

## Year in Review: 2011

### Survey evidence

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This publication catalogues references to survey evidence in decisions by Canadian courts and regulators related to intellectual property and other legal matters between January 2011 and December 2011.

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## Surveys in Trade-mark Cases - Trade-marks Opposition Board

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### **1. Bayer Aktiengesellschaft (Opponent) v. Marcon (Applicant), (Docket 1,201,366) 2011 TMOB 9. January 24, 2011.**

The Applicant filed an application for the trade-mark BAYER based upon proposed use in association with wares that included: dental products and topical skin balms, in December 2003.

Bayer Aktiengesellschaft (the Opponent and majority shareholder of Bayer Inc.) filed a statement of opposition in April 2007. The Opponent has a number of BAYER registered trade-marks and BAYER trade-name, registered and/or used in association with a variety of wares.

The Opponent submitted several pieces of evidence, including survey evidence.

*"[16] . . . The evidence shows that the Opponent's mark has acquired a high degree of distinctiveness through significant use, as described below:*

*[17] . . . Surveys of the Canadian public conducted jointly by Leger Marketing and Marketing magazine in 2006 and 2007 indicate that BAYER is the most recognized health care brand in Canada. Canadians have also voted Bayer as the top respected healthcare company in Canada.*

*[18] It is clear from [the Opponent's] evidence that the Opponent's mark has become very well known in Canada. As for the Applicant's mark, since the Applicant filed no evidence of use or making known of its mark, I must conclude that its mark has not become known in Canada at all. This factor therefore favours the Opponent."*

The Board ruled in favour of the Opponent.

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### **2. Yoplait Marques Internationales (Opponent) v. Compagnie Gervais Danone (Applicant), (Docket 1,298,268) 2011 TMOB 54. March 25, 2011.**

Both parties are makers of yogurt.

In 2006, Danone filed an application to register the trade-mark L. CASEI IMMUNITAS based on proposed use in association with milk-based liquid dietary food supplements for human consumption as a meal replacement or supplement; yogurts; non-alcoholic yogurt-based drinks.

Yoplait filed an opposition to the application in March 2008. It presented survey evidence which was rejected by the Trade-marks Opposition Board.

*"[27] It should be noted that I am disregarding all references to third-party documents such as the surveys, market studies or the distribution volume of certain newspapers or magazines to which [the Opponent] refers in his affidavit. This evidence is inadmissible, as it constitutes hearsay."*

The Opponent's application was rejected.

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**3. *Spirits International BV (Respondent) v. Distilleries Melville Limitée (Applicant), (Docket 1,203,487) 2011 TMOB 186; and Distilleries Melville Limitée (Respondent) v. Spirits International BV (Applicant), (Docket 1,065,643) 2011 TMOB 188. September 30, 2011.***

Both parties had applied to register similar trade-marks in association with vodka. The application of each party was opposed by the other. The Trade-marks Opposition Board ruled on both matters on the same date.

In both cases, Spirits presented evidence from a survey which was meant to determine whether MOSKOVA vodka was likely to lead to confusion with MOSKOVSKAYA vodka. In the survey, consumers were shown a series of five vodka labels, including the MOSKOVA and MOSKOVSKAYA labels. Survey respondents were asked: "Do you think any two or more of these brands of vodka are made by the same company?" If they answered in the affirmative, they were then asked to group together the brands of vodka that they thought were made by the same company and to explain why they thought this.

In both matters, the Board did not use, or put little weight, on the survey evidence.

*"[29-TMOB 186; 48-TMOB 188] According to Dr. Wind's expert opinion, the survey results demonstrate that 33% of all consumers interviewed believed that MOSKOVA vodka is produced by, or is otherwise related to, the producer of MOSKOVSKAYA vodka, because of similarities in the names. In the province of Quebec alone, 29% of those interviewed held that belief. By contrast, 4% of respondents believed that either MOSKOVSKAYA or MOSKOVA vodkas were related to one of the other three vodka labels due to similarities in their names."*

In the matter of Spirits opposition to the registration of Distilleries' trade-mark [TMOB-188], the Board said the material was too old for consideration.

