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The History of Survey Evidence in Canada - How the Hearsay Barrier got Busted

by Ruth M. Corbin, Ph.D., LL.M.

Surveys are second-hand reports of what others have said. In the language of law, that brings them uncomfortably close to "hearsay." Hearsay refers to an out-of-court statement which is presented in court, purporting to prove the truth of some matter. A hearsay statement is usually inadmissible in a court of law, because the statement is not made under oath, and the person who actually made it is not available for cross-examination.

In almost every case in Canada before 1970, where survey evidence had been offered regarding the opinions of some segment of the public, the court rejected it as inadmissible. The one known exception where a survey had been admitted prior to 1970 is the case of *Aluminum Goods Ltd. v. Registrar of Trade Marks*.[1] In that case, a national survey of housewives and dealers of cooking utensils was used to establish that the term "Wear-ever" was perceived as a brand name, and not just as a descriptor of quality. But seven years later, the same judge, Justice Cameron of the Exchequer Court[2], receiving evidence from the same survey firm, withdrew his earlier support of survey evidence, describing it as "utterly valueless" in the case to be described next.

The case of *Building Products ltd. v. B.P. Canada Ltd.*[3], involved a complaint by the company *Building Products Ltd.* that the use of the name *B.P.* in Canada (an abbreviation of *British Petroleum*) would be confusing with its own name. *Building Products* claimed that "BP" was its nickname, and formed part of its registered trademarks. It tendered the results of a door-to-door survey to support its claim that the public would be confused. The court definitively rejected it, Justice Cameron writing the following:

> This type of evidence is no doubt useful and may be admissible in certain inquiries and before certain administrative tribunals not bound by the laws of evidence. In my view, however, it is purely hearsay evidence and not within any of the exceptions to the rules excluding such evidence. No matter what attempts may be made to ensure that the survey is conducted in an impartial and objective fashion, the fact remains that the witness who tenders the report (or even brings in the questionnaires...) has no personal knowledge as to the manner in which the questions were submitted or that the recorded answers are those actually made by those interviewed. But the main objection to such evidence is that

> the witness is endeavouring to state certain conclusions based on opinions said to have been expressed by individuals who are not before the Court and whose opinions consequently are not expressed under the sanction of an oath or subject to the test of cross-examination. ...How, then, can an official of a survey company who has not participated in the questioning, but who bases his opinion on tabulations made by others of reports of supervisors who have collected written statements by interviewers of what others said, be allowed to express an opinion as to what "BP" means to others, or whether its use by several companies would or would not cause confusion? Such an opinion or report would be utterly valueless and in my view inadmissible.

But just three years later, another judge of the Exchequer Court agreed to consider results of a survey, reported in the form of 29 separate but near-identical affidavits from 29 survey respondents. The survey had been designed by Seven-up Company, who took exception to the registration of a trade-mark for a root beer drink called "Mugs Up." While the judge had no objection to survey evidence in principle, he declared himself "unimpressed" with this particular survey. The main question of the survey is reproduced below:

These are the names of various soft drinks. Some of those in the right hand column may be made by the same companies that make those in the left hand column. Will you please match the names of the soft drinks that you think are made by the same companies?

1. Coke
2. Pepsi
3. 7-Up
4. Canada Dry
5. Orange Crush

1. Howdy
2. Mugs-Up
3. Fanta
4. Teem
5. Pure Spring

All 29 of the respondents had matched "7-Up" and "Mugs-Up", which was argued by the 7-Up company to be evidence of confusion. The judge disagreed. He found the question "suggestive, if not directly leading." Thus, despite the open-mindedness of the court, in principle, to considering the relevance of a survey, that case was not to become the occasion for a full-blown test of acceptability and weight of such evidence.

Change gradually took place over the next several decades, as governments and businesses relied increasingly on the use of surveys for their own significant decisions, and as the survey industry strengthened its standards. For their part, lawyers put increasing pressure on the courts to accept as evidence that which held respect and was in common use in everyday commerce. With the strong influence on Canada and Britain of American precedents, case law and legal analysis in all three countries evolved to accommodate survey research as expert evidence, based on a series of reasoned principles.

