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Abstract

This empirical study explores the legal and non-legal factors influencing trial judges' decisions to admit or exclude illegally obtained evidence under section 24(2) of the Canadian Charter of Rights and Freedoms. Mining an original dataset of 1,472 reported decisions from 2013–2018, we found little evidence that they are affected by judges' gender or partisan ideology. We did find, in contrast, that they are substantially influenced by judges' previous professional backgrounds: Former criminal defence lawyers are more likely to exclude evidence than former non-criminal practitioners, who are in turn more likely to exclude evidence than former prosecutors. We also found significant regional disparities, with judges in Quebec, British Columbia, Newfoundland, and Nova Scotia more likely to exclude evidence than Alberta judges. The study also revealed that judges are more likely to admit evidence when trying more serious charges and less likely to do so when trying female defendants.

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STEVEN PENNEY & MOIN YAHYA*

This empirical study explores the legal and non-legal factors influencing trial judges' decisions to admit or exclude illegally obtained evidence under section 24(2) of the Canadian Charter of Rights and Freedoms. Mining an original dataset of 1,472 reported decisions from 2013–2018, we found little evidence that they are affected by judges' gender or partisan ideology. We did find, in contrast, that they are substantially influenced by judges' previous professional backgrounds: Former criminal defence lawyers are more likely to exclude evidence than former non-criminal practitioners, who are in turn more likely to exclude evidence than former prosecutors. We also found significant regional disparities, with judges in Quebec, British Columbia, Newfoundland, and Nova Scotia more likely to exclude evidence than Alberta judges. The study also revealed that judges are more likely to admit evidence when trying more serious charges and less likely to do so when trying female defendants.

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IN CANADA, EVIDENCE OBTAINED by police or other state actors in violation of the fundamental procedural norms set out in the Canadian Charter of Rights and Freedoms may be excluded at trial in prosecutions of criminal and regulatory offences if the court decides that admitting it could "bring the administration of justice into disrepute."[1] The exclusion of potentially reliable and probative evidence is a powerful remedy for police misconduct that may contribute to the acquittal of the factually guilty.[2] It is therefore no surprise that section 24(2) of the Charter—the provision instantiating the exclusionary power—has generated vast quantities of appellate and academic commentary.

Much less has been written about the way that section 24(2) is applied at trial. For several decades, courts have been deciding whether to exclude

1. S 24(2), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].
2. See R v Harrison, 2009 SCC 34 at para 42 [Harrison] ("[T]he price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining Charter standards").

unconstitutionally obtained evidence and explaining their reasons for doing so. We mined this rich dataset to identify factors influencing the decision to exclude or admit evidence obtained in violation of the Charter.

Ours is not the first quantitative study of section 24(2) decisions. Several researchers have used coding methods and descriptive statistics to examine how judges decide whether to exclude evidence obtained from Charter violations.[3] Our study is the first, however, to use inferential statistical methods to isolate variables correlating with the exclusionary decision at trial.[4] It is also the first to examine not only the "internal," doctrinal variables derived from positive law, but also the "external," non-legal variables (such as judges' gender and political affiliation) examined in the political science and realist legal literature on adjudication.

The remainder of this article proceeds as follows. In Part I, we examine the jurisprudence and scholarly literature needed to provide context for the research questions posed, i.e., determining the significance (if any) of a host of internal and external variables on the exclusionary decision. Part II summarizes our research methodology and Part III our findings, which reveal the unimportance of judicial gender, party of appointment, and court level to the exclusionary decision and the importance of judges' legal practice background, province, gender of the accused, and offence seriousness. Part IV discusses the policy implications of these findings and Part V concludes.

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3. See Mike Madden, "Empirical Data on Section 24(2) under R v Grant" (2010) 78 Crim Reports (6th) 278; Mike Madden, "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of R. v. Grant" (2011) 15 Can Crim L Rev 229 [Madden, "Marshalling"]; Thierry Nadon, "Le paragraphe 24(2) de la Charte au Québec depuis Grant: si la tendance se maintient!" (2011) 86 Crim Reports (6th) 33; Ariane Asselin, "Trends for Exclusion of Evidence in 2012" (2013) 1 Crim Reports (7th) 74 [Asselin, "Trends"]; Ariane Asselin, The Exclusionary Rule in Canada: Trends and Future Directions (LLM Thesis, Queen's University Faculty of Law, 2013); Nathan JS Gorham, "Eight Plus Twenty-Four Two Equals Zero-Point-Five" (2003) 6 Crim Reports (6th) 257; Richard Jochelson, Debao Huang & Melanie Murchison, "Empiricizing Exclusionary Remedies—A Cross Canada Study of Exclusion of Evidence under s. 24(2) of the Charter, Five Years After Grant" (2016) 63 Crim LQ 206 at 219; Benjamin Johnson, Richard Jochelson & Victoria Weir, "Exclusion of Evidence Under Section 24(2) of the Charter Post-Grant in the Years 2014-2017: A Comprehensive Analysis of 600 Cases" (2019) 67 Crim LQ 57.
4. For a recent analysis of section 24(2) decisions in five provincial appellate courts using similar inferential statistical methods, See Lori Hausegger, Danielle McNabb & Troy Riddell, "The Provincial Courts of Appeal and the Exclusionary Rule: Decision Making and Hierarchical Relations in the Charter Era" in Kate Puddister & Emmett Macfarlane, eds, *Constitutional Imperatives: Contemplations on Charter Rights, Reconciliation and Constitutional Change* (UBC Press) [forthcoming].

I. CONTEXT

A. EMPIRICAL SCHOLARSHIP

Few academics, lawyers, or even judges deny that some judicial decisions are influenced by non-textual factors; that is, those lying outside positive law. Efforts to describe, measure, and quantify these influences have been ongoing since at least the early twentieth century.[5] In recent decades, however, political scientists and legal academics have developed a robust literature (using increasingly sophisticated research designs and statistical tools) investigating these external influences on judicial outcomes. Most of this research has been of courts in the United States, though there is an emergent literature in Canada and other jurisdictions.[6] The research has also focused disproportionately on appellate courts as opposed to trial courts. To our knowledge, there have been no quantitative studies of external influence on Canadian trial decisions. That said, it is helpful to describe key findings from the scholarship on US appellate and trial courts and Canadian appellate courts in order to contextualize our study.

1. THE UNITED STATES

The most basic finding from the US research is that federally appointed appellate judges (i.e., from the US Supreme Court and the federal courts of appeals) tend to vote ideologically.[7] Simply put, this means that in most legal domains there are high positive correlations between various ex ante and ex post measures of judges' policy preferences (almost always characterized as conservative/liberal) and similarly characterized case outcomes.[8] The most common proxy for ex ante judicial ideology is the political party of the appointing President (Republican/conservative or Democrat/liberal). While there are limitations to

5. See *e.g.* Jerome Frank, Law and the Modern Mind (Brentano's, 1930) at 110-11; Sheldon Goldman, "Voting Behavior on the United States Courts of Appeals, 1961-1964" (1966) 60 American Political Science Rev 374.
6. See generally Benjamin Alarie & Andrew J Green, Commitment and Cooperation on High Courts: A Cross-Country Examination of Institutional Constraints on Judges (Oxford University Press, 2017) at 10-11 [Alarie & Green, Commitment and Cooperation].
7. See *e.g.* Jeffrey A Segal & Harold J Spaeth, The Supreme Court and the Attitudinal Model Revisited (Cambridge University Press, 2002); Cass R Sunstein et al, Are Judges Political? An Empirical Analysis of the Federal Judiciary (Brookings Institution Press, 2006).
8. See generally Lee Epstein, William M Landes & Richard A Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice (Harvard University Press, 2013) at 65-89.

the methodologies used,[9] viewed in the aggregate, the literature reveals robust and enduring support for ideological judging, often referred to as the "attitudinal" model of adjudication.[10]

That said, the US research also suggests that attitudinal influences may be muted in certain legal domains and in the lower levels of the court hierarchy. At the US Supreme Court, evidence for ideological voting is strong for most issues, including criminal justice.[11] But in the federal courts of appeal, evidence

9. See generally Frank B Cross, Decision Making in the U.S. Courts of Appeals (Stanford University Press, 2007) at 20-21; Epstein, Landes & Posner, *supra* note 8 at 46-47, 70-77; CL Ostberg & Matthew E Wetstein, Attitudinal Decision Making in the Supreme Court of Canada (University of British Columbia Press, 2007) at 45-48 [Ostberg & Wetstein, Attitudinal Decision Making]; Emmett MacFarlane, Governing from the Bench: The Supreme Court of Canada and the Judicial Role (University of British Columbia Press, 2013) at 21-26.
10. See Epstein, Landes & Posner, *supra* note 8 at 77-85; Nancy Staudt, Lee Epstein & Peter Wiedenbeck, "The Ideological Component of Judging in the Taxation Context" (2006) 84 Washington U L Rev 1797 at 1799-1809; Sara C Benesh & Wendy L Martinek, "State Supreme Court Decision Making in Confession Cases" (2002) 23 Justice System J 109 at 110-14; Alarie & Green, Commitment and Cooperation, *supra* note 6 at 12-13. Note that many scholars differentiate between strictly "attitudinal" models of adjudication, in which judges decide solely on the basis of their attitudes or policy preferences, and "strategic" models, in which judges moderate the influence of their preferences with other considerations, such as their decisions' effects on other judges and institutions, including legislatures. See Benjamin RD Alarie & Andrew Green, "The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada" (2007) 57 UTLJ 195 at 202 [Alarie & Green, "The Reasonable Justice"]. Still other researchers have posited a more purely economic "rational choice" model of adjudication, in which judges seek to maximize utility along a range of parameters, including imposing their preferences as well as achieving myriad personal and professional goals. See *e.g.* Epstein, Landes & Posner, *supra* note 8. In this paper, we use the term "attitudinal" as shorthand for whatever portion of adjudication may be determined by a judge's ex ante policy preferences as opposed to purely legal or case-specific considerations.
11. See Epstein, Landes & Posner, *supra* note 8 at 112-13, Table 3.5 (showing substantial voting differences in criminal procedure cases between Republican- and Democrat-appointed justices with an especially strong tendency for Republican judges to vote conservatively in such cases); Ward Farnsworth, "Signatures of Ideology: The Case of the Supreme Court's Criminal Docket" (2005) 104 Mich L Rev 67.

of ideological judging is weaker in criminal cases than in many other domains.[12] Attitudinal influences are weaker for all types of cases at this level than at the US Supreme Court[13] and are weaker still at the federal trial level.[14]