*"[49-TMOB 188] I note that, having been conducted in 2007, the survey post-dates the material dates for all of the grounds of opposition."*

With respect to the Spirits application to register its trade-mark [TMOB-186], the Board was not convinced of its relevance.

*"[129-TMOB 186] With respect to the survey evidence adduced through the Wind affidavit, I note that the Supreme Court in Masterpiece also made findings regarding the helpfulness of survey evidence in trade-mark confusion cases."*

*[130-TMOB 186] Specifically, the Supreme Court held that surveys can provide empirical evidence demonstrating consumer reactions in the marketplace, which would generally not be known by the decision maker. The Supreme Court held that in order to satisfy the Mohan requirement of relevance the survey must be both reliable and valid.*

*[131-TMOB 186] The Applicant submitted that the survey attached to the Wind affidavit was not free from bias because no brands of vodka also manufactured by the Opponent and/or including a phonetic resemblance to MOSKOVSKAYA were selected as a positive control. Therefore the Applicant submits the survey cannot be interpreted as indicating which of the brands were known to consumers and/or who these marks are distinctive of. Rather, the Applicant submits that the survey only provides circumstantial evidence that the consumers surveyed believe that a relationship may exist between the parties' brands.*

*As such, the Applicant submits that the survey is not relevant to determining the outcome of the opposition and it should be declared inadmissible and accorded little weight.*

*[132-TMOB 186] Furthermore, the Applicant also criticized the survey for focusing on labels when what is at issue is whether the Mark is confusing with the Opponent's alleged trade-marks. The Applicant also raised concerns about the fact that the label used in the survey to identify the Applicant's product was a modified version of the actual label used by the Applicant since the details regarding the Applicant (name, location of distillery) had been cropped off.*

*[133-TMOB 186] While I appreciate the Opponent's submissions that the survey was designed using labels as opposed to words to provide a "real life" marketplace feel to the questions, I note again that the Mark as applied for is merely the word MOSKOVA. A determination of confusion as between the labels used in the survey is not necessarily applicable to the determination of a likelihood of confusion as between the Mark and the Opponent's marks.*

*[134-TMOB 186] Based on the foregoing, including the analysis in Masterpiece, I am not convinced that the survey satisfies the Mohan requirement of relevance and as a result I am not willing to place any weight on the contents of the Wind affidavit."*

The Board rejected Spirits' application to register the trade-mark MOSKOVSKAYA and refused Spirits' opposition to Distilleries' registration of the trade-mark MOSKOVA.

## **Surveys in Trade-mark Cases - Federal Court and Supreme Court of Canada**

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### **4. *Masterpiece Inc. v. Alavida Lifestyles Inc., (Docket 33459) 2011 SCC 27 [2011] 2 SCR 387. May 26, 2011.***

Both parties operate in the retirement residence industry. Masterpiece Inc., operating in Alberta, used several unregistered trade-marks, including "Masterpiece the Art of Living," since 2001. Alavida Lifestyles Inc. ("Alavida"), operating in Ontario, entered the market in 2005 and applied to register the trade-mark "Masterpiece Living" on December 1, 2005 on the basis of a proposed use. Alavida began using this trade-mark in January 2006.

Shortly after Alavida's application, Masterpiece Inc. also began using "Masterpiece Living" and applied to register it and the word "Masterpiece" as its trade-marks in 2006.

Because of Alavida's prior application, which was eventually granted, Masterpiece Inc.'s applications were denied.

Masterpiece Inc.'s subsequent application to expunge Alavida's registration was dismissed by a Federal Court trial judge who concluded that there was no likelihood of confusion between Alavida's and Masterpiece Inc.'s marks. That decision was upheld on appeal, and reversed on appeal to the Supreme Court.

In discounting the evidence of Alavida's marketing expert, the Supreme Court relied on arguments arising from the market evidence presented by Masterpiece Inc., except for the survey component.

*“[Para 6] . . . Judges should consider the marks at issue, each as a whole, but having regard to the dominant or most striking or unique feature of the trade-mark, using their own common sense, to determine whether the casual consumer would be likely to be confused when first encountering the trade-mark. . . . Masterpiece Inc.’s survey was similarly unhelpful because it attempted to simulate consumers with an ‘imperfect recollection’ when none was available. For this reason, the survey was not a valid assessment of the relevant question. Judges should be careful to question the necessity and relevance of such evidence, perhaps as part of a case management process, particularly in light of the substantial cost of evidence that may be of little utility.”*

...