1. Survey research is not hearsay when it is presented, not to establish the "truth" of a particular fact, but rather to establish that a certain statement was made. For example, if Consumer X says in a survey that she bought a *ROXY* brand t-shirt at *The Bay*, the survey might be inadmissible as proof that *The Bay* sells *ROXY* t-shirts. But it could be admissible as evidence that such a statement was made.
2. In many circumstances a survey is not so much a documentation of facts, as it is a collective description of the "state of mind" of a relevant population. The court only needs to be assured of the soundness of administration of the survey in order to take confidence in its conclusions. That could be adduced from a cross-examination of the person who conducted the survey, and possibly also from testimony by one or more of the interviewers or other professional staff. In other words, the benefits of testing credibility through the adversarial system could still be preserved.
3. According to a slightly different nuance of interpretation, survey research should be viewed not as a basis for fact-finding by the judge, but rather as a foundation for the expert's opinion. As stated by the Ontario Court of Appeal, regarding a survey about community standards of obscenity [4], "no question of inadmissible hearsay arises because the survey or poll is not offered to prove the truth of the statements it contains, but merely to show the foundation of the opinion of the expert... Moreover, in my opinion, a hearsay upon a hearsay is not admissible and accordingly the persons who actually put the questions to the

> subjects surveyed should be before the Court so their credibility may be assessed. If their credibility is established the survey remains solely to show as a fact the reaction of those interviewed.

In summary, survey researchers need not imagine that they have received a special dispensation from the Hearsay Rule or from the strictures of the adversarial procedure for establishing "truth." Courts can still hold to their principle of testing credibility through cross-examination, but now a cross-examination focused on the likelihood that the survey in question did indeed capture the true unbiased perceptions of interviewees. This view is confirmed in the well-respected treatise by Sopinka and Lederman on The Law of Evidence in Civil Cases:

> Courts... have indicated a willingness to accept expert evidence of surveys... as long as it can be demonstrated that approved statistical methods and social science research techniques have been employed. With respect to this kind of evidence, the courts have been more concerned about the procedures and techniques utilized by the experts than they have been about the hearsay aspect of such evidence.

Many judges now notice and regret the absence of survey evidence where it would have been helpful. In the recent case of ITV Technologies Inc., regarding a dispute over the internet name ITV.net, the trial judge discounted the evidence of a marketing expert about the likelihood of consumer confusion, "since it was not based upon surveys and was not corroborated by the testimony of average consumers."[5] Thus, surveys have evolved from their early depiction as "utterly valueless" to a state of affairs today where they are considered, in some circumstances, to be *de rigeuer*. A definitive endorsement of the value of survey evidence was colourfully given in the Canadian Federal Court by Justice Macfarland writing in a dispute between Sun Life Assurance and Sunlife juice: "Without such evidence, how am I to otherwise determine whether there is likely to be confusion when it is the law as I understand it - that what I think personally is immaterial... To attempt to make such a determination without regard to evidence of what others may think or have said would to my mind be nothing more than an exercise in pure judicial fantasy and of not much assistance at all. I am satisfied that the survey evidence led before me was most satisfactory, having been conducted by persons very highly skilled in the field."[6]

History informs the present. History demonstrates the evolution of understanding by courts of the scientific underpinnings of surveys, and of the logic and defensibility of survey evidence co-existing with rules of hearsay. Historical analysis of the hearsay issue also explains why it is essential for surveys to maintain exemplary standards of scientific integrity, and why survey experts must stay connected to the operational processes at every stage.

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[1] [1954] Ex. C.R. 79, 14 Fox Pat. C. 41 at 45

[2] Now the Federal Court of Canada

[3] Building Products Limited v. B.P. Canada Limited [1961], 21 Fox Pat. C. 130 at 138

[4] R. v. Times Square Cinema Ltd. [1971] 3 O.R. 688, 4 C.C.C. (2d) 229

[5] ITV Technologies Inc. v. WIC Television Ltd. [2005] 38 C.P.R. (4th) 481, 251 D.L.R. (4th) 208, 332 N.R. 1 Federal Court of Appeal, March 14, 2005. See also Hard Drive Design Inc. v. CMT Cut, Make & Trim Inc. [1996} 66 C.P.R. (3d) 86

[6] Sun Life Assurance Co. of Canada v. Sunlife Juice Ltd. 1988 CarswellOnt 926 20 C.I.P.R., 87, 65 O.R. (2d) 496, 22 C.P.R. (3d) 244 Ontario Supreme Court, High Court of Justice, July 21, 1988, Docket No. 5293/85, paras. 20, 21.

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