Several explanations have been offered for these disparities, some of which are backed by empirical evidence. One is that lower court judges moderate their ideological predilections to avoid reversal on appeal (thereby enhancing their professional reputation or promotional prospects).[15] Indeed, there is evidence (both generally[16] and in criminal cases[17]) that federal district judges' decisions more closely adhere to their own ideologies (as estimated by party of appointment) when the court of appeal above them is comprised predominantly of judges with the same affiliation. Judges who face the prospect of review by a court dominated by the opposing party, in contrast, are less likely to decide in accordance with their normative preferences.[18] It has also been suggested that evidence of ideological judging in criminal cases at the intermediate appellate level is weakened by the fact that defendants appeal much more frequently than prosecutors (often with

12. See Sunstein et al, *supra* note 7 at 149; Jeffrey A Segal, Harold J Spaeth & Sara C Benesh, The Supreme Court in the American Legal System (Cambridge University Press, 2005) at 237-38; Cross, *supra* note 9 at 27-29 (small but statistically significant evidence of ideological judging in criminal procedure cases). But see Ward Farnsworth, "The Role of Law in Close Cases: Some Evidence from the Federal Courts of Appeals" (2006) 86 BUL Rev 1083; Epstein, Landes & Posner, *supra* note 8 at 168 (Republican judges more likely to vote conservatively in criminal than in civil cases, though differences between Republican and Democratic judges are small for both types); Benesh & Martinek, *supra* note 10 at 122 (voluntary confession cases slightly influenced by ideology but not statistically significant); Jeffrey A Segal, Avani Mehta Sood & Benjamin Woodson, "The 'Murder Scene Exception'—Myth or Reality? Empirically Testing the Influence of Crime Severity in Federal Search-and-Seizure Cases" (2019) 105 Va L Rev 543 at 577-78 (judicial ideology had a modest effect in predicting search and seizure exclusionary decisions in federal appellate courts but only in cases involving a potential life sentence or the death penalty).
13. See Jeffrey A Segal, "Judicial Behavior" in Keith E Whittington, R Daniel Kelemen & Gregory A Caldeira, eds, The Oxford Handbook of Law and Politics (Oxford University Press, 2008) 19 at 27; Epstein, Landes & Posner, *supra* note 8 at 168.
14. See Daniel R Pinello, "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis" (1999) 20 Justice System J 219 at 242.
15. Epstein, Landes & Posner, *supra* note 8 at 83.
16. See Kirk A Randazzo, "Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts" (2008) 36 American Politics Research 669.
17. See Max M Schanzenbach & Emerson H Tiller, "Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence" (2007) 23 JL Econ & Org 24.
18. This "reversal aversion" effect is likely much stronger for trial judges than for judges at intermediate appellate courts, since the former's decisions are much more likely to be reviewed on appeal than the latter's. See Epstein, Landes & Posner, *supra* note 8 at 84.

little merit), and as a consequence, both liberal and conservative judges most often vote to affirm convictions.[19]

It is also likely that attitudinal and other external influences on adjudication wane in comparison to internal legal factors as one moves down the judicial ladder.[20] At the intermediate appellate level and (especially) at trial, case outcomes are more likely to be dictated by legalist considerations.[21] Lower court judges (especially trial judges) see many more cases that can be decided based on straightforward applications of existing law.[22] Indeed, in a comprehensive review of the available datasets, Lee Epstein, William M. Landes, and Richard A. Posner found only slight evidence of partisan-ideological divergence in civil cases at federal district (trial) courts.[23]

On the other hand, trial judges must sometimes make highly discretionary decisions involving contentious policy matters. For some of these decision types, the prospect of reversal will be slight, either because the type is so common that proportionally few decisions are appealed or because appeal courts treat such decisions deferentially.[24] The section 24(2) decision arguably fits this profile. All else equal, we might expect these kinds of trial-level decisions to be more ideologically motivated than most.[25] The few studies testing this hypothesis in the

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19. *Ibid* at 159-64. Using the party of appointment method, the ratio of conservative votes of federal appellate judges in criminal cases is 76 Republican to 69 Democrat; using the senatorial courtesy method, the ratio 79 conservative to 68 liberal). This effect is not nearly as pronounced at the US Supreme Court level, which has a (highly selective) discretionary jurisdiction and thus typically chooses only to hear criminal appeals with arguable merit (*ibid* at 234). The ratio of conservative to liberal outcomes at the US Supreme Court is 1.17 to 1; at courts of appeals, the ratio is 1.59 to 1 (*ibid*).
20. *Ibid* at 231-36; Ostberg & Wetstein, Attitudinal Decision Making, *supra* note 9 at 58.
21. Epstein, Landes & Posner, *supra* note 8 at 213-20 (the only criminal cases included in the dataset were capital punishment cases where Republican judges were slightly more likely to rule conservatively than Democratic judges, but the difference was not statistically significant (p>5)).
22. *Ibid* at 180-83, 237. At the federal courts of appeals, there is also evidence of a substantial "conformity effect": All other things being equal, judges of a particular court are more likely to vote in the direction of the dominant party of that court. This effect dampens the ideological valence of individual votes, since Democrats are more likely to vote conservatively when they are in the minority and vice versa (*ibid* at 197-99).
23. *Ibid* at 213; see also Pinello, *supra* note 14 at 242.
24. See Corey Rayburn Yung, "Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts" (2011) 105 Nw UL Rev 1 at 20-21.
25. Epstein, Landes & Posner, *supra* note 8 at 11-12, 226-27, 237-38.

United States, however, have revealed little evidence of ideological judging, even for discretionary trial decisions.[26]

Compared to the empirical literature in the United States on the influence of partisan affiliation and other proxies for political ideology, less research has been conducted on whether other aspects of judicial background (such as gender, race, seniority, and professional experience) influence decision making.[27] The studies that have been done (mostly involving federal appellate courts) have tended to find little effect over the general range of cases.[28] The consensus explanation is that ideology predominates in the selection process and largely cancels out other background factors.[29]

There is some evidence, however, that some background characteristics may have an effect in certain types of cases.[30] Some studies have shown either that former prosecutors were more likely to render conservative decisions in criminal cases than other judges[31] or that former criminal defence lawyers were more likely

26. See *ibid* at 240-53 (for federal district courts, only very slight evidence of ideological judging in civil cases, but greater (but still modest) evidence in sentencing cases). Interestingly, this study did show that both Republican and Democratic district judges sentence more harshly when the court of appeals were dominated by Republicans, suggesting that reversal aversion may be robust even for highly discretionary trial-level decisions (*ibid* at 253).
27. For exceptions, see *e.g.* "Judicial Background and Circuit Court Decision Making" in Cross, *supra* note 9, 69.
28. See Jeffrey A Segal & Harold J Spaeth, The Supreme Court and the Attitudinal Model (Cambridge University Press, 1993); Epstein, Landes & Posner, *supra* note 8 at 169-70; Christina L Boyd, Lee Epstein & Andrew D Martin, "Untangling the Causal Effects of Sex on Judging" (2010) 54 American J Political Science 389. Not surprisingly, there are exceptions. See *e.g.* Morris B Hoffman et al, "The Intersectionality of Age and Gender on the Bench: Are Younger Female Judges Harsher with Serious Crimes?" (2020) 40 Colum J Gender & L 128 (finding that young female judges in Colorado imposed substantially greater punishments for serious crimes than male or older female judges).
29. Cross, *supra* note 9 at 69-70, 74, 92-93.
30. See generally *ibid* at 73-74.
31. See C Neal Tate, "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978" (1981) 75 American Political Science Rev 355 at 362; Stuart S Nagel, "Judicial Backgrounds and Criminal Cases" (1962) 53 J Crim L & Criminology 333 at 336 (among federal and state supreme court judges in 1955, former prosecutors voted more conservatively in criminal cases). But see Cross, *supra* note 9 at 83-85 (among federal courts of appeals judges in criminal cases, former assistant district attorneys voted more conservatively; but district attorneys, US attorneys, assistant US attorneys, and special prosecutors did not).

to rule liberally.[32] Some researchers (but not all)[33] have also found that female judges vote more liberally in criminal cases than men.[34]

Research has also shown that, apart from attitudinal factors stemming from judicial attributes and backgrounds, judges may be influenced by case-specific factors exogenous to positive law. Some researchers have found, for example, that judges of both genders favour female defendants over male defendants in criminal cases.[35] And one study of federal appellate decisions showed that judges were more likely to exclude unconstitutionally obtained evidence for more

32. See Gregory C Sisk, Michael Heise & Andrew P Morriss, "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning" (1998) 73 NYUL Rev 1377 at 1470-74 (among federal district judges, former defence lawyers are more likely to find sentencing guidelines unconstitutional; former prosecutors more likely to uphold sentencing guidelines against specific type of constitutional challenge).
33. See Boyd, Epstein & Martin, *supra* note 28 at 402-405 (no sex effect in capital punishment cases in federal courts of appeals); Sue Davis, Susan Haire & Donald R Songer, "Voting behavior and gender on the U.S. courts of appeals" (1993) 77 Judicature 129 (no sex effect in search and seizure cases).
34. See Cross, *supra* note 9 at 77-82 (federal courts of appeals); Donald R Songer & Kelley A Crews-Meyer, "Does Judge Gender Matter? Decision Making in State Supreme Courts" (2000) 81 Soc Science Q 750 (female Democratic judges are more likely to cast a liberal vote than male Democrats in criminal law and civil liberties cases; female Republicans do not vote differently than their male counterparts); Jeffrey J Rachlinski, Chris Guthrie & Andrew J Wistrich, "Probable Cause, Probability, and Hindsight" (2011) 8 J Empirical Leg Studies 72 at 95 (in some experimental treatments, female judges were slightly less likely to find probable cause than males). See also Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, "Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects" (2012) J Empirical Leg Stud 246 at 272-74, 280-81 (female judges vote more liberally than males in criminal cases at the Israel Supreme Court, although the finding was sensitive to the inclusion of a single judge).
35. *Ibid* at 274-75, 281; Jill K Doerner & Stephen Demuth, "Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?" (2014) 25 Crim Justice Policy Rev 242; S Fernando Rodriguez, Theodore R Curry & Gang Lee, "Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offences?" (2006) 87 Soc Science Q 318; Barbara A Koons-Witt et al, "Gender and Sentencing Outcomes in South Carolina: Examining the Interactions With Race, Age, and Offense Type" (2014) 25 Crim Justice Policy Rev 299. Judicial bias has also been experimentally demonstrated in relation to other legally irrelevant defendant characteristics. See *e.g.*, Holger Spamann & Lars Klöhn, "Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges" (2016) 45 J Leg Stud 255.

serious offences than less serious ones, despite the fact that crime severity is not a doctrinally relevant consideration.[36]

2. CANADA

The empirical literature on judging in Canada is not as extensive as in the United States. The vast majority of studies have been of the Supreme Court of Canada. Most have shown a modest correlation between party of appointment[37] and the ideological valence of case outcomes, but the strength of the association is

36. Segal, Sood & Woodson, *supra* note 12 at 572-76. See also Andrew J Wistrich, Jeffrey J Rachlinski & Chris Guthrie, "Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?" (2015) 93 Tex L Rev 855 at 890-93 (experimental evidence that judges are more likely to suppress unconstitutionally obtained evidence for more serious offences); Jeffrey J Rachlinski, Andrew J Wistrich & Chris Guthrie, "Altering Attention in Adjudication" (2013) 60 UCLA L Rev 1586 at 1614 (experimental evidence that judges are more likely to convict when exposed to inadmissible confession evidence when police misconduct was mild).

