and report on matters related to the management and operation of selected federal departments and agencies. As part of this mandate, they are conducting a study of 'Consumer Protection and Oversight in relation to Schedule 1 banks'.

In a May 2018 hearing of the House of Commons Finance Committee, *Lucie Tedesco*, the Commissioner of the Financial Consumer Agency of Canada (FCAC) provided opening remarks which dealt with their recent review of the banking industry titled '*Domestic Bank Retail Sales Practices Review*', based on a review of customer complaints, and employee interviews. In her remarks, she commented on the work still to be conducted which would rely on social science evidence.

"Although our report on the industry review has been released, our work continues. For example, we will provide an institution-specific report to each of the six banks in the coming weeks, and we will work to ensure that the necessary changes to mitigate the risks identified in the report are implemented. We are also planning a mystery shopping exercise to enhance our understanding of how the risk drivers we identified during the review may materialize."

Read the full speech [here](#).

2. OSC Staff Notice re: Seniors Strategy

The Ontario Securities Commission (OSC) aims to "deliver strong investor protection and responsive regulation". In line with this mandate, the OSC developed a strategy and action plan specifically designed to respond to the needs of Ontario seniors.

This plan was partly based on a comprehensive environmental scan which identified the risks older investors face with "*financial exploitation and diminished cognitive capacity*". This scan included a joint project by the OSC, the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association (MFDA) into the investor experience, and more specifically, advisory practices. It involved a mystery shopping approach which assessed multiple platforms of financial advisory firms across Ontario. One key finding was that consumers came across multiple business titles and were frequently left to "*navigate the alphabet soup of credentials*" on their own. As a result, the plan recommended a defined list of approved titles that more explicitly describes the activities seniors will be provided with.

[Click here](#) to review the full Seniors Strategy.



3. CFCJ Report on Alternative Dispute Resolution

The Canadian Forum on Civil Justice (CFCJ) is a national non-profit organization dedicated to advancing civil justice reform through research and advocacy. They recently released a report titled 'An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods'. This was based on a study designed to assess different dispute resolution methods in family law cases, including collaborative settlement processes, mediation, arbitration and litigation. The study was primarily based on a survey of family lawyers pertaining to perceived usefulness of each of these methods.

The CFCJ summarized the study findings as follows:

“The results indicated that family lawyers overwhelmingly found collaborative settlement processes and mediation to be very useful for a variety of disputes, particularly those involving care of children, child or spousal support, and division of property. In most cases, litigation was seen by a majority of family lawyers to be only somewhat useful, except where there was an urgent problem involving a risk to an adult or a child, or in cases involving allegations of family violence or abuse, where a majority agreed it was very useful. However, lawyers also reported that litigation was more than twice as expensive as other methods, and took almost twice the amount of time to resolve a dispute.”

[Click here](#) to review the full CFCJ report.

4. Bank of Canada study on house price expectations

Expectations pertaining to pricing in the housing market is a key determinant of market cycles. In order to study Canadian consumer expectations, the Bank of Canada uses a nationally representative quarterly online survey called the 'Canadian Survey of Consumer Expectations' (CSCE). This survey is directed at heads of households and allows the Bank to assess and forecast inflation and the labour market, and to monitor key issues such as financial stability.

In a recent version of the survey, the following was concluded:

- ▶ *Recently experienced changes in local house prices are routinely extrapolated into expectations of year-ahead changes in national house prices.*
- ▶ *Individuals who have experienced more volatile changes in house prices in the recent past are more uncertain about their expectations of future house price changes.*
- ▶ *Our results are broadly consistent with those from related work using the Survey of Consumer Expectations conducted by the Federal Reserve Bank of New York.*

[Click here](#) for a Staff Analytical Note about a recent version of the study.



5. Health Care in Canada Survey – A national survey of health care providers, managers, and the public

McGill University, in collaboration with a range of reputable professional associations and not-for-profits, has continuously supported the annual Health Care in Canada (HCIC) study. Its vision is *“to provide reliable evidence to inform and influence the improvement of Canadian health policy and care, through achievement of specific goals and objectives....”*

The study is based on a cross-Canada online survey of health care professionals and managers, as well as the general public. The study helps to understand what a wide range of stakeholders think about their personal health, as well as the quality of the health care system that serves them. It allows for continuous tracking of strengths, weaknesses, opportunities and threats.

