2019 Year in Review
Social Science Expert Evidence

25th Anniversary Issue

Courtesy of

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2019 Year in Review for Social Science Expert Evidence

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February 2020

CorbinPartners' annual 'Year in Review for Social Science Evidence' 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 litigated matters for which a decision is still pending.

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1. Chinatown & Area Business Association v. Canada (Attorney General), 2019 FC 236

The Chinatown and Area Business Association ("CABA") filed for a judicial review of Health Canada exemptions to the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*], which allow for three supervised consumption sites in close proximity, as well as local hospital-based facilities. Its challenge to the ruling was primarily based on an "*unfair burden on the community.*" [3]

The respondent, the Attorney General of Canada, and the organization who applied for the exemption, Access to Medically Supervised Injection Services Edmonton (AMSISE), supported the decision arguing there was no violation to ones right to procedural fairness.

The decision reintroduced evidence from AMSISE's initial proposal for exemptions, including survey evidence. The University of Alberta's School of Public Health's 'Edmonton Drug Use and Health Survey' assessed opinions of those residing in Edmonton's inner city who were using illicit drugs. The survey found causal links between regular drug use and certain risk-defined behaviours, violence, and health issues. Over 90% of participants injecting drugs stated they would use a supervised consumption site if one opened, with the majority noting it would need to be within one kilometre of walking distance. Based on the survey results, AMSISE recommended "*expanding operating hours for needle exchange programs, implementing SCSs and increasing access to support services*." [39]

The Urban Core Coalition, of which CABA is a member, raised a number of objections to the original AMSISE proposal, including challenges that the survey results conflict with public health data, and relied on too small a survey sample size to accurately assess public attitudes. Regardless, due to the substantial information supplied by AMSISE related to the relevant criteria, Health Canada approved the exemptions, without commenting on the weight to be accorded to the survey.

Based on the entirely of evidence submitted in its judicial review, the Court found the earlier decisions made with respect to the exemptions to be reasonable. The application was ultimately dismissed.

2. Loblaws Inc. v. Columbia Insurance Company, 2019 FC 961

Loblaws Inc. ("Loblaw") alleged that Columbia Insurance Company / The Pampered Chef, Ltd. / Pampered Chef – Canada Corp. ("Pampered Chef") infringed upon its exclusive right to use its PC marks throughout Canada and caused confusion through use of a number of design marks, including the following two "short-form" marks:


As part of its evidence, Loblaw submitted an online survey designed and conducted by Léger Marketing, using Léger's online panel. The purpose of the survey was to determine the extent to which consumers would misidentify a mark used by Pampered Chef as belonging to Loblaw. After being shown an image of one of three Internet images of Pampered Chef products with the mark in question, between 11-17% of consumers (depending on the product shown) misidentified the product as being associated with President's Choice.

Based on reply evidence from multiple experts, including CorbinPartners, Pampered Chef presented several issues with the survey evidence, including a) not surveying those who had purchased items through the distribution channels used by Pampered Chef, as well as those who had not purchased the products at all, and b) excluding the necessary "contextual cues" a consumer would encounter when seeing/purchasing these products. The Court agreed with the out-of-context concerns noting that the "*survey is relevant in circumstances where the consumer does not encounter any such cues…. However, it would not be relevant in circumstances where the cues are present*." [145]. The Court also agreed that the differences in the trade channels between Pampered Chef and Loblaw would reduce the likelihood of confusion.

Taking into account all the evidence provided, the Court concluded that Loblaw had not established a likelihood of confusion with its own marks and the Loblaw claims were dismissed. [1]

3. ***Facility*** *Association (Re), 2019 NSUARB 15*

Facility Association ("Facility"), an organization representing auto insurance providers in Nova Scotia, filed applications with the Nova Scotia Utility and Review Board (Board) to increase its rates and modify its risk-classification system for Taxis and for Private Passenger Vehicles. A public hearing was conducted to address the applications.

A core issue with the Taxi application pertained to the costs of financing premiums and how these costs should impact overall rates charged to taxi drivers. The Board had previously ruled that revenue related to financing must be accounted for and based a calculation on the assumption that approximately one-third (33%) of taxi drivers used premium financing.