37. Superior court judges (for our purposes, judges of the provincial and territorial superior trial courts and courts of appeal) are formally appointed by the Governor General under section 96 of the Constitution Act, 1867. In practice, the appointments are made by the Minister of Justice in consultation with the Prime Minister and cabinet. Appointments to the Supreme Court of Canada are made by the "Governor in Council" (i.e., cabinet) under the authority of section 4(2) of the Supreme Court Act, and indirectly, section 101 of the Constitution Act, 1867. In practice, the decision is made by the Prime Minister in consultation with cabinet. See generally Peter McCormick, "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada" (2005) 7 J App Pr & Pro 1. Provincial court judges are appointed by the provincial justice minister in consultation with cabinet and the premier. Over the years, both the federal and provincial governments have used nominating committees to vet prospective candidates. The workings of these committees have varied across time, jurisdiction, and (within the federal jurisdiction) level of court. See generally Lori Hausegger, Matthew Hennigar & Troy Riddell, Canadian Courts: Law, Politics, and Process, 2nd ed (Oxford University Press, 2015) at 135-51, 157-61; Richard Devlin, A Wayne MacKay & Natasha Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a 'Triple P' Judiciary" (2000) 38 Alta L Rev 734; Lori Hausegger et al, "Exploring the Links between Party and Appointment: Canadian Federal Judicial Appointments from 1989 to 2003" (2010) 43 Can J Political Science 633 at 634-35; Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47 Osgoode Hall LJ 1 at 19-20 [Alarie & Green, "Policy Preference Change"].

substantially weaker than in the United States.[38] Studies isolating criminal cases have found modest correlations at best.[39] Moreover, the only study done to date of

38. See Susan W Johnson, "The Supreme Court of Canada and Strategic Decision Making: Examining Justices' Voting Patterns during Periods of Institutional Change" (2012) 42 American Rev Can Studies 236; C Neal Tate & Panu Sittiwong, "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations" (1989) 51 J Politics 900 at 907-908; Alarie & Green, "Policy Preference Change," *supra* note 37; Benjamin Alarie & Andrew Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada" (2009) 47 SCLR 475 [Alarie & Green, "Charter Decisions in the McLachlin Era"]; Ostberg & Wetstein, Attitudinal Decision Making, *supra* note 9; Donald R Songer, The Transformation of the Supreme Court of Canada: An Empirical Examination (University of Toronto Press, 2008) [Songer, Transformation of the Supreme Court]; Susan W Johnson, Donald R Songer & Nadia A Jilani, "Judge Gender, Critical Mass, and Decision Making in the Appellate Courts of Canada" (2011) 32 J Women Politics & Policy 237 at 249 (liberal appointees are more likely than conservative appointees to support criminal defendants in Supreme Court cases from 1982-2007). See also Thaddeus Hwong, "A Review of Quantitative Studies of Decision Making in the Supreme Court of Canada" (2003) 30 Man LJ 353 at 367-75 (reviewing Canadian literature). But see Donald R Songer & Susan W Johnson, "Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model" (2007) 40 Can J Political Science 911 at 923-29 (between 1978-2000, there was no significant correlation between appointing party and outcomes in criminal, civil liberties, or economic cases). Researchers applying methods other than "party of appointment" to gauge the degree to which various appellate courts are "ideological" have come to the same conclusion, i.e., that the Supreme Court of Canada is markedly less ideological than its US counterpart. See Alarie & Green, Commitment and Cooperation, *supra* note 6 at 21; Alarie & Green, "The Reasonable Justice," *supra* note 10 at 224; Benjamin Alarie & Andrew Green, "Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada" (2008) 58 UNBLJ 73 at 76-78 [Alarie & Green, "Should They All Just Get Along?"]; Ostberg & Wetstein, Attitudinal Decision Making, *supra* note 9 at 191-92, 204-205; Songer, Transformation of the Supreme Court, *supra* note 38 at 7-9, 161, 194, 247-49.

39. See Alarie & Green, "Policy Preference Change," *supra* note 37 at 28-36 (finding conservative-appointed Supreme Court of Canada judges voted only slightly more conservatively than liberal-appointed judges for both appeals generally and criminal cases); Nadia A Jilani, Donald R Songer & Susan W. Johnson, "Gender, Consciousness Raising, and Decision Making on the Supreme Court of Canada" (2010) 94 Judicature 59 at 66 (liberal-appointed judges voted more liberally than conservative ones in criminal cases from 1976-2007); Alarie & Green, "Charter Decisions in the McLachlin Era," *supra* note 38 at 490-92, Table 1 (finding only modest partisan differences, mostly attributable to equality rights cases, between liberal- and conservative-appointed judges in Charter cases decided between 2000-2009 (including criminal cases)); Ostberg & Wetstein, Attitudinal Decision Making, *supra* note 9 at 64, Table 3.4, 214-17 (modest evidence of partisan-ideological voting in criminal cases); Johnson, *supra* note 38 at 247 (liberal-appointed judges more likely to support liberal outcomes in criminal cases, but the effect is substantially larger in pre-Charter cases); Songer, Transformation of the Supreme Court, *supra* note 38 at 196-201 (modest correlation between appointing party and outcomes in non-unanimous criminal

Supreme Court decisions involving criminal procedural rights found no evidence of the expected ideological divide, i.e., that conservative-appointed judges favour the prosecution. For the years 1984–2003, C.L. Ostberg and Matthew E. Wetstein found either no association between party of appointment and outcomes (in "right to counsel" cases) or a modest negative correlation (in "search and seizure" cases).[40] In other words, liberal and conservative appointees did not differ in right to counsel cases, but counterintuitively, conservative-appointed judges modestly favoured the accused in search and seizure cases.[41]

Many fewer studies have been done of lower courts in Canada. James Stribopoulos and Moin A. Yahya surveyed decisions of the Court of Appeal for Ontario from 1990–2003 and found that conservative appointees were slightly more likely to rule conservatively in Charter criminal matters than liberal appointees.[42] Analyzing the same data using different methods, Lori Hausegger, Troy Riddell, and Matthew Hennigar found that conservative appointees were less likely than liberal appointees to vote conservatively in these cases.[43] Neither group of researchers found a significant difference in non-Charter cases.[44] Analyzing court of appeal decisions in Ontario, British Columbia, Saskatchewan, and Nova Scotia, Hausegger, Danielle McNabb, and Riddell

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cases between 1970-2003). See also Alarie & Green, "Should They All Just Get Along?" *supra* note 38 at 77-78.

40. Attitudinal Decision Making, *supra* note 9 at 85-114, 215, Table 8.1.
41. For the years 1984-1994, the same researchers found a positive correlation between ideology and outcomes in search and seizure cases. In that study, however, they used a measure of ideology that combined party of appointment with an ideology score based on content analysis of pre-appointment newspaper articles about the judges. Matthew E Wetstein & CL Ostberg, "Search and Seizure Cases in the Supreme Court of Canada: Extending an American Model of Judicial Decision Making across Countries" (1999) 80 Soc Sci Q 757. In their more recent study referred to in the text immediately above, the researchers found that the newspaper-based metric correlated in the expected direction for both search and seizure and right to counsel cases. Ostberg & Wetstein, Attitudinal Decision Making, *supra* note 9 at 214-15, Table 8.1.
42. "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario" (2007) 45 Osgoode Hall LJ 315 at 354-55.
43. Lori Hausegger, Troy Riddell & Matthew Hennigar, "Does Patronage Matter? Connecting Influences on Judicial Appointments with Judicial Decision Making" (2013) 46 Can J Political Science 665 at 681. They found, however, that judges with ties to the Liberal party (whether appointed by a Liberal or Progressive Conservative prime minister) voted more liberally in criminal cases than those with ties to the Progressive Conservatives. *Ibid* at 677-78.
44. Stribopoulos & Yayha, *supra* note 42 at 354-55; Hausegger, Riddell & Hennigar, *supra* note 43 at 681.

found no significant divergence between liberal and conservative appointees in section 24(2) decisions.[45]

These findings do not mean that ideology plays no role in Canadian appellate decision making. Indeed, studies of voting patterns suggest (as most would expect) that many judges have distinct ideological profiles,[46] though an individual judge's profile is not always consistent either over time[47] or across different legal domains.[48] It is also possible that judges appointed by different governments with the same partisan affiliation might differ ideologically.[49] It does mean, however, that party of appointment is generally a weak predictor of votes and case outcomes, including in criminal cases.

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45. *Supra* note 4 at 17-18; Tables 3 & 4.
46. Alarie & Green, "Policy Preference Change," *supra* note 37 at 34 (showing that many judges exhibit voting patterns substantially more or less conservative than the median); Songer, Transformation of the Supreme Court, *supra* note 38 at 185-93 (same); Ostberg & Wetstein, Attitudinal Decision Making, *supra* note 9 at 60-68, 76 (Table 4.3); "Attitudinal Consistency in the Post-Charter Supreme Court" in *ibid*, 193 (finding that judges exhibited strong patterns of ideological voting in many domains, including criminal justice, and that these patterns often correlated strongly with ex ante ideology); CL Ostberg, Matthew E Wetstein & Craig R Ducat "Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991–1995" (2002) 55 Political Research Q 235 (same); C L Ostberg & Matthew Wetstein, "Dimensions of Attitudes Underlying Search and Seizure Decisions of the Supreme Court of Canada" (1998) 31 Can J Political Science 767 (evidence of ideological voting in search and seizure cases); Stribopoulos & Yahya, *supra* note 42 at 361-62 (patterns of ideological voting on Ontario Court of Appeal); Panu Sittiwong, Canadian Supreme Court Decision-making, 1875-1990: Institutional, Group, and Individual Level Perspectives (PhD Dissertation, University of North Texas, Department of Political Science, 1994) at 112-40, online (pdf): <digital.library.unt.edu/ark:/67531/metadc278740/m2/1/high_res_d/1002721270-sittiwong.pdf> (showing substantial variations in voting behaviour between Court judges). See also generally S R Peck, "The Supreme Court of Canada, 1958-1966: A Search for Policy through Scalogram Analysis" (1967) 45 Can Bar Rev 666; Sidney R Peck, "A Scalogram Analysis of the Supreme Court of Canada, 1958–1967" in Glendon Schubert & David J Danelski, eds, Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West (Oxford University Press, 1969) 293 at 297-324; Donald E Fouts, "Policy-Making in the Supreme Court of Canada, 1950-1960" at 270-87 in *ibid*, 257; Michael Bader & Edward Burstein, "The Supreme Court of Canada 1892-1902: A Study of the Men and the Times" (1970) 8 Osgoode Hall LJ 503.
47. Alarie & Green, "Policy Preference Change," *supra* note 37 at 39-41.
48. See Songer, Transformation of the Supreme Court, *supra* note 38 at 185-93; Ostberg & Wetstein, Attitudinal Decision Making, *supra* note 9 at 206-09; Ostberg, Wetstein & Ducat, *supra* note 46.
49. We made no attempt, for example, to distinguish between judges appointed during the tenure of different Liberal (or Conservative) prime ministers.