In 2018, the 13th version of the study was completed. The iteration specifically inquired about ... *“implementation of a national Pharmacare program, whether individuals diagnosed with a chronic disease take their medications as prescribed, timeliness of access to health care, quality of health care, challenges faced by non-professional caregivers as well as options for end-of-life care and the opioid crisis.”*

Among the key findings are the following:

- ▶ Wait times are a primary concern. More than three in ten of the general population and of health professionals identified this factor as the most important health care issue in Canada.
- ▶ A team-based approach is considered the best way to increase access to health care professionals. In the general population, eight in ten support or strongly support the concept of health professionals to work in teams.
- ▶ When commenting on how to enhance access to prescription medications, almost a third of the public noted funding from the federal government to assist those not currently covered by a public/employer drug plan, and those with insufficient funds to afford their medications,

To view the latest results, click [here](#).

6. Study on resident health in Grassy Narrows

Decades after mercury was dumped into a First Nation river system, a government study was commissioned to assess the health of residents before and after the occurrence. Funded by Health Canada and the Ontario Ministry of Health and Long-term Care, this study included a comprehensive survey of more than 300 adults, which found that the physical and mental health of residents following the incident was significantly worse than other First Nations in Canada. More specifically, the survey found fewer elders, higher rates of suicide attempts, lower success levels in school, and higher rates of nervous system disorders. According to the report....



“The results of the (survey) provide clear evidence that the physical and mental health of (Grassy Narrows community) members is poorer than that of other First Nation communities in Canada and Ontario,” says a report of the survey’s findings. The document also says that the health and well-being of the community “cannot be understood without taking into account their history of mercury poisoning and its consequences.”

As a result, the Ontario government has agreed to remediate the river and the federal government has committed to funding a treatment centre.

[Click here](#) to view a CBC news story on the study.

7. CRTC decision re: application to disable access to piracy websites

Early this year, Asian Television Network International Limited, on behalf of the FairPlay Coalition, formally requested the Canadian Radio-television and Telecommunications Commission (“CRTC”) to “(i) identify websites and online services that are blatantly, overwhelmingly, or structurally engaged in copyright piracy and (ii) require ISPs to block end-user access to those websites and services.”

In its application, the FairPlay Coalition argued that online piracy is a significant issue in Canada and the creation of a CRTC-led organization is a necessary response to this issue, which would also be a useful solution for ISPs. The application included survey evidence related to public attitudes towards online piracy. Among the findings were that the majority of Canadians believe that “Canada should have online piracy protections similar to those of countries such as the United Kingdom, Australia, and France”, and that the majority support the notion that “online piracy websites should be removed from Canada through government intervention.”

While the CRTC conceded that copyright piracy does harm to the Canadian economy, it ultimately determined it does not have the jurisdiction to implement the proposed system and denied the application. In doing so, the CRTC did comment that

“...there are other avenues to examine the means of minimizing or addressing the impact of copyright piracy, including the ongoing parliamentary review of the Copyright Act and the expert panel review of the Telecommunications Act and the Broadcasting Act.”

[Click here](#) to review the full CRTC decision.



Noted Absence of Social Science Evidence

1. *Advance Magazine Publishers, Inc. v. Banff Lake Louise Tourism Bureau, 2018 FC 108*

To promote tourism, the Banff Lake Louise Tourism Bureau (“Banff”) advertised an event, and applied for a wordmark, under the name “Bon Appétit Banff”. (Additional design mark shown below.)



The wordmark application was opposed by Advance Magazine Publishers, Inc. (“Advance”), who has a number of registered trademarks under the name “Bon Appétit” (including one used for Bon Appétit magazine). While the application was initially granted by the Trademark Opposition Board (TMOB), it was subsequently appealed by Advance in Federal Court, claiming that the mark would likely be confusing for individuals in the marketplace.