*[76] . . . Judges must fulfil their gatekeeper role to ensure that unnecessary, irrelevant and potentially distracting expert and survey evidence is not allowed to extend and complicate court proceedings. . . .”*

...

*[93] Surveys, on the other hand, have the potential to provide empirical evidence which demonstrates consumer reactions in the marketplace — exactly the question that the trial judge is addressing in a confusion case. This evidence is not something which would be generally known to a trial judge, and thus unlike some other expert evidence, it would not run afoul of the second Mohan requirement that the evidence be necessary. However, the use of survey evidence should still be applied with caution.*

*[94] The use of consumer surveys in trade-mark cases has been recognized as valid evidence to inform the confusion analysis. As Binnie J. noted in *Mattel*, often the difficulty with survey evidence is whether it meets the first of the Mohan requirements: relevance. At para. 45, he further divided the question of relevance into two sub-issues:*

*As to the usefulness of the results, assuming they are elicited by a relevant question, courts have more recently been receptive to such evidence, provided the survey is both reliable (in the sense that if the survey were repeated it would likely produce the same results) and valid (in the sense that the right questions have been put to the right pool of respondents in the right way, in the right circumstances to provide the information sought). [Emphasis added.]*

*[95] In *Mattel*, the survey at issue was found to be invalid, as it did not address the likelihood of confusion, only a “mere possibility, rather than a probability, of confusion” (para. 49). This was because the survey asked consumers whether they thought that the company that makes Barbie dolls “might have anything to do with” a restaurant that used the trade-mark “Barbie’s” (para. 1 (emphasis in original)).*

*[96] In this case, the problem is somewhat different. Unlike *Mattel*, *Masterpiece Inc.* had not yet established a presence in the community in which it operated. Thus, there were no casual or average consumers with “imperfect recollection” of *Masterpiece Inc.’s* marks to test. As a result, the survey was based on a series of questions that attempted to establish a proxy for “imperfect recollection”, and only thereafter test how such customers would react when exposed to the second mark. This is not asking questions “in the right way, in the right circumstances” to elicit evidence of how those with an imperfect recollection of *Masterpiece Inc.’s* marks would react to *Alavida’s* proposed mark. For a survey to be valid, it seems elementary that there must be some consumers who could have an imperfect recollection of the first mark. Simulating an “imperfect recollection” through a series of lead-up questions to consumers will rarely be seen as reliable and valid.*

[97] While I would not absolutely foreclose the possibility that a party may devise a valid survey in a case where a trade-mark user has not established a sufficient presence in the marketplace for consumers to have formed an imperfect recollection of its trade-mark, I would venture that it is highly unlikely that such a survey would meet the requirements of reliability and validity.

[98] I do not know the exact circumstances in which the expert evidence was introduced in this case or what was requested of the trial judge, and there is no suggestion that the trial judge erred in admitting it. Nonetheless, I think it is apparent, particularly with respect to the survey, that the evidence was of little assistance to the trial judge and indeed distracted from the required confusion analysis.

[99] Where parties propose to introduce expert evidence, a trial judge should question the necessity and relevance of the evidence having regard to the Mohan criteria before admitting it. As I have already pointed out, if a trial judge concludes that the expert evidence is unnecessary or will distract from the issues to be decided, he or she should disallow such evidence from being introduced.

[100] I would further suggest that it would be salutary to have a case management judge assess the admissibility and usefulness of proposed expert and survey evidence at an early stage so as to avoid large expenditures of resources on evidence of little utility.

[101] As I have said, I do not know the exact pre-trial procedures in this case or whether the Federal Court generally includes the scope and methodology of proposed surveys within the case management process in trade-mark confusion cases. However, in making this recommendation I have had regard to a similar recommendation made by Arden L.J., at para. 63 of *esure*, where she observed that surveys can be costly and sometimes based on wrong questions and produce irrelevant or unhelpful responses, precisely the difficulty with the survey in this case. I have had regard to her recommendation for case management direction on proposed surveys in making the recommendation outlined above. As she explained, at para. 64:

My object of referring to this developing practice [case management directions] is to give it wider publicity and to encourage practitioners in this field to use this mechanism, so that any waste of costs and court resources is minimised.