Examinations of the effect of gender and other background factors on judicial decision making in Canada have produced mixed results. Donald R. Songer found that female Supreme Court justices were more likely to vote conservatively in criminal cases,[50] whereas Ostberg and Wetstein found no correlation between judges' gender and case outcomes in the criminal realm.[51]

Stribopoulos and Yahya found that male judges of the Court of Appeal for Ontario were more likely to overturn a Charter-based acquittal than their female counterparts.[52] Looking at the same data, Hausegger, Riddell, and Hennigar found that female judges voted more liberally in non-Charter (but not Charter) criminal cases than male judges.[53] In examining provincial appellate decisions from five provinces from 1982–2008, Songer, Miroslava Radieva, and Rebecca Reid found that female judges were modestly more likely to vote conservatively than males in criminal cases.[54] Hausegger, McNabb, and Riddell's examination of section 24(2) decisions from four provincial appellate courts, however, found no significant difference between male and female judges.[55]

Two previous studies examined the effect of professional background on case outcomes in Canada. Hausegger, Riddell, and Hennigar found that between

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50. Songer, Transformation of the Supreme Court, *supra* note 38 at 206. In contrast, they were substantially more likely to vote liberally in civil liberties and economic cases (*ibid*). See also Johnson, Songer & Jilani, *supra* note 38 at 249 (female Supreme Court judges voted more conservatively than males in criminal cases from 1982-2007); Susan W Johnson & Donald Songer, "Judge Gender and the Voting Behavior of Justices on Two North American Supreme Courts" (2009) 30 Justice System J 265 at 272-74; Jilani, Songer & Johnson, *supra* note 39 at 66 (female Supreme Court judges from 1976-2007 voted slightly more conservatively in criminal Charter cases).
51. Attitudinal Decision Making, *supra* note 9 at 75. See also Songer & Johnson, *supra* note 38 at 928-29, Table 3 (female-liberalism correlation in civil liberties, but not criminal or economic cases; no significant correlation between gender and liberalism in Supreme Court criminal cases from 1978-2000). See also Candace C White, "Gender Differences on the Supreme Court" in FL Morton, ed, Law, Politics and the Judicial Process in Canada, 3rd ed (University of Calgary Press, 2002) 85 (female-liberalism correlation in civil liberties and equality cases but not legal rights claims).
52. *Supra* note 42 at 356. In domestic and sexual violence cases, however, women voted more conservatively than men (*ibid* at 356, 358). Stribopoulos and Yahya also examined the interaction of appointing party and gender, concluding that the latter has more explanatory power than the former (*ibid* at 353, 358). But see Peter McCormick & Twyla Job, "Do Women Judges Make a Difference? An Analysis of Appeal Court Data" (1993) 8 CJLS 135 (no significant difference between male and female judges in criminal appeals in Alberta).
53. *Supra* note 43 at 680, 682.
54. "Gender Diversity in the Intermediate Appellate Courts of Canada" (2016) 37 Justice System J 4 at 12, Table 1.
55. *Supra* note 4 at 17-18 and Tables 3 and 4.

1990–2003, former defence lawyers on the Court of Appeal for Ontario voted more liberally in Charter (but not non-Charter) criminal cases than the average judge.[56] Former prosecutors (of whom there were few in the dataset) did not vote differently in criminal cases than other judges.[57] Hausegger, McNabb, and Riddell found no difference between former prosecutors and defence lawyers in section 24(2) cases from four provincial courts of appeal.[58]

Another possible external influence on judges' section 24(2) decisions is location-specific legal culture. Conformity bias may induce judges in some jurisdictions or courts to be more inclined to exclude unconstitutionally obtained evidence than in other jurisdictions or courts. There has been little study of this question in Canada. Songer, Radieva, and Reid found that provincial appellate judges in British Columbia, Alberta, and Ontario voted more conservatively in criminal cases than in New Brunswick.[59] And using Court of Appeal for Ontario judges as a reference point, Hausegger, McNabb, and Ridell found that British Columbia appellate judges were more likely to admit and Saskatchewan and Nova Scotia judges more likely to exclude.[60]

B. JURISPRUDENCE

The scholarship reviewed above suggests that extra-legal influences on section 24(2) decisions may be limited. In other words, case-specific legalist factors likely play an important, if not dominant, role in deciding whether unconstitutionally obtained evidence is excluded. We therefore mined our dataset to tease out the internal legal correlates of exclusion. To put our findings in context, it is first necessary to summarize the section 24(2) jurisprudence.

Before the Charter, courts in Canada had no general power to exclude illegally obtained evidence.[61] After its passage in 1982, courts were required to adjudicate claims of police[62] violations of fundamental, constitutionally entrenched

56. *Supra* note 43 at 683.
57. *Ibid* at 683-84.
58. *Supra* note 4 at 18 and Tables 3 and 4. They did find, however, that judges with both backgrounds were more likely to exclude (*ibid*).
59. *Supra* note 54 at 13, Table 2.
60. *Supra* note 4 at 17 and Tables 3 and 4.
61. See generally A Anne McLellan & Bruce P Elman, "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983) 21 Alta L Rev 205 at 225-30.
62. We use "police" throughout this article as shorthand for any state actor, i.e., a person or entity governed by the Charter as defined in section 32 of that enactment. See generally Patrick J Monahan, Byron Shaw & Padraic Ryan, Constitutional Law, 5th ed (Irwin Law, 2017) at 427-34.

procedural norms.[63] If claimants establish a violation of one of their own Charter rights, they may apply for exclusion under section 24(2).[64] Under the language of the provision, claimants must prove that: (1) the evidence was "obtained in a manner" that violated the Charter; and (2) admission of the evidence would "bring the administration of justice into disrepute."[65]

Very briefly, to satisfy the "obtained in a manner" requirement, the claimant must show either a sufficiently strong causal connection between the violation and the acquisition of the evidence or that the two events occurred as part of the "same transaction or course of conduct."[66] As we will see, this requirement plays only a minimal role in section 24(2) trial decisions.

The "disrepute" requirement is far more consequential. Early on, the Supreme Court signaled (to the surprise of many) that exclusion would not be an extraordinary remedy reserved only for egregious misconduct, but rather one that would be appropriate at least in cases when the violation was characterized as "flagrant."[67] In its 1987 decision in R v Collins ("Collins"), the Court confirmed that section 24(2) represented an "intermediate" position between the (Canadian) common law's rejection of illegality as a basis for exclusion and what it characterized as the "American rule" of automatic exclusion.[68] The exclusionary

63. See Charter, *supra* note 1 (right to be "secure against unreasonable search or seizure," s 8; right "not to be arbitrarily detained or imprisoned," s 9; right on arrest or detention "to be informed promptly of the reasons therefor," s 10(a); and right on arrest or detention to "retain and instruct counsel without delay and to be informed of that right," s 10(b)).
64. *Ibid*, s 24(2). In rare circumstances exclusion may also be ordered under section 24(1) of the Charter, which empowers courts to issue any remedy that is "appropriate and just in the circumstances" (*ibid*, s (24(1)). This is possible, however, only if the evidence was not "obtained in a manner" that violated the Charter, for example, when it is the admission of the evidence at trial that violates the Charter and not the police misconduct associated with the acquisition of the evidence (*ibid*, s 24(2)). When the violation is sufficiently connected to the obtaining of the evidence (in the manner discussed in the text below), the only route to exclusion is section 24(2). See R v Bjelland, 2009 SCC 38 at paras 3, 19. This study focuses exclusively on exclusion under s 24(2).
65. Charter, *supra* note 1, s 24(2).
66. R v Wittwer, 2008 SCC 33 at para 21. See also R v Goldhart, [1996] 2 SCR 463 at paras 32-40.
67. See Don Stuart, Charter Justice in Canadian Criminal Law, 6th ed (Carswell, 2014) at 636-38. Given the pre-Charter jurisprudence and legislative history of section 24(2), many expected that the exclusion of evidence would be reserved only for conduct that "shocks the community." See McLellan & Elman, *supra* note 61 at 243-45; Rothman v R, [1981] 1 SCR 640 at 696-97 (Lamer J).
68. R v Collins, [1987] 1 SCR 265 at 280 [Collins].

decision, it stressed, should be made objectively, in light of "long term community values" and with deference to the trial judge's decision on appeal.[69]

Writing for the majority, Justice Lamer grouped the case-specific factors relevant to gauging disrepute into three categories: (1) those affecting the "fairness of the trial"; (2) those bearing on the "seriousness of the violation"; and (3) those bearing on exclusion's effect on the repute of the justice system, including the importance of the evidence and the seriousness of the offence.[70] The fairness of the trial would be compromised, he asserted, by admitting a confession or other self-incriminating evidence, including bodily samples taken to gauge alcohol concentrations for those charged with impaired driving offences.[71] Subject to a consideration of the other factors, such evidence "generally should be excluded."[72]

Collins was refined and consolidated a decade later in R v Stillman ("Stillman").[73] There, the Court confirmed that evidence affecting trial fairness is subject to a strong exclusionary presumption.[74] Such evidence was defined as evidence that is both "conscriptive" (statements of the accused, compelled bodily evidence, and physical evidence derived therefrom) and non-discoverable (not obtainable by legal means).[75] As in Collins, the fate of evidence not affecting trial fairness was to be determined by balancing the seriousness of the violation (on the one hand) against the seriousness of the offence and importance of the evidence to the prosecution (on the other).[76]

69. *Ibid* at 281-83.
70. *Ibid* at 284-85.
71. *Ibid* at 284.
72. *Ibid* at 284-85.
73. [1997] 1 SCR 607 [Stillman].
74. *Ibid* at para 72. See also R v Grant, 2009 SCC 32 at para 64 [Grant] (noting that courts had generally interpreted Stillman "as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence").
75. Stillman, *supra* note 73 at paras 80-119.
76. See David M Paciocco & Lee Stuesser, The Law of Evidence, 7th ed (Irwin Law, 2015) at 405-06.

