The “Casual Consumer in a Hurry”: The Need For a Living Standard

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**Introduction: The fluidity of technological understanding**

Technology and its use changes at a rapid pace. As I write this paper, the world is now one year from when the World Health Organization declared SARS-COVID-19 a global pandemic. In response to social distancing measures, society began to use technology, much of which is patented and trademarked, to both work from home and to socialize. Many individuals had never used such technology before. This is illustrated perfectly when one considers the word “zoom”. Today there is a strong degree of association with this word with a certain video calling program. If someone was to hear this word a little over a year ago, this same association would likely not occur, the average person would not associate the word zoom with video calling, but rather with something completely different, such as a degree of speed. Therefore, the word “zoom” as well as the use of video calling technology and other services used to promote physical distancing are contained in the average individuals wealth of knowledge which they carry with them. Now the average consumer understands what a video call is, what a pandemic is, what social distancing means, and perhaps how vaccine technology works. This is critical, it shows how quickly the world can change and how quickly the immediate knowledge the average person changes. As a result, the law must adapt to the ever-changing test person in areas of law, especially in consumer protection law.

**Law cannot remain static**

The law must adapt to account for quick changes in society. In a seminal constitutional law case at a time where the highest court of Canada was still the Judicial Committee of the Privy Council, Lord Sankey stated that the BNA act, which is know as the Constitution Act of 1867, planted in Canada a “living tree capable of growth and expansion within its natural limits”.[[1]](#footnote-1) This statement, although made specifically regarding our constitution, accounts for the inevitable fact that the law must be capable of growth and adaptation to fit the changing social landscape. The constitution differs from other statutes in that it is much more difficult to amend, however, I argue that in areas where the law must adapt quickly, relying purely on amendments is not sufficient. Therefore, these areas where standards quickly change are better suited to the common law, to allow for flexibility and changes where judges see fit.

**“The casual consumer test” a living tree meant to adapt to technological change**

The Trademarks Act [*The Act*][[2]](#footnote-2) is arguably consumer protection legislation[[3]](#footnote-3) which provides that a trademark is registrable if it is not, amongst other disqualifying reasons, confusing with a registered trademark.[[4]](#footnote-4) *The Act* states that use of a trademark can cause confusion with another if their mutual use in the same area would lead consumers to infer the goods are associated with the same source.[[5]](#footnote-5) The act suggest one must consider “all the surrounding circumstances” to make a determination regarding confusion.[[6]](#footnote-6) A question remains which the statute doesn’t provide for, who is the test person to determine confusion?

Attempting to define “confusion” is a lofty goal. What can cause confusion varies from individual to individual, and from time period to time period. Binnie J articulated a common law test which provides the test person and scenario to asses confusion in Mattel, Inc v. 3894207 Canada Inc[[7]](#footnote-7), recently articulated in *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltee*. [*Veuve Clicquot*][[8]](#footnote-8) as

“*The test to be applied is a matter of* ***first impression*** *in the mind of a* ***casual consumer*** *somewhat in a hurry who sees the mark at a time when he or she has no more than an imperfect recollection of the prior trade-marks, and* ***does not pause to give the matter any detailed consideration or scrutiny****, nor to examine closely the similarities between the marks*”.[[9]](#footnote-9)

I argue that the “casual consumer” is a, albeit to a lesser degree than our constitution, a “living tree” of sorts. The emphasized parts above [emphasis added] suggest that the test person is one who quickly glances at the item, and uses the knowledge immediately available to them to determine the source. The knowledge one has on hand in such a “hurry” changes based on the societal landscape at the time. This test accounts for the changing in immediate knowledge, if the standard was one of detailed scrutiny – the standard would remain more static and therefore would not account as well for societal changes. A standard based on scrutiny would not account for the fact that before a person will even scrutinize, there must be something to suggest this is necessary. What suggests the need to inquire is likely a matter of first impression, which as stated above, will change rapidly.

Case law illustrates changes to what a “casual consumer” has in their immediate knowledge. For example, as society became more adept and used to surfing the internet, what could confuse the casual consumer has changed. We see this in two cases, In 2001, in *BCAA et al v office and Professional Employee’s Int Union et al 2001 BCSC 165*, the court suggest that there would be confusion [albeit in the passing off context] to a causal consumer because of factors such as the similar domain names and meta tags between BCCA website and the BCCA worker unions website, but a deeper examination of the actual website would make it clear that it is not BCCA sanctioned or affiliated.[[10]](#footnote-10) In 2014, a similar issue arose in *Insurance Corporation of British Columbia v. Stainton Ventures Ltd 2014 BCCA 296* [ICBC]. In this case, the court states

“*I am unable to accept the average internet user does not appreciate that domain names …. are often merely descriptive of the subject matter of the website to which the domain name revolves, rather than indicating affiliation, source or endorsement*”.[[11]](#footnote-11)

These cases suggest that in 2001 the “casual consumer” would presume a domain name and similar meta tags found on a website indicated affiliation and therefore a casual consumer would be confused by these at first impression. Whereas in 2014, a casual consumer would know such information is merely descriptive of the content on the website, and not indicative of its affiliation and therefore they would not be confused at first impression. This is an illustration of how what a “casual consumer” understands at a brief glance changes over time. There is no doubt that skills and understanding regarding the internet changed from 2001 to 2014 and thus what information the casual consumer had on first impression also changed. In creating a test which analyze the test person as one who uses their immediate knowledge to make a determination Binnie J ensured that the test person was one which would change and evolve over time.

1. *Edwards v. Canada (Attorney General),* 1929 UK JCPC CanLII 438. [↑](#footnote-ref-1)
2. *Trademarks Act* (R.S.C., 1985, c. T-13) [Trademarks Act]. [↑](#footnote-ref-2)
3. *Mattel Inc v. 3894207 Canada Inc* 2006 SCC 22. [↑](#footnote-ref-3)
4. *Trademarks Act* s.12(2)(d). [↑](#footnote-ref-4)
5. *Trademarks Act* s.6(2). [↑](#footnote-ref-5)
6. *Trademarks Act* s.6(5). [↑](#footnote-ref-6)
7. *Mattel, Inc v. 3894207 Canada Inc* 2006 SCC 22. [↑](#footnote-ref-7)
8. *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23 (CanLII), [2006] 1 SCR 824. [Veuve Clicquot] [↑](#footnote-ref-8)
9. *Veuve Clicquot* para 20*.* [↑](#footnote-ref-9)
10. *BCCA et al v Office and Professional Employees’ Int Union et al* 2001 BCSC 156 para 212. [↑](#footnote-ref-10)
11. *Insurance Corporation of British Columbia v. Stainton Ventures Ltd* 2014 BCCA 296 para 39. [↑](#footnote-ref-11)