My object is the same.”

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**5. *Target Brands, Inc. and Target Corporation (Plaintiffs) v. Fairweather Ltd., International Clothiers Inc. and Les Ailes de la Mode Incorporeés, (Defendants), (Docket T-1902-10) 2011 FC 758. June 23, 2011.***

Target Brands, Inc. sought an interlocutory injunction to restrain the Defendants (“INC”) from operating a retail store in association with a trade-mark or trade name comprising TARGET or a bull’s-eye design, and from displaying, advertising or using the word TARGET or a bull’s-eye design to direct public attention to the Defendants’ business as to cause confusion between the Defendants’ business and the Plaintiff’s business.

The Plaintiffs is a large chain of retail department stores operating in the United States and plans to open stores in Canada in 2013.

The Defendants (“INC”) are related companies that sell private label clothing and accessories, and includes stores such as Fairweather. INC acquired the registered trade-mark TARGET APPAREL when it purchased the assets of Dylex Limited. INC has opened a chain of clothing apparel stores under the Target Apparel name.

(A trial has been set for 2012 to hear Target’s request for a permanent injunction, and damages, against INC from using the trade name TARGET or the bull’s-eye mark; and INC’s counterclaim against Target for infringement of its registered trade-mark TARGET APPAREL. )

Both the Plaintiffs and Defendants submitted survey evidence.

The court first examined whether the survey evidence demonstrated it was a serious issue.

*“[28] Although they do not agree on either the reliability or the significance of the survey data by the other party, both Target and INC agree the surveys indicate some degree of confusion presently exists in the minds of Canadian shoppers who were surveyed about TARGET and Target Apparel stores.*

*[29] Target is concerned that INC is passing off its Target Apparel venture on Target’s name and that its reputation and brand promise will be harmed. Although it has not commenced sales in Canada, Target has led evidence by its experts who opine that the TARGET brand will be harmed.*

...

*[31] On the other hand, INC has led evidence that its Target Apparel stores are part of its plans developed for positioning itself in a market niche to cope with international competitors. It disputes Target’s survey and expert evidence about the degree of confusion among consumers or harm to the TARGET brand.*

...

*[35] Without going into the evidence concerning the issue of passing off in any more than in a preliminary way, I think there is little doubt that the low threshold for demonstrating a serious issue has been met by the evidence in this case, which involves two sizeable business entities with similar business trade names where both sell a similar product, clothing. I am satisfied Target’s evidence is sufficient to raise an issue whether INC’s Target Apparel’s store launch would deceive customers into thinking the stores are affiliated with Target and would harm Target’s reputation. In coming to this conclusion, I need not decide if the evidence favours one party or the other, only that it supports finding a non-frivolous issue.”*

The Court next assessed confusion.

*“[42] Target submits that its survey evidence confirmed by expert interpretation supports the conclusion that INC’s Target Apparel stores is creating a high level of confusion in the minds of surveyed Canadians.*

*[43] INC disputes the validity of Target’s telephone survey by Dr. Corbin, submitting that the survey did not measure the extent to which Canadians recognized TARGET in combination with the bull’s-eye logo or other visual contextual cues like store size, appearance and layout. It similarly challenges Target’s mall intercept surveys by Dr. Ford as not clearly showing respondents the size, layout or internal appearance of a Target Apparel store, the type and price of products or the disclaimers now in Target Apparel stores.*

INC submits its own survey conducted by Mr. Klein found the apparent confusion as between 7 - 14% and stated: "This is considerably lower than in the Plaintiff's survey and is also below the '15% of people' who, according to Corbin. '...think Elvis is still alive.'"

[44] INC submits that its survey of Target Apparel shoppers by Mr. Klein clearly showed that over 80% of Target Apparel shoppers, after being shown a picture of a real Target store and told that it sold a variety of merchandise, said they were likely to visit a Target store once they opened in Canada.