The Collins/Stillman framework was subject to withering academic[77] (and even judicial)[78] criticism and in 2009 the Court changed course. In R v Grant ("Grant") it jettisoned the "trial fairness" category and instructed judges to consider and balance the following categories of factors: (1) "the seriousness of the Charter-infringing state conduct"; (2) "the impact of the breach on the Charter-protected interests of the accused"; and (3) "society's interest in the adjudication of the case on its merits."[79]

Under the first category, the court's task is to gauge the state's culpability along a spectrum ranging from inadvertent, reasonable errors to deliberate wrongdoing.[80] In recent years, the Court has consistently characterized inadvertent but negligent errors as serious, thus militating in favour of excluding evidence.[81] Reasonable mistakes made under conditions of legal uncertainty, in contrast, are viewed as less serious and favour admitting evidence.[82]

The second factor is measured by gauging the extent to which the violation infringed on protected interests, such as privacy for section 8 claims or liberty under section 9.[83] Proving that the evidence would have been legally discovered

77. See *e.g.* David M Paciocco, "The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule" (1990) 32 Crim LQ 326 at 338-39; David M Paciocco, "Stillman, Disproportion and the Fair Trial Dichotomy under Section 24(2)" (1997) 2 Can Crim L Rev 163; Richard Mahoney, "Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery" (1999) 42 Crim LQ 443; Don Stuart, Charter Justice in Canadian Criminal Law, 4th ed (Thomson Carswell, 2005) at 566-76, 578-82; Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter" (2004) 49 McGill LJ 105 at 129-33.
78. See *e.g.* R v Grant (2006), 81 OR (3d) 1 at paras 47, 49-50 (Ont CA), rev'd in part 2009 SCC 32. This decision was reversed on other grounds in 2009. See Grant, *supra* note 74; R v Dolynchuk (E.N.), 2004 MBCA 45 at paras 47-48; R v Richfield (2003), 178 CCC (3d) 23 at para 18 (Ont CA); R v Janzen, 2006 SKCA 111 at para 7; R v Lotozky, (2006) 81 OR (3d) 335 at para 44 (Ont CA). See also R v Orbanski; R v Elias [2005] 2 SCR 37 at paras 87, 92-93 (LeBel J, dissenting in Elias).
79. Grant, *supra* note 74 at para 71.
80. *Ibid* at paras 72-74. See also Steven Penney, Vincenzo Rondinelli & James Stribopoulos, Criminal Procedure in Canada, 2nd ed (LexisNexis, 2018) at ss 10.107-119.
81. See *e.g.* Harrison, *supra* note 2 at para 22; R v Morelli, 2010 SCC 8 at paras 100-103 [Morelli]; R v Le, 2019 SCC 34 at para 147 [Le].
82. See *e.g.* R v Cole, 2012 SCC 53 at para 86 [Cole]; R v Aucoin, 2012 SCC 66 at para 50 [Aucoin]; R v Fearon, 2014 SCC 77 at paras 92-94 [Fearon]; R v Vu, 2013 SCC 60 at paras 69-71; Grant, *supra* note 74 at paras 133, 140.
83. Grant, *supra* note 74 at paras 78, 109, 113-14; Le, *supra* note 80 at paras 153-54.

without the violation, however, may diminish its effect on the relevant interest and weigh in favour of admission.[84]

Under the third factor, courts consider the evidence's reliability and importance to the prosecution's case as well as the seriousness of the offence.[85] Reliable and important evidence is more likely to be admitted (and vice versa).[86] Offence seriousness, however, may "cut both ways."[87] "[W]hile the public has a heightened interest in seeing a determination on the merits where the offence charged is serious," the Court asserted, "it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high."[88] As it had in Collins,[89] the Court in Grant stressed that the purpose of excluding evidence is to dissociate the courts from unacceptable state misconduct and maintain long-term public confidence in the criminal justice system.[90]

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84. *Ibid* at para 122. See also R v Nolet, 2010 SCC 24 at para 54; R v Côté, 2011 SCC 46 at paras 72, 84 [Côté] (the fact that police had probable grounds to search attenuated the impact of the violation caused by failure to obtain a warrant); Cole, *supra* note 82 at para 93 (same); Fearon, *supra* note 82 at para 96 (same).
85. Grant, *supra* note 74 at paras 80-83. Note that the reliability criterion relates only to reliability concerns arising from Charter violations (*e.g.*, when an accused confesses without having been properly afforded the right to counsel). See Fearon, *supra* note 82 at para 194 (Karakatsanis J dissenting).
86. Grant, *supra* note 74 at paras 81-83.
87. *Ibid* at para 84.
88. *Ibid*. The Court's treatment of offence seriousness post-Grant is difficult to characterize. In some cases, it has either ignored the factor or characterized its net effect as being roughly neutral. See Morelli, *supra* note 81 at para 107; Côté, *supra* note 84 at paras 47-48, 53-56; Aucoin, *supra* note 82 at para 51; Cole, *supra* note 82 at para 96; Fearon, *supra* note 82 at para 97; R v Taylor, 2014 SCC 50 at para 37; R v MacKenzie, 2013 SCC 50 at paras 134-35. In others, it has seemingly counted an offence's relative seriousness as weighing (at least somewhat) in favour of admission. See R v Spencer, 2014 SCC 43 at paras 79-80 ("Society undoubtedly has an interest in seeing a full and fair trial based on reliable evidence, and all the more so for a crime which implicates the safety of children" at para 80); R v Mian, 2014 SCC 54 at para 88 [Mian] (noting uncritically that the trial judge considered offence seriousness as favouring admission); Harrison, *supra* note 2 at paras 34-35 (noting that while offence seriousness "must not take on disproportionate significance," the "very serious charge…weighs in favour of admission" at paras 34-35).
89. *Supra* note 68 at 281 (the purpose of excluding evidence is to prevent further disrepute occasioned by "admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies").
90. *Supra* note 74 at paras 68-72. See also Le, *supra* note 81 at para 140; Morelli, *supra* note 81 at para 108.

While the Court stressed in Grant that the three factors must be balanced without the benefit of any "overarching rule,"[91] some general guidelines have emerged. First, the Court in Grant pronounced a "presumptive" but "not automatic" rule that statements obtained from the accused through a Charter violation should be excluded.[92] The Court reasoned that Charter breaches producing statements are often serious; the self-incrimination interests harmed by such violations are particularly "fundamental," and improper questioning often results in unreliable confessions.[93] Unconstitutionally obtained statements could be admitted, however, when these generalizations did not apply.[94]

The Court stressed, however, that compelled bodily samples are not subject to the same exclusionary presumption.[95] Indeed, it hinted that breath samples collected in impaired driving investigations would often be admitted because "the method of collection is relatively non-intrusive."[96] In the years since Grant, however, many lower courts have attempted to qualify this dictum, noting that the Charter violations arising in impaired driving cases often involve significant intrusions on liberty.[97]

Lastly, the Court has recently stated that excluding evidence may be warranted even where only one of the three factors pulls in that direction.[98] It is possible, the Court stated in R v Le, "that serious Charter-infringing conduct, even when coupled with a weak impact on the Charter-protected interest, will on its own support a finding that admission of tainted evidence would bring the administration of justice into disrepute."[99] And where both of the first two categories strongly favour exclusion of evidence, "the third inquiry will seldom

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91. Grant, *supra* note 73 at para 86. See also Harrison, *supra* note 2 at para 36 (the Grant test is "qualitative" and "not capable of mathematical precision"); Mian, *supra* note 87 at para 88 (characterizing the Grant test as "flexible and imprecise balancing exercise"); Côté, *supra* note 83 at para 48 ("No one consideration should be permitted to consistently trump other considerations").
92. *Supra* note 73 at para 92.
93. *Ibid* at paras 93-98.
94. *Ibid* at para 96.
95. *Ibid* at paras 99-111.
96. *Ibid* at para 111.
97. See *e.g.* R v Bagherli (A), 2014 MBCA 105 at paras 76-79; R v Spin, 2014 NSCA 1 at paras 60-79; R v Cullen, 2015 SKCA 142 at paras 53-55. See also Don Stuart, Charter Justice in Canadian Criminal Law, 6th ed (Carswell, 2014) at 664-65. But see R v Jennings, 2018 ONCA 260 at paras 27-29 (stressing minimal intrusiveness of the breath sampling process as limiting the impact of a section 8 breach on the accused's Charter-protected interests).
98. Le, *supra* note 81 at para 141.
99. *Ibid* [emphasis in original].

if ever tip the balance in favour of admissibility."[100] Conversely, "if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence."[101]

II. DATA & METHODS

To gauge the influence of both the legal and extra-legal variables on section 24(2) decisions, we compiled an original dataset of all trial decisions (provincial and superior trial court) obtained from the Canadian Legal Information Institute (CANLII) database decided between 1 January 2013–31 December 2018.[102] We excluded cases in which judges either did not find a Charter violation or found that the evidence sought to be excluded was not "obtained in a manner" that infringed the Charter.[103]

The details of our coding procedure may be found online.[104] The key external variables were the judge's gender, party of appointment, professional background, court level, and provincial and territorial jurisdiction. The key internal variables were the accused's gender along with the suite of factors identified in Grant as guiding the exclusionary decision. To test for changes wrought by that decision, we also compiled a sample of cases from 2007, two years before Grant.

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100. *Ibid* at para 142. See also R v Paterson, 2017 SCC 15 at para 56 [Paterson]; R v McGuffie, 2016 ONCA 365 at para 62-63; Stevens c R, 2016 QCCA 1707 at paras 89-90.
101. Le, *supra* note 81 at para 142.
102. The dataset is available online. See "Penney & Yahya 24(2) Datasets," online: <bit.ly/2BPF5wF>; for the details of our coding procedure, see "Codebook" (2020), online: <bit.ly/2EIprEr> ["Codebook"]. Additionally, see generally Mark A Hall & Ronald F Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96 Cal L Rev 63 at 100-16.
103. In many of these cases, judges went on to conduct a full section 24(2) inquiry for the purposes of potential appellate review. In none of these cases did the judge conclude that, had there been a violation, the evidence would have been excluded. This suggests that the practice of conducting an "in the alternative" section 24(2) assessment serves no purpose and that no appellate deference should be given to trial judges' exclusionary assessments when they did not find that evidence was obtained in a manner that violated the Charter. See Le, *supra* note 81 at para 138; Paterson, *supra* note 100 at para 42.
104. See "Codebook," *supra* note 101.

III. FINDINGS

A. DATASET CHARACTERISTICS

Our main dataset (2013–2018) contains 1,472 observations.[105] The breakdown of the cases by level of court can be seen in Table 1 below.

