

# Is Law too good for social science?

## Social science evidence in *Charter*-related cases

### Social science what?

Social science evidence is being used more and more in the courtroom to demonstrate social aspects of a case based on cultural backgrounds, education, child behavior, and more.

Such evidence is used to give better insight on society's evolving nature and as Common Law is often referred to as a "living tree" and morphs along with societal changes, social science evidence has a primordial role.

If society was not taken into account, the justice system would still, amongst other things, deal with problems through a duel (sword-fighting).

### Why is it so interesting?

Social science evidence is used, in Charter-related cases, to defend an argument. However, it is generally not presented by the parties themselves.

Rather, an expert witness is brought to trial and their expert opinion is what constitutes social science evidence. A recent example of social science evidence in law is Dr. Mohjab's comments in the Shafia case where the opinion was used to give background information on a societal group.

### How did we conduct this research?

The research was conducted through a doctrinal and jurisprudential analysis using law databases such as CanLII, HeinOnline, Westlaw, Azimut, and other legal databases provided by the University of Ottawa's online library.

### Results

Our findings indicate that social science evidence is becoming more important in *Charter*-related cases. The Court in *Irwin Toy Ltd. v. Quebec*, stated that "the Court will not [...] take a restrictive approach to social science evidence". The problem, however, rests in the usurpation such evidence might have of the judge's role during trial. Social science evidence is most often presented by experts in court. If the Court decides to fully rely on experts' testimonials, it limits its own understanding of the facts of the case.

### Conclusion

Due to society's ever evolving nature and Common Law's intrinsic dependence on it, social science evidence is of primary importance in Law, and especially in Charter-related cases, where society's most fundamental rights are at stake. It should be allowed in the courtroom with certain limits, as it should not usurp the bench's duties.

### A few doctrinal references

Danielle Pinard, *Incertitude et risques: la preuve en matière constitutionnelle*, Éditions Thémis, 2001

Melvin M. Mark, "Social Science Evidence in the Courtroom: Daubert and Beyond?" (1999) 5 Psychol. Pub. Pol'y & L.

David Schneiderman, *Common Sense and the Charter*, Supreme Court Law Review, Vol. 45, 2006.

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### A few jurisprudential references

*Irwin toy ltd. v. Quebec (A.G.)*, [1989] 1 SCR 927.

*M. v. H.*, [1999] 2 SCR 3.

*R v Lavallée* [1990] 1 SCR 852 at 21, 39.

*R v Sadiqi*, [2009] CR 6<sup>th</sup> 346 (Ont SCJ).

*R v Tran*, [2010] SCR 350

*R. v. Sharpe*, [2001] 1 S.C.R. 45

*RJR-MacDonald Inc. v. Canada (A.G.)*, (1995) 3 S.C.R. 199.

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