A challenge to this assumption was presented by the President of the Halifax Taxi Owners' Association (HTOA). The HTOA put forth that estimates of premium financing are too low and referred to a survey it had conducted that found that closer to 70% of taxi drivers currently finance their insurance premiums, including those who pay via credit card installments or through a third-

[1] The case also included a counterclaim by Pampered Chef to have certain Loblaw trademarks declared invalid. Those claims were also dismissed.

party financing company. The HTOA concluded the Board should incorporate an assumption that a higher percentage of taxis using premium financing in determining the appropriate rate adjustment.

However, Facility countered HTOA's conclusion by claiming it does not receive any revenue from financing fees, with all applicable revenues flowing directly through to its servicing carriers. The Board agreed with Facilty's claim, and decided that since Facility's premium financing fee arrangement is similar to any third-party financing arrangement, it should apply no offset to expenses related to premium financing fees when calculating fees charged to taxi drivers.

Based on all the issues presented, a rate revision was directed by the Board, but it reflected the decision made to the above issue pertaining to premium financing fees.

4. Spectrum Brands, Inc. v Schneider Electric Industries SAS, 2019 TMOB 94

Schneider Electric Industries SAS ("Schneider") applied to register the trademark WISER in association with various electric products and services. Spectrum Brands, Inc. opposed the application on various grounds, including that the mark is confusing with its registered trademark WEISER.

In support of its opposition, the Opponent filed an affidavit from the Marketing Director of Spectrum Brands. The affidavit provided evidence on the acquired reputation of the WEISER brand as it relates to residential locks, lock systems, and door hardware. The affidavit referred to a brand awareness study conducted by Vision Critical, which found that the WEISER brand is the most recognized brand of locks in Canada.

In its decision, the TMOB placed no weight on the survey because the "*methodology used to justify this brand awareness is unexplained*" [42]. However, based on the significant investment in advertising in Canadian-based publications, many of which promote the word play of "Weiser" and "wiser", it was determined that the WEISER word mark has acquired significant reputation in the lock industry, thus favoring the opponent.

Based on all the evidence submitted, the TMOB refused the application in part, and accepted the application in part. It concluded that Schneider failed to prove "no likelihood of confusion" between the mark in association with a partial set of goods, noting the compatibility of these goods with the opponent's residential locks and locks systems, and refused the application. However, the TMOB was satisfied there was no reasonable likelihood of confusion between the mark in association with the remaining applied-for goods and services, which are substantially different from the Opponent's.

5. Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé, 2019 QCCA 358

This case involves multiple appeals of 2015 class action decisions, based on a matter originating in 1998, regarding compensatory and punitive damages against three cigarette manufacturers, IMPERIAL TOBACCO CANADA LIMITED, JTI-MACDONALD CORP. and ROTHMANS, BENSON & HEDGES INC. The damages pertained to having "*conspired, for close to five decades, to silence or minimize the risks inherent to smoking and to have, if not created, at least maintained a controversy surrounding the state of scientific knowledge to encourage smoking*." [2]

In the appeals, the appellants argued that numerous errors were made by trial judges, and challenged a number of contingent conclusions, including the calculation of damages.

Evidence presented in the case included numerous references to consumer surveys. The appellants argued that addiction to tobacco was a well-known fact, supported by surveys conducted in the 1950's and 1960's, including one showing that over 80% of the Quebec population was aware of the harmful effects of smoking, and another showing that 90% of Canadians were aware of the risks.

The plaintiff countered with opposing survey evidence. It presented a 1996 survey of Canadians, conducted on behalf of a coalition among the Heart and Stroke Foundation of Canada, the Canadian Cancer Society and the Canadian Lung Association. This survey found that when asked about the hazards of smoking, only 2% of Canadians make an explicit reference to tobacco addiction.

Based on the entirety of the evidence submitted, the judgement of the Court was that the appellants failed to demonstrate significant errors in the Superior Court decisions. Appeals were allowed to correct some inaccuracies, but the original judgement was confirmed.

6. Corus Radio Inc v Harvard Broadcasting Inc, 2019 ABQB 880

Corus Radio Inc. and Corus Entertainment Inc. ("Corus") filed for an interlocutory injunction against Harvard Broadcasting Inc. ("Harvard") for using the 'POWER 107' name or logo in its Edmonton-based radio business. Corus referred to its previous use and registration of 'POWER 92'and 'POWER 97', and argued that Harvard "*wrongfully traded on the reputation and goodwill of the POWER radio brand that Corus built over more than a decade in the Edmonton market and longer elsewhere in Canada*". [2]

Harvard argued that Corus was not entitled to copyright protection, and had not proven that it had current goodwill in the POWER brand, or that there was any listener confusion.