TABLE 1: NUMBER OF OBSERVATIONS BY COURT LEVEL

Level of court	Number	Percent
Provincial	938	63.7
Superior	534	36.3
Total	1,472	100

As seen in Table 2, below, most of the observations came from Alberta, British Columbia, Saskatchewan, Quebec, and Ontario. Ontario decisions comprised almost half (46%) of all observations.

TABLE 2: NUMBER OF OBSERVATIONS BY PROVINCE

Province	Number	Percent
AB	165	11.21
BC	128	8.7
MB	33	2.24
NB	10	0.68
NL	36	2.45
NS	31	2.11
NT	8	0.54
NU	3	0.2
ON	678	46.06
PE	1	0.07

105. The number of reported "exclusionary decisions" in our dataset (1,472) is greater than the number of reported cases, i.e., decisions with unique citations (1,327). As explained in greater detail in the "Codebook," *supra* note 102, we coded judges as making multiple exclusionary decisions in a single case if they either: (1) considered the admissibility of both a statement of the accused and any other kind of evidence; or (2) for non-statement evidence, dealt with more than one type of evidence and treated them differently in the Grant analysis. All statistical analyses are based on "exclusionary decisions."

TABLE 2: NUMBER OF OBSERVATIONS BY PROVINCE		
QC	256	17.39
SK	108	7.34
YT	15	1.02
Total	1,472	100

In terms of judicial characteristics, one quarter of cases were adjudicated by female judges.[106] Former prosecutors decided 27% of the cases, 30% were decided by former criminal defence counsel, and the remainder were decided by judges with non-criminal practice backgrounds.[107] Forty-one percent of the cases were decided by judges appointed by conservative governments, 43% by liberal governments, and 16% by social democratic governments.[108] This can all be seen in Table 3, below.

TABLE 3: NUMBER OF OBSERVATIONS BY JUDGE'S BACKGROUND, PARTY OF APPOINTMENT, AND GENDER		
	Number	**Percent**
Crown	393	26.7
Defence	456	31.0
Other	623	42.3
Total	1,472	100
Conservative	596	40.5
Liberal	635	43.2
N/A	9	0.6
Social Democrat	230	15.7
Total	1,470[109]	100

106. Note that there is greater gender balance in the superior courts (30% of judges being female) than provincial courts (23%). Overall, the percentage of female judges increased (non-linearly) between 2013 (20%) and 2018 (26%).
107. In the provincial courts, 28% of judges were former prosecutors, 38% were former defence counsel, and 33% were non-criminal lawyers. In the superior courts, 24% were former Crown counsel, 18% were former defence counsel, and 58% were non-criminal lawyers.
108. Our partisan-political classification methodology is described in detail in the "Codebook," *supra* note 102. The number of liberal appointees increased over time (from 34% in 2013 to 57% in 2018) while the number of conservative (47% to 35%) and social democratic (19% to 7%) appointees decreased.
109. In two instances, we were not able to determine the judge's party of appointment.

TABLE 3: NUMBER OF OBSERVATIONS BY JUDGE'S BACKGROUND, PARTY OF APPOINTMENT, AND GENDER

Female	373	25.3
Male	1,099	74.7
Total	1,472	100

All superior courts judges were appointed by either conservative or liberal governments. Sixty-three percent of superior court decisions were made by conservative-appointed judges, with the remaining 37% by liberal appointees. The party of appointment proportions for provincial court were 28% conservative, 47% liberal, and 25% social democratic. The distribution of judges by party of appointment across the two court levels is shown in Table 4, below.

TABLE 4: JUDGES' PARTY OF APPOINTMENT BY LEVEL OF COURT. PERCENT IS EQUAL TO THE PROPORTION OF THE TOTAL NUMBER OF JUDGES FROM EACH POLITICAL PARTY CATEGORY IN EACH COURT LEVEL

Court		Conservative	Liberal	N/A	Social Democrat	Total
Provincial	**Number**	260	438	8	230	936
	Percent	43.6	69.0	88.9	100	63.7
Superior	**Number**	336	197	1	0	534
	Percent	56.4	31.0	11.1	0	36.3
Total		596	635	9	230	1,470

B. OVERALL EXCLUSION RATE

The exclusion rate in our dataset was 70.4%; that is, in 1,472 reported exclusionary decisions from 2013–2018, trial judges who found that evidence was obtained in a manner that violated the Charter excluded at least some of the evidence in just over seven in ten instances. This figure is broadly consistent

with the exclusion rate found in other studies.[110] As illustrated in Table 5 below, the exclusion rate was highest in 2014 (73.52%) and lowest in 2017 (68.37%). While no clear secular trend emerged from this period, in no year was the rate as high as that found in our sample of 2007 trial decisions (75%). While this offers some support for the hypothesis that the Court's 2009 decision in Grant modestly diminished the frequency of excluding evidence, the difference between the mean 2013–2018 rate and the 2007 rate is not statistically significant.[111]

TABLE 5: NUMBER AND PERCENTAGE OF EXCLUSIONS BY YEAR

	2013	2014	2015	2016	2017	2018	Total
Number	144	161	159	178	227	167	1,036
Percent	72.7	73.5	68.2	72.4	68.4	68.4	70.4

Like the datasets in other studies, our dataset includes only "reported" or "published" decisions, i.e., those available on online databases.[112] More than

110. See Madden, "Marshalling," *supra* note 3, Table 1 (70% exclusion rate for 100 cases reported in English in 2010, including some appeal decisions); Nadon, *supra* note 3 (69% exclusion rate for 45 Quebec trial decisions from 2009-2011); Asselin, "Trends," *supra* note 3, Table 1(a) (73% exclusion rate for 98 trial decisions in 2012), Table 8 (67% exclusion rate for 1,236 trial decisions from 2009-2014); Johnson, Jochelson & Weir, *supra* note 3, Table 2 (75% exclusion rate for 600 trial decisions from 2014-2017); Patrick McGuinty, "Section 24(2) of the Charter; Exploring the Role of Police Conduct in the Grant Analysis" (2018) 41 Man LJ 273 at 288 (67% exclusion rate for 100 cases from 2016, including some appeal decisions). Madden generously shared his dataset with us. We adapted it for our purposes by deleting appeal decisions and including every reported case (in English or French) from 2010 that we could find that was not initially included. For this adjusted dataset, the exclusion rate was 68% (76 out of 111). We also deleted the appeal decisions and decisions where no breach was found from the 2016 McGuinty dataset, finding an adjusted exclusion rate of 71% (52 out of 73).

111. The t-statistic is 1.15, which is not significant at a level of 5% or 10%. See also Hausegger, McNabb & Riddell, *supra* note 4 at 14-16 and Table 4 (noting significant decline in post-Grant exclusion rate in court of appeal decisions from four provinces).

112. Trial judges are generally thought to publish when they think that their reasons would have significant precedential or jurisprudential value. See Denise M Keele et al, "An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions" (2009) 6 J Empirical Leg Stud 213 at 214; Theodore Eisenberg & Stewart J Schwab, "What Shapes Perceptions of the Federal Court System?" (1989) 56 U Chicago L Rev 501 at 535; Peter Siegelman & John J Donohue III, "Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases" (1990) 24 Law & Soc'y Rev 1133 at 1149-50. Decisions to publish may be influenced by other factors, however, such as individual judges' preferences for writing, willingness to work, desire for promotion, and other idiosyncratic factors. See Karen Swenson, "Federal District Court Judges and the

half[113] of section 24(2) trial decisions are not reported and there is (to our knowledge) no efficient means of collecting (or even scientifically sampling) these decisions. As a result, we cannot state that our findings are representative of all trial decisions.[114]

Though this is a substantial caveat, it is far from fatal. First, inasmuch as our analyses reveal meaningful patterns in ways that section 24(2) is applied in reported decisions, our understanding of the jurisprudence is enhanced beyond what would be achievable through traditional, ad hoc appellate case analysis.[115] To the extent that judges are influenced by other judges' decisions, that influence comes predominantly from reported reasons.

Second, it is possible to get at least some sense of the extent to which reported section 24(2) cases are representative of all such cases.[116] We collected all reported appeal decisions for 2013 and 2018 where a trial judge's section 24(2) decision was challenged on appeal (n=133).[117] Assuming that reported and unreported trial decisions are appealed with the same frequency and distribution,[118] we can test for differences between the two types of cases.

Decision to Publish" (2004) 25 Justice System J 121 at 123-28. In addition, courts may have differing practices and norms associated with publication. See Siegelman & Donohue, *supra* note 112 at 1144.

113. We explain how we estimated this proportion below.
114. See generally Siegelman & Donohue, *supra* note 112; Keele et al, *supra* note 112; Eisenberg & Schwab, *supra* note 112 at 535.
115. See Siegelman & Donohue, *supra* note 112 at 1136, n 9.
116. For similar methodologies, see Donald R Songer, "Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review" (1988) 50 J Politics 206 at 208; Swenson, *supra* note 112 at 129-31.
117. This includes appeals of both summary conviction offences (heard by a judge of the provincial superior trial court) and indictable offences (heard by a panel of the court of appeal). The vast majority of appeal decisions involving section 24(2) of the Charter are themselves reported, so there is negligible risk of selection bias for these cases. To confirm this assumption, we first examined all Supreme Court of Canada decisions from 2013–2018 where a section 24(2) determination was made at some point in the proceedings (n=20). In every case, the decision from the court of appeal below was reported. We also collected all court of appeal decisions constituting appeals of summary conviction appeal dispositions from the same period and found that 23 of 25 (92%) of the decisions below (i.e., the initial summary conviction appeal) were reported.
118. This assumption is not unassailable as the decision to appeal is made by the parties, not by researchers selecting a representative random sample. See Keele et al, *supra* note 112 at 221; Swenson, *supra* note 112 at 129. We cannot think of reasons for any major systemic differences, however, between reported and unreported cases in relation to the decision to appeal trial judges' section 24(2) rulings. See generally *ibid* at 130 (finding only minor differences between appealed and un-appealed US district court decisions).