[45] From a review of the parties' survey evidence on confusion it is apparent that there would be some confusion between the two ventures. More to the point is the question of whether the present confusion is indicative of actual harm to Target.

[46] In *Mattel, Inc v 3894207 Canada Inc* [2006 SCC 22 \(CanLII\)](#), 2006 SCC 22 at para 57 (Mattel) the Supreme Court of Canada agreed that the average consumer is owed a certain amount of credit in assessing the likelihood of confusion and that "one must not proceed on the assumption that the prospective customers or members of the public generally are completely devoid of intelligence or of normal powers of recollection or are totally unaware or unformed as to what goes on around them.

[47] Keeping this directive in mind and INC's survey evidence that the majority of Target Apparel shoppers who were shown a picture of a Target store indicated they would shop at Target, I am not persuaded that the customer confusion demonstrated by these early surveys in Target's evidence would continue in the face of the real observable differences that would accompany a comparison of a 32,000 square feet Target Apparel discount clothing store with a 133,000 square feet full featured retail Target department store that is four times larger."

The Court dismissed Target's application for an interlocutory injunction against INC.

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**6. 1429539 Ontario Limited (Plaintiff) v. Café Mirage Inc., BDD Solutions Inc., Michael Bachour, and Amy Salam (Defendants), (Docket T-82-05) 2011 FC 1290. November 9, 2011.**

The Plaintiff launched a lawsuit in 2005 contending that the Defendants infringed upon its registered trade-marks by using its trade-marks in its Café Mirage signage and notices. The Plaintiff franchises "The Symposium Café" restaurants and holds the registered trade-mark along with other trade-marks related to the concept.

The Plaintiffs submitted a customer survey. The Court dismissed the results.

"[40] Ms. Fleming testified about the results of a customer survey. The Defendants challenged the value of this survey. I agree that the survey had been insufficiently grounded and I do not give that evidence any weight."

The Court did consider testimony from Symposium Café franchise operators that their restaurant customers told them about the similarities of Café Mirage with their Symposium Cafés.

"[90] An average restaurant customer, entering Café Mirage, seeing the prominent featuring of the School of Athens, the large display/counter, the antiqued wall pattern, and seeing the exact and very

similar trade-marked expressions with menus containing the same items, would, in my view, conclude that Café Mirage was associated with the Symposium Café Group.

[91] I am satisfied that, having regard to the above, the average restaurant customer in somewhat of a hurry would, on first impression, consider the Café Mirage to be associated with the Symposium Café Group and would be confused by the Defendants' use of the Plaintiff's trade-marks."

The Court ruled in favour of the Plaintiff.

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**7. Mövenpick Holding AG (Applicant) v. Exxon Mobil Corporation and Attorney General of Canada (Registrar of Trade-marks), (Respondents), (Dockets T-1641-10; T-1640-10) 2011 FC 1397. December 1, 2011.**

The Applicant appealed the Trade-marks Opposition Board decision to dismiss its opposition to Exxon Mobil's application to register "Marché Express" word and design (the "marks") for use in association with "convenience store and fast-food services offered at gasoline stations." The Board, in its decision, had ruled that the marks were not clearly descriptive of "convenience stores" or "dépanneurs" and were not confusing with the Mövenpick's "Marché" trade-mark for use in association with the operation of restaurants.

Exxon Mobil Corporation provided new evidence at the appeal, including survey evidence to support that the marks were not descriptive. Mövenpick argued the survey results supported its case. The Court disagreed.

"[25] . . . Mövenpick has unearthed some use of "Marché Express" by third parties and also relies upon the results of a survey carried out on behalf of Esso by Robert Klein, a market researcher. Esso produced this survey of over 2,000 consumers in Toronto, Ottawa, and Montreal to demonstrate that there was no likelihood of confusion. Mövenpick asserts that the survey is faulty in that regard, but that it does establish that "Marché Express" is clearly descriptive of the service.

[26] Mövenpick highlights the answers given by some of the survey participants who were of the view that "Marché Express" referred to a "convenience store", "dépanneur", "to me it is like the combination of restaurant and variety store", "un genre de dépanneur où on trouve les produits de base, lait, pain", "c'est un endroit où on peut se procurer rapidement les produits essentiels ou de dernières minutes, etc. Of particular interest was "à cause du nom ça dit tout".