Corus presented social media evidence regarding the sentiment of Edmonton pop music listeners to the old POWER radio stations. They relied on social media posts used directly on Harvard's social media channels, including references to Corus's POWER 92 logo and contest, and the public's social media response that implied a connection between the new Power station and old one, such as:

> *"I haven't been this happy listening to a radio station since back in the Power 92 days!*
>
> *"The new Power 92, for us old kids."*
>
> *"are you guys going out of your way to play songs that I vividly remember playing on my beloved Power92?"*
>
> *"Power 92 plays today's best music, now show me my money!...I mean..."*

In its decision, the Court agreed with the recognition for the older radio station, commenting that…

> "*I have before me clear evidence that listener response to the POWER 107 station is not just to the music it plays, but draws on the association to the POWER 92 brand: the Phrase that Pays contest, the POWER 92 Logo and the former POWER 92 programming and on-air announcers. Harvard employees acknowledge the heritage of the POWER name in the Edmonton radio industry, and Harvard assumed that listeners from the 90s and 2000s would likely remember the Corus POWER 92 station. Harvard's actions have invited the average listener to associate the goodwill it might hold for POWER 92 with Harvard's POWER 107 station. I accept that in doing so, Harvard has created confusion and a loss of distinctiveness with respect to Corus' POWER 92 brand."* [98]

The injunction was granted.

Uses of Social Science Evidence by Regulatory/Government Agencies, Judicial Inquiries and Advocacy Organizations

1. Consumers' Association of Canada study on tobacco alternatives

The Consumers' Association of Canada (CAC) has a mandate to inform and educate consumers on marketplace issues, and to advocate with government and industry to solve marketplace problems. In line with that mandate, it conducted a 2019 online survey with Canadian general practitioner physicians to assess alternatives available to smokers to help quit tobacco products.

While almost two-thirds of the physicians surveyed believe electronic nicotine delivery systems (ENDS), such as vaping products, to be less harmful than cigarettes, only a quarter of the physicians surveyed recommended ENDS within the past year. According to the survey, fewer than four in ten physicians had read research on ENDS in the past 6 months, or discussed it with patients looking to quit smoking.

Based on the survey, CAC concluded that Canadian physicians are unprepared to discuss available alternatives, a finding in stark contrast to other countries where medical associations are offering summary evidence and practical guidance to members about alternatives to tobaco. As a result, CAC is recommending that Health Canada or a professional association step up to offer this guidance. As noted by CAC President - Bruce Cran, "*Offering reliable, practical guidance to physicians will ensure that physicians, in turn, are able to fulfil their responsibility to make smokers fully aware of all options that are available.*"

Click here to read the full press release.

2. CRTC report on 'Misleading or Aggressive Communications Retail Sales Practices'

Based on the Order in Council P.C. 2018-0685, the Canadian Radio-television and Telecommunications Commission (CRTC) issued a report on the use of misleading or aggressive retail sales practices by Canada's large telecommunications carriers. The study aimed to assess how common these practices are, existing protection measures, and ways to both strengthen the measures and allow consumers to make more informed decisions.

The study solicited feedback from Canadian consumers, representatives of telecom service providers, advocacy groups, unions, and government bodies. The feedback was obtained in part through an Ipsos online survey among a representative sample of Canadians, in-depth interviews with individuals with disabilities; and focus groups with seniors in rural communities. Additional data was obtained from mystery shopper programs, whereby investigators posing as customers evaluated the treatement they received from salespeople.

Overall the CRTC found that….

> *"….there is a gap between the internal measures that the Service Providers stated they have in place to identify, monitor, and prevent misleading or aggressive sales practices and the behaviours reported by Canadians on the record in relation to some Service Providers. In some cases, the Service Providers failed to make their policies and processes effective in day-to-day sales activities and to adequately monitor their sales agents' ongoing compliance with these policies."*

Click here to access the full CRTC report.

3. FCAC issues new code of conduct for delivery of banking services to seniors

The Financial Consumer Agency of Canada (FCAC) ensures that the banking industry protects and educates consumers. In 2019, the banking industry adopted a code of conduct for the delivery of banking services to seniors, which will come into effect in 2021 and be monitored by the FCAC.

The code was based in part on an FCAC study with senior consumers, financial institutions and experts to understand the banking experience and challenges faced by Canadian seniors. The study included a national telephone survey of adults aged 55 and older.

The survey uncovered several important findings, including….