In the appeal proceedings, an assessment of consumer confusion was conducted, including the extent to which the Advance mark had become known in Canada. While social science evidence was not submitted, its value was reinforced by Justice Pentney in his decision comment ---“*Consumer awareness can be demonstrated through surveys, or simply inferred from widespread advertising and the number of stores displaying the banner.*” [42]

Advance focused on that latter approach by submitting new evidence to establish its Canadian presence. Its evidence highlighted a variety of initiatives to promote its Bon Appétit product, including social media activity, website presence, and use of its mark at a number of well-known retailers.

Based on Advance’s significant evidence to demonstrate distinctiveness, combined with a finding that the marks at issue had a strong resemblance, the Court concluded a likelihood of confusion and granted the appeal.

2. *Weldpro Limited v. Weldworld Corp., 2018 FC 312*

Weldpro Limited alleged that Weldworld Corp caused confusion and engaged in passing off activity due to their opponent’s use of the trademark “1-877-WELDPRO”.

In assessing distinctiveness of the mark, the judge noted that lack of evidence from Weldpro to establish “reputation in the mind of the purchasing public” While Weldpro argued it was not necessary to provide evidence of advertising campaigns or budgets to establish goodwill, using *Vancouver Community College*

v Vancouver Career College (Burnaby) Inc, 2017 BCCA 41 as an example, the judge referred to the same case in countering that Vancouver Community College submitted “a significant body of evidence to the issue of goodwill including use of the mark in issue on brochures, as a domain name, and on calendars and other documents; there was also evidence from surveys into name awareness.” [22]

Based on the finding that goodwill was not established, the judge concluded that confusion could not be proven and dismissed the application

3. *Trust v. Navsun Holdings Ltd.*, 2018 FC 42

This decision is an appeal of a 2015 TMOB matter by Sadhu Singh Hamdard Trust (“Sadhu”), owners of the India-based daily “Ajit” newspaper, regarding their rejected application for the trademark “AJIT” in association with printed publications and newspapers.

In the earlier decision, objection to registration came from Navsun Holdings Ltd (“Navsun”), publisher of a free weekly Canadian newspaper named “THE AJIT” since 1993, claiming the mark was not distinctive due to their own use of the same mark in Canada in association with newspapers. A 2014 Federal Court judgment was cited where Sadhu was unsuccessful in its claim against Navsun of “copyright infringement, passing-off, and making false statements about Sadhu’s publication, the Ajit Weekly.” [43]. In that Federal Court judgment, the judge noted the “Plaintiff’s evidence falls short of demonstrating reputation in the Defendant’s geographic region. There is no survey or other independent reputable evidence before me to find that the Ajit Daily has commercial goodwill in Canada or is famous in Canada” [43]. The TMOB rejected the Application by Sadhu Singh Hamdard Trust.

In the appeal, Sadhu introduced new evidence of the readership of its electronic newspaper, which was rejected on appeal due to the initial application’s focus on “printed” publications/newspapers.

Sadhu also leveraged the decision in the passing-off matter at the Federal Court of Appeal, by arguing that the Board erred based on an assessment of distinctiveness solely in the Canadian market “because use of a trade-mark in Canada is not a necessary pre-condition for the existence of goodwill in Canadian law”. The Court rejected this argument noting different principles for an assessment of passing off vs. an application to register a trademark, with the latter requiring that “distinctiveness of a mark can only be acquired by use in Canada.”

Based on these conclusions, much of the new evidence from Sadhu was found to be irrelevant and would not have affected the Board’s earlier decision. Accordingly, the Court decided that the Board correctly applied the applicable law. The appeal was dismissed.

4. *Quality Program Services Inc. v. Canada*, 2018 FC 971

Quality Program Services Inc. [“QPS”] operates in British Columbia and holds a trademark registration for the mark “EMPOWER ME”, in connection with energy awareness, conservation, and efficiency services. QPS filed a motion for summary trial in their claim of trademark infringement against Her Majesty the Queen in Right of Ontario (“Ontario”), represented by Ontario’s Minister of Energy. The claim related to Ontario’s use of “emPOWERme” on a website designed to educate Ontarians about the electricity system



and how to conserve energy. Ontario argued that the official mark status of “emPOWERme” (obtained after commencement of this action), provides sufficient defence to this claim.