[27] In my view, this new evidence merely shores up the Registrar's decision. She accepted that the word "marché" was used by other traders to describe convenience stores. However the mark applied for was not solely the word "marché" but the combined words "Marché Express", which is not a linguistic construction which flows naturally in the French language. She was of the view that these combined words did not have a precise meaning with respect to the character of convenience store services. She concluded that the mark was merely suggestive of the result liable to be produced as opposed to being intrinsically linked to the services themselves."

The Court also examined the survey evidence when assessing confusion and concluded the results wouldn't have affected the Board's decision.

*[56] As mentioned earlier, Esso also provided new evidence by Robert Klein, a market researcher, in the form of a survey of over 2,000 consumers in Toronto, Ottawa, and Montreal. The results indicate that there is no likelihood of confusion between Esso’s “Marché Express” and Mövenpick’s “Marché”. Mövenpick has not moved to have the affidavit struck because it relies upon it to support its “clearly descriptive of the services” submissions, but criticizes the methodology when it comes to its value to the Court in determining the likelihood of confusion. I will discuss Mr. Klein’s evidence later on.*

*[57] As stated in Masterpiece, in analyzing the various factors in section 6(5) of the Act in determining the likelihood of confusion, it is often better to first consider section 6(5)(e), the degree of resemblance. I see nothing in the new evidence which would have affected the Registrar’s opinion. Although the first word in a trade-mark may well be more important than others, in this case “Marché” is a weak mark because of its broad-based use, and therefore consumers are more likely to pick up on slight differences. In this case, as stated by the Registrar, “[t]he word EXPRESS differentiates the marks when sounded and the idea suggested by them.*

...

*[65] In my opinion, the Klein survey, whether or not the methodology used was reasonable, would not have affected the Registrar’s decision. It showed insignificant confusion which, if relevant, could only be used to bolster the Registrar’s opinion. What it shows, together with evidence filed by Esso before the Registrar, and the evidence filed on behalf of Mövenpick, is that it is difficult, if not impossible, for a consumer to see “Marché Express” signage without at the same time seeing an Esso sign, and for a patron at a Mövenpick restaurant to see “Marché” without at the same time seeing “Mövenpick”.*

The Federal Court upheld the Board’s decision.

## **Surveys in Copyright cases**

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### **8. SOCAN AND RE: SOUND TARIFFS 1.C (CBCRADIO) 2006-2011. July 8, 2011**

This was a proposal before the Copyright Board of Canada to increase the royalties the Canadian Broadcasting Corporation Radio (CBC) pays to the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and to Re:Sound Music Licensing Company (Re:Sound).

Part of the evidence submitted was an analysis of the amount of air time CBC uses music in its radio broadcasts.

*[26] All parties jointly filed a report prepared by Erin Research, a Canadian media research company, on music use by CBC radio in 2009. The report measures music broadcast between 6:00 a.m. and midnight on CBC’s flagship stations: Radio One and Radio 2 in Toronto, la Première Chaîne and Espace Musique in Montreal. Using recordings provided by CBC, Erin Research verified the accuracy of the log sheets also provided by CBC, added music played but not logged and removed music that was logged but not played. To assess the relative use of music in local programming compared to flagship stations, Erin Research sampled three additional radio stations for each of Radio One and Première Chaîne.*

...

[104] First, we compare the relative use of each repertoire to derive the rate. Throughout, the parties used numbers expressed as percentages. This approach is invalid, since the total minutes of music on each station are not the same in the SOCAN and Re:Sound music use reports.

[105] This point is perhaps best clarified by use of an example. For Radio One, Erin Research documents 1,060.5 minutes of music played relevant for SOCAN and 1,467.7 minutes of music played relevant for Re:Sound. The difference between these two is more than 400 minutes. Where the Erin Research reports contain percentages of music used on Radio One, the percentages for SOCAN would be relative to the 1,060.5 minutes, whereas the percentages for Re:Sound would be relative to the 1,467.7 minutes.”

The Board agreed to increase the tariffs CBC pays to both SOCAN and Re:Sound. It concluded its decision with a critique of the survey.