Of the reported trial decisions appealed (n=58, 44% of cases), the exclusion rate was 55% at trial; for unreported cases (n=75, 56% of cases), it was 41%. Both rates are substantially lower than the rate for all reported trial decisions in our sample (70%). This is to be expected, since defendants are much more likely to appeal the admission of evidence than the prosecution is to appeal its exclusion.[119] The difference between the exclusion rates for reported and unreported cases appealed tells us, however, that a judge who excludes evidence is more likely to publish reasons for the decision than a judge who admits.[120] This could be because exclusion induces writing, because judges who write more are more exclusionary, or a combination of these factors. This finding is consistent with previous research which shows that when there are ideological differences between published and un-published decisions, the former is more liberal than the latter.[121]

In any case, the data suggest that that actual exclusion rate (for reported and unreported cases together) is closer to 60% than the 70.4% rate for reported decisions. While this difference is substantial,[122] it is not huge. While it does signal a need for caution in extrapolating from reported to all decisions, it does not suggest that findings from the former are wholly unrepresentative of the latter.[123]

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119. See generally Cross, *supra* note 9 at 134-35.
120. The difference between the two means is statistically insignificant at the 10% level, possibly due to the small sample size. We note that at the 12% level of significance, the difference would have been significant.
121. See CK Rowland & Robert A Carp, Politics and Judgment in Federal District Courts (University Press of Kansas, 1996) at 126-27 (criminal cases in federal district courts in three cities); Siegelman & Donohue, *supra* note 112 at 1155-56 (federal courts in employment discrimination cases); Keith Carlson, Michael A Livermore & Daniel N Rockmore, "The Problem of Data Bias in the Pool of Published U.S. Appellate Court Opinions" (2020) 17 J Empirical Leg Stud 224 (computational modeling of various publication effects in federal circuit courts).
122. We derived this estimate by using the number of cases in the appeal sample to infer the number of unreported trial judgments that would exist to match what we collected. Given that there were seventy-five unreported trial decisions and fifty-eight reported, we infer that there would be 1472 x (75/58) = 1903 corresponding unreported cases in our sample. Given that the relative exclusion rate in the appellate sample was 41%/55% = 74.5%, this implies that the exclusion rate for the 1,903 unreported cases would be 74.5% x 70.4% = 52.4%. As such, the total exclusion rate will be (70.4% x 1472 + 52.4% x 1903)/(1472+1903) = 60.3%.
123. See Keele et al, *supra* note 112 at 230, 233 (no ideological differences between published and unpublished decisions in federal district courts).

C. EXTERNAL VARIABLES

1. SUPERIOR VERSUS PROVINCIAL COURTS

As seen in Table 6, below, provincial court judges were more likely to exclude evidence (74%) than superior court judges (65%).[124] The difference is statistically significant.[125]

TABLE 6: THE NUMBER AND RATE OF EXCLUSION BY LEVEL OF COURT

	Provincial	**Superior**
Number	691	345
Rate	73.7	64.6

This difference in exclusion rates could be explained either by differences between the judges appointed to the two levels of court or differences between the types of cases that they hear. We examine the question of judicial characteristics in this section and case characteristics in the next.

2. JUDGES' GENDER

Table 7, below, shows that gender differences were small and statistically insignificant, both overall and within each court level.[126]

TABLE 7: THE NUMBER AND RATE OF EXCLUSION BY LEVEL OF COURT AND JUDGE'S GENDER

	Provincial	**Superior**	**Combined**
Male			
Number	533	242	775
Rate	73.7	64.4	70.5
Female			
Number	158	103	261
Rate	73.5	65.2	70.0
Total			
Number	691	345	1036
Rate	73.7	64.6	70.4

124. See also Johnson, Jochelson & Weir, *supra* note 3, Table 15 (reporting a higher exclusion rate at trial for provincial courts, 74%, than superior courts, 62%); Jochelson, Huang & Murchison, *supra* note 3, Table 8 (reporting a 70% exclusion rate for provincial trial courts; 62% for superior trial courts).

125. The t-statistic is -3.67, which is significant at the 5% level.

126. The t-statistic for provincial courts is 0.07; for superior courts, it is 0.19; for both combined it is 0.2. None of these results is significant at a level of 5% or 10%.

3. PARTY OF APPOINTMENT

The exclusion rates for ideology (as measured by party of appointment) are depicted in Table 8. The combined exclusion rates for both levels of court are 69.8% for liberal appointees, 68.3% for conservative appointees, and 77.0% for social democratic appointees. The difference between conservative and liberal appointees is very small and statistically insignificant.[127] The social democratic exclusion rate, however, is significantly higher.[128]

TABLE 8: THE NUMBER AND RATE OF EXCLUSION AND ADMISSION BY LEVEL OF COURT AND JUDGE'S PARTY OF APPOINTMENT

	Provincial	Superior	Combined
Liberal			
Number	317	126	443
Rate	72.4	64.0	69.8
Conservative			
Number	188	219	407
Rate	72.3	65.2	68.3
Social Democrat			
Number	177	n/a	177
Rate	77.0	n/a	77.0
N/A			
Number	8	0	8
Rate	100	0	88.9
Total			
Number	690	345	1035
Rate	73.7	64.6	70.4

In addition to the three-way comparison discussed immediately above, we also conducted a two-way comparison, classifying each judge as either

127. The t-statistic for the difference between conservative and liberal exclusion rates in all courts was 0.57, which was statistically insignificant at the 5% and 10% levels. For the difference between liberals and conservatives on the superior courts, the t-statistic was 0.3, and for the differences between liberals and conservatives on the provincial courts, the t-statistic was 0.02. Both are also statistically insignificant at the 5% and 10% levels.

128. The t-statistic for social democratic judges versus liberal and conservative judges combined is 2.42; for social democratic judges versus liberal judges, it is 2.05; for social democratic judges versus conservative judges, it is 2.45. Each result is significant at the 5% level.

"liberal" or "conservative."[129] This did not yield any significant differences in exclusion rates.[130]

4. JUDGES' PROFESSIONAL BACKGROUND

Another possible source of difference is the judges' pre-appointment background. Table 9, below, displays the exclusion rates by court level and professional background. For both levels of court combined, former criminal defence lawyers excluded evidence 76% of the time, Crown prosecutors 64%, and non-criminal lawyers 71%. Each of these differences is statistically significant.[131]

TABLE 9: THE NUMBER AND RATE OF EXCLUSION BY LEVEL OF COURT AND JUDGE'S PRE-APPOINTMENT BACKGROUND

	Provincial	Superior	Combined
Defence			
Number	277	69	346
Rate	76.9	72.0	75.9
Non-criminal			
Number	238	201	439
Rate	76.5	64.4	70.5
Crown			
Number	176	75	251
Rate	65.9	59.5	63.9
Total			
Number	691	345	1036
Rate	73.7	64.6	70.4

5. JURISDICTION

As shown in Table 10, below, we also found substantial differences between jurisdictions. The exclusion rate was higher than the national average in Quebec

129. For this comparison we classified a judge as "liberal" if his or her party of appointment was situated to the ideological left of the contemporary opposition party, and vice-versa. This is explained in further detail in the "Codebook," *supra* note 102.

130. In the provincial courts, the exclusion rate for conservative judges was 73.3%; for liberal judges, it was 73.6%, a statistically insignificant difference (t-statistic of 0.09). In the superior courts, the exclusion rate was 64.0% for liberal appointees and 65.1% for conservative ones, which is also a statistically insignificant difference (t-statistic of 0.30).

131. The t-statistic for defence versus Crown is 3.84 (significant at 5%); for non-criminal versus Crown, it is 2.25 (significant at 5%); for non-criminal versus defence, it is 1.93 (significant at 10%).

and British Columbia and substantially lower in Alberta.[132] Of the remaining jurisdictions with more than 100 cases each, Ontario showed a modestly higher admission rate and Saskatchewan a modestly lower one. Rates for the remaining provinces are reported in Table 11, below.

TABLE 10: EXCLUSION RATE BY PROVINCES (WITH >100 OBSERVATIONS)

	AB	BC	ON	QC	SK
Number	165	128	678	256	108
Rate	63.6	73.4	67.6	77.0	71.3

TABLE 11: EXCLUSION RATE BY PROVINCES (WITH <100 OBSERVATIONS)

	MB	NB	NL	NS	NT	NU	PEI	YT
Rate	33	10	36	31	8	3	1	15
Number	69.7	40.0	83.3	87.1	100	33.3	100	73.3

6. PAIRWISE DIFFERENCES

A note at this point is warranted regarding how to interpret our results. One way to interpret them is to think of them as conditional rates, which means that a given exclusion rate is a function of what information we possess. For example, knowing a judge's gender would not enhance our ability to predict whether unconstitutionally obtained evidence would be excluded. Nor would knowing that the judge was a conservative or liberal appointee. So far, the variables that appear predictive are court level, professional background, and jurisdiction. As we proceed, we will condition the odds of exclusion on more than two variables, such as whether the judge is a male who was a prosecutor prior to his appointment who now sits on a superior court.

Consider first the combination of court level and party of appointment. We know that the exclusion rate is higher for both social democratic appointees (compared to liberals and conservatives) and provincial court judges (compared to superior court judges). However, we also know that social democrats are present

132. Among these five provinces, pairwise tests of differences are significant at the 5% level for BC versus Alberta, Quebec versus Alberta, and Quebec versus Ontario. See also Johnson, Jochelson & Weir, *supra* note 3, Table 3 (substantially lower than average exclusion rate for Alberta; substantially higher rates for British Columbia and Quebec).

only on the provincial courts. Could this help explain the higher exclusion rate in provincial court?

The answer appears to be no. While social democratic appointees in the provincial courts do exclude evidence more frequently than liberals or conservatives, the differences are not statistically significant.[133] Further, when we compare the exclusion rate of liberal and conservative appointees, we see an almost identical rate in provincial courts (72%) and a statistically insignificant 1.2% difference in superior courts (64.0% for liberal appointees and 65.2% for conservative appointees).[134] This suggests that liberal and conservative appointees vote similarly regardless of court level. Overall, party of appointment does not appear to explain the difference between provincial and superior court exclusion rates.

Now consider the interaction between court level and professional background. As seen in Table 9, above, provincial court judges with criminal defence or non-criminal practice backgrounds excluded evidence at a virtually identical rate (76.9% versus 76.5%).[135] Judges who were prosecutors, however, had an exclusion rate of 65.9%, a full 11 percentage points lower than the other two categories.[136]

In the superior courts, the exclusion rates were 71.9% for criminal defence, 59.5% for prosecution, and 64.4% for non-criminal practice backgrounds. However, only the defence and prosecution rates were significantly different from each other.[137] There was no statistically significant difference between non-criminal lawyers and defence or Crown lawyers, individually or combined.[138] In the superior courts, knowing that a judge had a non-criminal practice is not predictive of exclusion, but knowing that a judge had been a prosecutor or criminal defence lawyer is.