In its assessment of trademark infringement based on “confusion”, the Court noted that “QPS *has not provided any evidence of market surveys or other evidence which demonstrates actual confusion by consumers resulting from the parties’ respective marks.*” [55]. However, it countered this by stating neither were a precondition to a conclusion related to “confusion”, and its exclusion would be expected considering both QPS and Ontario operated in different regions of Canada.

The Court ultimately concluded that the “official mark” status did not protect Ontario from the claims, and that the claim of infringement is valid based on the finding that Ontario’s mark is confusing with the QPS mark.

[Note – Additional QPS claims of passing off and depreciation of goodwill were rejected as they were based on distinct markets of operation, and therefore not affected by use of the mark in Ontario.]

5. *Genentech, Inc. v. Amgen Canada Inc.*, 2018 FC 694

Amgen Canada Inc, filed a submission for a new breast and gastric cancer drug (known as KANJINTI), and to market this product for the same indications as a product by Genentech, Inc. called HERCEPTIN. Genentech then commenced an action against Amgen seeking an order that would prohibit approval for KANJINTI until after the expiry of the patents related to HERCEPTIN. Amgen asserted that it will not infringe the applicable patents, and that there is insufficient evidence to even support these claims.

As part of its evidence, Genentech filed affidavit evidence from a Toronto-based medical oncologist, who claimed that the new Amgen drug would likely be used by medical oncologists as a replacement for HERCEPTIN, and in combination with another Genentech drug named PERJETA.

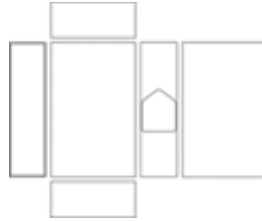
Amgen argued that the expert’s evidence does not prove any form of inducement as “his evidence is not based on any study or survey of fellow medical oncologists”. [55]. The plaintiff countered that just because he didn’t conduct this form of research, it shouldn’t discredit his opinion.

The Court ultimately agreed that Amgen’s new drug leads to an indirect infringement on the Genentech patents by way of inducement and dismissed Amgen’s motion.

6. *Player’s Company Inc. v Rothmans, Benson & Hedges Inc.*, 2018 TMOB 145

Player’s Company Inc. applied to register a distinguishing guise for a shape of cigarette container (shown below) referred to as a SLIDE PACK, in association with tobacco products.





At the initial examination stage, the applicant was informed their evidence was insufficient and asked to provide *“affidavits from, and/or survey evidence of, end-users across Canada which clearly state that at or before the date of filing they were familiar with, and could easily recognize at a glance, the wares sold by the applicant in the particular packaging . . .”* [6]. The applicant responded with affidavits from tobacco retailers noting recognition of the container as being put out by Player’s.

When the trademark was subsequently advertised prior to acceptance, it was opposed by Benson & Hedges Inc., claiming that its features were *“primarily functional”* [14] and not distinctive of the applicant.

In its review, the Board repeated the earlier comment that affidavit/survey evidence from end-users was excluded and should have been provided in cases where the distinguishing guise had a *“utilitarian function.”* [33]. Based on this finding and on other evidence submitted, the application was refused.

7. Arterra Wines Canada, Inc. v Diageo North America, Inc., 2018 TMOB 134

Diageo North America, Inc. applied to register the work mark “The Naked Turtle” (and two related design marks) in association with rum and rum-flavoured beverages. The application was opposed by Constellation Brands Canada, Inc., alleging that the mark was confusing with their mark for “The Naked Grape” in association with wine and wine-based beverages.

As part of its evidence pertaining to the work mark, the applicant filed an affidavit from an expert of fine wine who provided multiple examples of wine and spirits that include the word “Naked”. However, the Board countered that this evidence did not refer to consumer familiarity with these brands, nor had the applicant *“conducted any surveys of consumers to understand what they mean by the word naked”* [14]. In turn, the Board determined that this evidence was not relevant to the issue of distinctiveness, commenting that it *“does not approximate the buying experience of the casual consumer for alcoholic beverages generally or the parties’ products specifically.”* [14]

However, based primarily on the differences in the two marks and the lack of evidence on consumer perception of the word ‘Naked’ as it pertains to alcoholic beverages, the Board ultimately concluded that there was no likelihood of confusion and rejected the opposition. (Note – The opposition to the front label design mark was also rejected, but the opposition to the back label design mark succeeded.)