“[134] Finally, we wish to point out a number of issues that may exist in the design and assumptions of the music logs and the Erin music use study.

[135] Music that should have been counted in may have been left out, and vice versa. Erin Research calculations appear based only on what was considered to be “relevant music” but no indication was provided of what constitutes irrelevant music. Some music that Re:Sound treated as irrelevant (news themes) clearly is relevant to SOCAN, making comparisons between the two collectives unnecessarily complicated.

[136] The classification of music into the various categories used in the Erin Research reports also raised some concerns. Mr. Steinmetz testified that a “demo” is “either something we have commissioned and that we own or it can be something that was sent to us [electronically] without any deep information” and that “custom” are “vanity records” and self-released CDs. CBC reported all these recordings as unpublished; Re:Sound treated them as such. Yet some “demo” recordings are indeed published and as such, potentially eligible for remuneration rights royalties. This would tend to understate the royalties. In the absence of data relating to this subject, we chose to leave well enough alone.

[137] Such ambiguities are not new. In the future, parties may wish to seek Board input before defining the parameters of certain studies and surveys so as to ensure that the results are as reliable and as useful as possible.”

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## **9. Sound Tariff No. 6.A – Use of Recorded Music to Accompany Dance, 2008-2012. July 15, 2011**

In 2007, Re:Sound Music Licensing Company (“Re:Sound”), acting for performers and makers of sound recordings, filed a proposed statement of royalties to collect for the use of recorded music to accompany dance and fitness from 2008 to 2012.

The Copyright Board of Canada issued a decision in regards to royalties paid for dance venues. (A decision for Tariff 6.B (use of recorded music to accompany fitness) is still under advisement.)

The Alliance of Beverage Licensees of BC (ABLE BC) and the Canadian Restaurant and Foodservices Association (CRFA) gave evidence in opposition to the proposed dance tariff. ABLE BC is a business trade association that represents British Columbia’s pubs, bars, nightclubs and privately owned liquor stores. CRFA is Canada’s largest hospitality association with over 30,000 members.

ABLE BC submitted survey evidence.

*“[16] Ms. Kim Haakstad, Executive Director of ABLE BC, introduced the results of an email-based survey she conducted of her members who are owners of bars and restaurants where recorded music is sometimes played. One hundred and thirty-nine members responded to the survey. Of these, 51 reported playing recorded music for dancing less often than once per week and 34 reported playing recorded music for dancing once per week. The survey also asked the members to report the capacity of their establishments. The most common response by 51 of those responding was that their licensed capacity was between 100 and 150 persons.*

*[17] Ms. Haakstad contended the evidence presented by Mr. Fong was not a representative sample, at least of the province of British Columbia’s establishments. Mr. Fong focused on establishments that advertise themselves as nightclubs or are classified as cabarets with the British Columbia Liquor Control and Licensing Branch. In so doing, Ms. Haakstad argued, Mr. Fong omitted a large number of pubs that play recorded music for dancing infrequently but that would also be subject to the proposed tariff.*

*[18] Ms. Haakstad testified about the prevalence of Top 40 music in ABLE BC’s member’s establishments. Many of the establishments hire a live band and of those who play recorded music “Top 40” music was slightly more popular than “House” music. Ms. Haakstad explained the discrepancy between her evidence and that of Dr. Bowman by noting that Dr. Bowman focused on nightclubs, a small segment of the businesses that play recorded music for dancing.*

...

*[31] Next, we must next consider whether the 50 per cent repertoire adjustment is appropriate. There is no particular reason to expect that dance venues (as Re:Sound defines them) play music similar to commercial radio. However, since both Re:Sound and the Objectors agree on the 50 per cent repertoire adjustment for dance venues and that no repertoire study was conducted to suggest that 50 per cent is either too high or too low, we will use a 50 per cent repertoire discount.”*

## **Other applications of survey evidence**

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### **10. Halifax (Regional Municipality) (Re), (Docket NSUARB-MB-10-06) 2011 NSUARB 119. July 27, 2011.**

The *Municipal Government Act* of Nova Scotia [S.N.S. 1998, c. 18](#) requires the council of every municipality to conduct a study and make an application to the Nova Scotia Utility and Review Board (the Board) to confirm or alter the number of councillors and the boundaries of the polling districts. Halifax Regional Municipality (HRM) made an application to keep the status quo of 23 councillors.