- The majority of seniors use/prefer more traditional forms of banking
- Seniors who conduct their banking in person have the most positive relationship with their bank
- Seniors are less likely to be informed about financial abuse or scams

For more information about the code of conduct and the research involved, click here.

4. *Payments Canada* launches consumer 'Bitcoin Sentiment Tracker'

Payments Canada, in partnership with CorbinPartners Inc., released its inaugural "*Bitcoin Sentiment Tracker*", a national study to gauge Canadian consumer perceptions and attitudes towards Bitcoin. It was designed to begin to understand the experience of those who have used Bitcoin on a trial basis or who are actively invested, and to assess reasons or obstacles for those yet to acquire it.

Key highlights of the study findings included:

- Consumer interest has spurred adoption
- Price volatility has opposing effects.
- Bitcoin users are primarily satisfied with their experience
- Bitcoin users are dissatisfied with the number of businesses that accept Bitcoin payments
- Majority of businesses transacting in Bitcoin would recommend other businesses adopt it
- Further growth in use will need to be fueled by awareness and education

For more information, click here.

Note - A 2nd stage study designed to gauge perceptions and attitudes of the merchant sector is in progress and is targeted for release in 2020.

5. Canadian Judicial Council invites public consultation on ethical principles for judges

As part of its assessment into the ethical requirements of Superior Court judges in Canada, the Canadian Judicial Council (CJC) has invited the public to complete an online survey. Topics for discussion include judicial mediation, case management, self-represented litigants, and the use of social media. Input received will assist CJC in a revision of their guidance document 'Ethical Principles for Judges'. As noted by the Council's Chairperson, Chief Justice Richard Wagner, "As society evolves, so do the ethical issues that judges sometimes face," noted Chief Justice Richard Wagner, Council's Chairperson. "*Since taking office, I have taken steps to enhance transparency about Council's work and I am pleased to launch a public consultation….*"

For more information, click here.

6. OSC panel investigates advice received on small/medium-size portfolios

Canadian securities regulators are examining policies related to compensation given to investment advisors and portfolio managers. Policy revisions are being proposed for banning specific practices, such as trailing commissions, identified as causing potential harm to certain individual investors. When considering the implications of such changes, one hypothesis posed is that access to advice will be significantly limited for investors who hold small to medium-sized investment portfolios.

An Investment Advisory Panel (IAP) of the Ontario Securities Commission had been setup to "enable investor concerns and voices to be represented in the Commission's rule development and policymaking process." To address a possible "advice gap" from such a policy change, the IAP conducted a survey of Canadian investors to assess the level of advice received, and the impact of banning the payment of trailing commissions.

In March 2019, the IAP surveyed a representative sample of more than 3,000 Canadians investors who utilize an advisor or portfolio manager. An Internet survey was used, drawing from subscribers to an established survey panel.

The survey revealed the following key findings:

- In many cases, basic investment topics are not addressed in the advice that is provided
- In most cases, frequency of communication from advisors appears to be minimal
- Frequently, the extent of time given for advisor communication is limited

The study ultimately found that there are numerous concerns with the scope of advice provided, thereby questioning whether it is comprehensive enough to meet investor needs. As a result, the IAP concluded that "*it is not at all clear that preserving the availability of trailing commissions will ensure investors with small and medium-sized portfolios get access to advice that meets their needs*."

To read the IAP report, click here.

Noted Absence of Social Science Evidence

1. *Thomson v. Afterlife Network Inc., 2019 FC 545*

The representative applicant in a class proceeding alleged that Afterlife Network Inc., the operator of a website that posts obituaries and photos, infringed the copyright and moral right of the class by using items retrieved from the websites of Canadian funeral homes and newspapers without permission.

With regards to moral rights, the Applicant argued that the actions of Afterlife led to a prejudice to honour or reputation. In her decision, Justice Kane noted that in determining whether such a prejudice has occurred, it requires both subjective and objective evidence. Regarding the latter, the decision states that "*no objective evidence has been provided, such as public opinion or expert evidence….. I have not been directed to any authority, nor have I found any, that suggests that the Court can make its own determination regarding prejudice to honour or reputation without objective evidence*." [47]

As a result, the Court concluded there was insufficient evidence to prove that Afterlife had infringed the moral rights of the Applicant and Class Members. However, based on other evidence in the matter, the Court determined the respondent did infringe the copyright of the Class, and that the applicant and class members were entitled to injunctive relief.