Published Literature on Social Science Evidence

1. *“Lessons from Latif: Guidance on the Use of Social Science Expert Evidence in Discrimination Cases”*, Ranjan K Agarwal, Faiz M Lalani, Misha Boutilier – Canadian Bar Review (Canadian Bar Foundation)

This article addresses the critical role that social science can play for litigants attempting to prove discrimination, and key lessons in using this form of evidence in court. It bases its analysis on the 2015 Latif decision by the Supreme Court [Quebec v. Bombardier Inc., 2 SCR 789, 2015 SCC 39] in which a Canadian pilot of Pakistani origin claimed he was refused security clearance based on discrimination against Arabs or Muslims. The case included expert evidence related to stereotyping and racial profiling, which was ultimately rejected in the Quebec Court of Appeal, and then once again by the Supreme Court, thereby supporting the viewpoint that proving discrimination faces an uphill battle when direct evidence is not available.

The article highlights how social science evidence can connect the dots between cause and effect, and offer insight in the probability of certain outcomes. It also addresses specific ways that social science evidence can assist the court, including the provision of “social fact research to resolve a specific issue in a proceeding (such as consumer surveys)”.

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

2. *“The (social media) evidence is clear - Litigators need a sophisticated understanding of social media to use it effectively in court”*, Elizabeth Raymer – Canadian Lawyer

The boom in social networking has resulted in practical tools aimed at eDiscovery and the use of social media data for purposes of litigation. From the discovery process to admission at trial, evidence of this kind has been increasingly presented in cases related to family and criminal law, as well as personal injury claims. This article explores examples of social media evidence, both domestically and internationally, and addresses best practices for admissibility.

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

3. *“Surveying the field – A gold standard for survey evidence”*, Ruth Corbin et al - AIPPI World Congress

Dr. Ruth Corbin moderated a panel at the AIPPI World Congress in Cancun on international gold standards for survey evidence. She was joined by judges from China and the UK, a regulator from the European IP Office, and a recognized European survey expert. The session: “Surveying the field – A gold standard for survey evidence” provided a valuable background for a possible AIPPI resolution on standards for survey evidence in trademark disputes, including issues of confusion, dilution and acquired distinctiveness.

To access the presentation slides, [click here](#).



4. “Helping to ensure the admissibility of survey evidence”, John McKeown – Goldman Sloan Nash & Haber

McKeown demonstrates how combining claims for infringement and passing off can make challenges to survey evidence more onerous. He illustrates this with the 2017 Diageo Canada case who alleged that their Captain Morgan rum products were being infringed by designs used on Admiral Nelson’s rum bottles (offered by Heaven Hill Distilleries). In that matter, the Federal Court accepted a survey of rum purchasers concluding that “Captain Morgan’s rum was spontaneously and almost exclusively brought to mind on viewing the Admiral Nelson’s rum bottle”, and subsequently ruled in favour of Diageo.

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

5. “Practical Guide to Comparative Advertising: Dare to Compare”, Ruth M. Corbin, Rebecca Bleibaum, Tom Jirgal, David Mallen, Christine A. Van Dongen

Authored by a team of experts (including CorbinPartners’ Ruth Corbin), *the Practical Guide to Comparative Advertising: Dare to Compare* is an informative, reader friendly, corporate handbook on the principles for issuing and defending against competitive claims, of common stakeholder interest to corporate marketers and advertisers, in-house or external counsel, market researchers, advertising agencies, international standards organizations, and judges. The handbook covers several topics including organizational culture and strategic goals that favour comparative advertising, laws and regulations, standards for research evidence, comparative advertising in social media, and a checklist of process steps and quality controls that allow managers to orchestrate ad campaigns and manage complaints from indignant competitors.

For more information on the handbook, [click here](#).

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