As part of its study, HRM commissioned an online citizen survey, which the Board criticized.

*“[107] . . . it never asked respondents their specific view on their preferred size of Regional Council.”*

The Board also examined polling data gathered by an interested citizen who was president of a public opinion and market research firm. The citizen was qualified by the Board to testify as an expert. The timing of poll coincided with HRM’s application. According to the Board:

*“[136] In the present matter, there is compelling evidence respecting the public's desire to have a much smaller council.*

*[137] The polling results presented by Mr. Mills showed strong support for a smaller council.*

*[138] In response to their preference of the desired council size, the mean number given consistently since November 2010 was 14 councillors.*

*[139] The Board notes that HRM never asked this question about specific size in its survey by Thinkwell Research.*

...

*[142] Taking all of the above into account, the Board concludes that public opinion (when properly determined) is a factor which should carry significant weight in determining council size. Accordingly, in this matter, the Board attributes significant weight to the polling results, which express the public's overwhelming desire to have a much smaller council.”*

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**11. WCAT-2011-02225 (Re), (Docket WCAT-2011-02225) 2011 CanLII 74561 (BC WCAT). August 31, 2011.**

A worker believing his wrist pain was related to new work duties sought a review by the Workers' Compensation Appeal Tribunal after he was denied compensation. The worker submitted as evidence an occupational health and safety committee survey of the worker and 218 of his co-workers.

*“[42] . . . The survey results indicated that these co-workers complained about a variety of effects of the new computer system . . . The survey documented, in particular, that the system required increased right-handed use, unbalanced with the left hand.*

*[43] The same results documented that these co-workers reported a range of physical symptoms as an initial reaction to use of the new computer system (including headaches, blurred vision, stomach pain, back pain, tingling/swelling in the hands/fingers, and nausea, as well as bilateral eye, shoulder, arm, elbow, and wrist pain).*

...

*[67] In closing, the worker asserted that the prevalence of the same condition (as well as shoulder conditions) affecting his co-workers indicated that the introduction of the new computer system was associated with the development of that condition. He added (through his representative) that the survey results provided support for such a conclusion.*

...

*[119] . . . While the survey results discussed complaints about the number of keystrokes required and reported symptoms which various co-workers related to the use of the new computer system, this does not assist me in deciding whether the worker's conditions at issue in this appeal were due to the nature*

*of his employment. I do not consider the survey results to provide sufficiently detailed evidence or any medical evidence which is of assistance to me in considering those issues.”*

The Tribunal placed little weight on the survey results and upheld the ruling to deny compensation.

## **Noted absence of survey evidence**

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**12. *Demerara Distillers Ltd. (Opponent) v. Bedessee Imports Ltd. (Applicant), (Docket 1,206,738) 2011 TMOB 101; and Guyana Sugar Corporation (Opponent) v. Bedessee Imports Ltd. (Applicant), (Docket 1,206,738) 2011 TMOB 102. June 30, 2011.***

Bedessee Imports Ltd. (the Applicant), filed an application in February 2004 for the trade-mark DEMERARA GOLD in association with the wares: sugar, glucose, rice and coconut oil. The Applicant disclaimed the right to the exclusive use of DEMERARA apart from the trade-mark as a whole in respect of the wares “sugar and glucose.”

Demerara Distillers Ltd. and Guyana Sugar Corporation (the Opponents) both filed applications in opposition in February 2005. The Trade-marks Opposition Board rejected the opposition, noting that the opponents could have used survey evidence to produce a stronger case.

*“[35-TMOB 101; 33-TMOB 102] . . . If the Opponent was of the view that Canadians have been educated to recognize that the word DEMERARA designates the place of origin of DEMERARA style sugar, it could have introduced evidence from Canadian consumers to that effect in the form of survey evidence. In the absence of evidence from consumers indicating that they would be, or have been, deceived by the use of a DEMERARA prefixed mark for a sugar that does not emanate from there tends to undermine the Opponent’s case.”*

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