2. *Chartered Professional Accountants of Ontario v The Chartered Institute of Management Accountants, 2019 TMOB 106*

The Chartered Institute of Management Accountants ("CIMA") applied to register the 'CIMA' wordmark and following design mark:

The application was opposed by Certified Management Accountants of Ontario (CMAO) on multiple grounds, including that the mark is clearly descriptive and therefore not registrable. CIMA countered that claim by arguing that the casual consumer would not be able to discern what the acronym stands for or means.

In its decision, the TMOB concluded that CMAO provided insufficient evidence regarding consumer perceptions and therefore determined the mark is not clearly descriptive. They specifically mentioned the lack of survey evidence by stating ….

"Other than Ms. Treasure's statement supporting the Opponent's position that the Mark is clearly descriptive, I have no evidence to that effect. Such evidence could have taken the form of survey evidence." [185]

"If indeed a survey had supported the Opponent's contention that the acronym CIMA clearly identifies the Applicant's name at length in the mind of Canadian consumers, then the question to be asked would have been whether such result was caused by the extensive use of the Mark in Canada so as to have become distinctive at the filing date of the application such that the Applicant could have benefit from the provisions of section 12(2) of the Act. I do not have to determine that issue because the Opponent has not provided sufficient evidence to conclude that Canadian consumers would clearly identify the acronym CIMA with the Applicant's full name at length when it is used in association with the Goods and Services." [186]

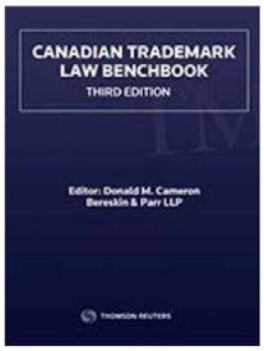
Based on all the evidence submitted, TMOB also concluded that CIMA proved that even though there is an overlap in the two parties' services and their channels of trade, there is no likelihood of confusion between the marks at issue.

The application was ultimately allowed in part.

Published Literature on Social Science Evidence

1. *'Canadian Trademark Law Benchbook',* Donald M. Cameron - Bereskin & Parr

The third edition of the Canadian Trademark Law Benchbook is now available through Carswell publishing. Edited by Donald M. Cameron of Bereskin & Parr, the book contains chapters by several senior and well-regarded Intellectual Property professionals. A chapter titled 'Social Science Evidence in Canadian Litigation' is authored by Dr. Ruth M. Corbin.



For more information, click here.

2. 'Trademark Litigation: A Global Guide 2019', World Trademark Review

The World Trademark Review (WTR) released the third edition of *Trademark Litigation: A Global Guide 2019*, a reference guide to litigation in key jurisdictions across the globe. This edition examines such issues as the availability of alternative dispute resolution mechanisms, defences to trademark infringement or dilution, and the use of survey evidence and expert witnesses.

Click here to access the full publication.

3. '*Impact Of Trade-Marks Act Amendments On Pharmaceutical Brand Owners'*, Mark Davis and Amy Grenon – Norton Rose Fulbright Canada LLP

This article refers to the June amendments to Canada's *Trademarks Act*, and its impact to brand owners in the pharmaceutical industry. Regarding companies looking to protect non-traditional marks (e.g., size, shape, colour), the article refers to the possible need for affidavit and/or survey evidence to address the reputation and distinctiveness of the mark.

Click here to access the full article.

4. ***'CANADA: Federal Court Clarifies Requirements for Admissibility of Survey Evidence in Trademark Matters'*, INTA Bulletin – International Trademark Association, Diana Mansour – Gardiner Roberts**

This bulletin makes reference to a 2018 Federal Court decision in *Imperial Tobacco Canada Limited v. Philip Morris Brand Sar*l, involving multiple appeals. The decision was based, in part, on survey evidence deemed inadmissible in all but one of the appeals. In the decision, the court stated that survey evidence can be admitted if relevant and properly designed. The court followed this statement with a set of survey evidence requirements as it related to relevancy and reliability.

To review the bulletin, including list of survey requirements, click here.

5. ***'Mediation Psychology – Seven Science-based Insights'*, Canadian Arbitration and Mediation Journal – ADR Institute of Canada Inc.**

The Summer/Fall issue of the Canadian Arbitration and Mediation Journal featured this article authored by CorbinPartners' chair Ruth Corbin. The article identifies key factors that shape people's judgments in the course of mediation hearings, that may either assist or impede settlement.

To access the article, click here

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