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133. The t-statistic for social democrats versus liberals and conservatives combined is 1.33; for social democrat versus liberal, it is 1.24; and for social democrat versus conservative it is 1.13. None is significant at the 5% or 10% level.
134. The t-statistic for liberal versus conservative in provincial court is 0.02 (not significant at the 5% or 10% level); for liberal versus conservative in superior court, it is 0.30 (not significant at 5% or 10%).
135. The t-statistic for defence versus non-criminal is 0.12 (not significant at the 5% or 10% level).
136. The t-statistic for Crown versus defence is 3.01 (significant at the 5% level); for Crown versus non-criminal, it is 2.81 (significant at the 5% level).
137. The t-statistic for defence versus Crown is 2.01 (significant at the 5% level).
138. The t-statistic for Crown versus non-criminal Crown lawyers is 1.02 (not significant at the 5% or 10% level); for non-criminal versus defence lawyers, it is 1.41 (not significant at 5% or 10%); for non-criminal versus Crown and defence lawyers combined in provincial court, it is 1.36 (not significant at 5% or 10%); for non-criminal versus Crown and defence lawyers combined in superior court, it is 0.11 (not significant at 5% or 10%).

What happens when we add gender to the mix? Not much. The strongest predictor of exclusion rates continues to be professional background. Table 12, below, shows the exclusion rates in the two levels of court conditional on judges' gender and professional background. More patterns have emerged now that there are twelve ways to categorize the judges. By testing every possible two-way combination within each level of court, we can see which judicial characteristics correlate with statistically significant differences in exclusion rates. In the provincial courts, male judges with criminal defence backgrounds exclude evidence more frequently than former prosecutors of either gender. Similarly, in provincial courts, judges with non-criminal backgrounds exclude evidence at a higher rate than prosecutors regardless of gender.

In the superior courts, male criminal defence lawyers were more likely to exclude evidence than male prosecutors.[139] There were additional significant differences between various subcategories across the levels of court. We do not address those here. The overall finding is that professional background appears to make a substantial difference in provincial courts and a lesser (but still significant) difference in the superior courts.

TABLE 12: THE NUMBER AND RATE OF EXCLUSION LEVEL OF COURT, JUDGES' GENDER, AND JUDGES' BACKGROUND

		Provincial			*Superior*		
		Crown	**Defence**	**Other**	**Crown**	**Defence**	**Other**
Male	**Number**	170	307	246	100	76	200
	Rate	65.9	76.9	75.2	59.0	71.1	64.5
Female	**Number**	97	53	65	26	20	112
	Rate	66.0	77.7	81.5	61.5	75.0	64.3
Total	**Number**	267	360	311	126	96	312
	Rate	65.9	76.9	76.5	59.5	71.9	64.4

We also examined exclusion rates conditional on gender and party of appointment. Although there were differences in the superior courts, none is statistically significant.[140] In provincial court, in contrast, the following pairwise comparisons are significant (with the group on the left more likely to exclude than that on the right):[141]

139. See "Appendix," Part VI, below, Table A.
140. See "Appendix," Part VI, below, Table B.
141. See "Appendix," Part VI, below, Table C.

- Female social democrats > female liberals;
- Male social democrats > female liberals;
- Male liberals > female liberals; and
- Female conservatives > female liberals.

What stands out most here, perhaps counterintuitively, is that female judges appointed by liberal provincial governments are less likely to exclude evidence than any other party–gender combination.

We also examined exclusion rates conditional on professional background and party of appointment.[142] In the superior courts, the only statistically significant finding is that conservative defence lawyers excluded evidence more often than conservative prosecutors. We found more significant differences in the provincial courts as follows:

- liberal non-criminal > social democratic Crown;
- conservative non-criminal > liberal Crowns;
- social democratic defence > conservative Crown;
- social democrats non-criminal > social democratic Crown;
- social democratic defence > social democratic Crown;
- liberal non-criminal > liberal Crown;
- social democratic other > liberal Crown;
- liberal defence > liberal Crown; and
- social democratic defence > liberal Crown.[143]

This suggests that at the provincial level, judges' professional background is a weighty factor, with a prosecutorial experience mattering most. Party of appointment matters in some instances, but not to the same degree.

While the results reported in Tables 12–14 highlight differences within the provincial courts, there are also significant differences between the exclusion rates of provincial and superior courts across the categories of gender, background, and party of appointment. Significant differences also arise when jurisdiction is considered. We do not report these findings, however, as analyzing each possible two-way combination would be unduly lengthy. Instead, as detailed in the next section, we apply a multivariate analysis to gauge the marginal impact of each external variable on the exclusionary decision.

142. See "Appendix," Part VI, below, Table D.
143. See "Appendix," Part VI, below, Table E.

7. MULTIVARIATE ANALYSIS

Our logistical regression model takes the decision to admit or exclude evidence as the dependent or "explained" outcome.[144] We then control for each identified variable to measure its significance on the exclusionary decision.

Tables 15–18 below display the base outcome as "exclude," so the measure of each independent or "explanatory" variable shows whether it is more likely to result in admission. The first column displays the explanatory variables: judges' gender (with female as the starting point); judges' pre-appointment background (with Crown as the starting point); and judges' party of appointment (with conservative as the starting point). The constant reported at the bottom is the model's starting point, i.e., a female prosecutor appointed by a conservative government.

The result for each explanatory variable is reported in the second column in the "relative odds" format with its associated p-value in the third column.[145] For example, consider the constant shown in Table 15 below: a female, conservative Crown. The strict interpretation of the 0.61 odds ratio for that judge is that the ratio of admission to exclusion is 61%, i.e., the odds that she will admit the evidence are 61% relative to the likelihood that she will exclude it. Such a judge would admit the evidence 38% of the time and exclude it 62% of the time.[146]

What emerges from Table 15 is that former criminal defence lawyers and former non-criminal lawyers are even less likely than the baseline judge to admit the evidence. For example, the odds for a female liberal defence counsel can be calculated by multiplying 0.61 x 0.96 x 0.56 = 33%. This means that a female, liberal-appointed judge with a background in criminal defence will admit at a rate of 33% of her exclusion rate, equating to a 25% chance of admission and 75% chance of exclusion.

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144. This is the same method used by Stribopoulos & Yahya, *supra* note 42 at 329-42.
145. The definition of the relative odds (also known as the odds ratio) is the probability of an event divided by the probability of a non-event. Imagine drawing a ball from a box with three colored balls (red, yellow, and blue). If the probability of drawing a red ball were 1/3, then the probability of the non-event would be 2/3. The odds ratio of drawing a red ball can therefore be expressed as 1/2, 50%, or 1:2. If one knew the odds ratio for drawing a red ball were 50%, one could also infer that the probability of drawing a non-red ball was 1/50%, or 2, which means that probability of drawing a non-red ball was twice that of drawing a red ball.
146. Since the odds ratio is the odds of the event divided by the odds of the non-event, then 61% = probability of event / (1 - probability of event), which implies that the probability of the event is 1/(1+(1/0.61)) = 38%.

TABLE 15: MULTINOMIAL LOGIT RESULTS OF EXCLUSIONARY DECISION (ADMIT OR EXCLUDE) AS DEPENDENT VARIABLE AND JUDICIAL CHARACTERISTICS AS INDEPENDENT VARIABLES

Variables	*Relative Odds*	*P-value*
Judge's gender		
Male	1.013418	0.921
Judge's Background:		
Defence	0.565538	0*
Other	0.734208	0.025*
Party of Appointment		
Liberal	0.955091	0.715
Social Democrat	0.668279	0.026*
Constant (Female + Conservative + Crown)	0.610201	0.002*

Base Outcome: Exclude
* indicates significance at the 5% level
** indicates significance at the 10% level
Log Likelihood = -881.73
Number of observations = 1,470
pseudo R2= 0.0124
Akaike's Information Criterion (AIC) = 1771.46

To see this more concretely, look again at Table 12, above. Table 12 contains the rates for judges by level of court, gender, and background. One can construct numbers from that table that indicate that the number of admissions by "female + liberal + defence counsel" was seventeen out of a total of seventy-three decisions. This means that these judges had a 23% admission rate, which results in an odds ratio of 23/77 = 30.4%. While this is not exactly 33%, keep in mind that Table 12 does not include party of appointment. Had we been able to construct a four-way table, the odds would have been closer to 33%. This is the advantage of the multivariate logistic approach.

Table 15 also shows that judicial gender is statistically insignificant, and the only political affiliation that matters is a social democratic relative to a conservative counterpart. In other words, professional background matters more than gender or party.

When we add the level of court as an explanatory variable, Table 16, below, results. In this model, the baseline judge is a female prosecutor appointed by a conservative government to a provincial court. The odds that such a judge will admit evidence are lower than in Table 15, and the difference is statistically

significant. This means that presence on a superior court makes exclusion less likely. As with the model in Table 15, professional background is significant, and gender is insignificant.

However, when court level is included, party of appointment becomes insignificant. This supports the finding discussed in Part III(C)(6), above, that the difference in exclusion rates between the two courts is not an artifact of differential party of appointment distributions. In other words, it appears that the difference arises from factors intrinsic to the level of court itself and not from any of the control variables such as gender or party of appointment.

TABLE 16: MULTINOMIAL LOGIT RESULTS OF EXCLUSIONARY DECISION (ADMIT OR EXCLUDE) AS DEPENDENT VARIABLE AND JUDICIAL CHARACTERISTICS AND COURT LEVEL AS INDEPENDENT VARIABLES

Variables	*Relative Odds*	*P-value*
***Court:* Superior**	1.457197	0.005*
***Judge's Gender:* Male**	1.04654	0.736
***Judge's Background:* Defence**	0.579061	0*
Other	0.686964	0.008*
Party of Appointment:		
Liberal	1.041766	0.753
Social Democrat	0.827355	0.338
Constant (Female + Provincial Court + Crown + Conservative)	0.491319	0*

Base outcome: exclude
* indicates significance at the 5% level
** indicates significance at the 10% level
Log Likelihood = -877.74
Number of observations = 1,470
pseudo R2= 0.0169
AIC = 1771.486

Lastly, we added the jurisdiction variable, with results reported in Table 17, below. The model's baseline is a female prosecutor appointed to the provincial court by a conservative government in Alberta. This regression reveals that judges in British Columbia, Newfoundland, Nova Scotia, and Quebec are significantly less likely to admit evidence than those in Alberta. As in the previous regressions, professional background and court level are statistically significant; gender and party of appointment are not.

TABLE 17: MULTINOMIAL LOGIT RESULTS OF EXCLUSIONARY DECISION (ADMIT OR EXCLUDE) AS DEPENDENT VARIABLE AND JUDICIAL CHARACTERISTICS, COURT LEVEL, AND JURISDICTION AS INDEPENDENT VARIABLES

Variables	*Relative Odds*	*P-value*
***Court:* Superior**	1.488894	0.004*
Province:		
BC	0.54379	0.022*
MB	0.764409	0.536
NB	2.567663	0.166
NL	0.298813	0.012*
NS	0.231507	0.01*
NT	2.78E-13	0.987
NU	1.049162	0.973
ON	0.756749	0.147
PE	5.33E-07	0.993
QC	0.536961	0.012*
SK	0.802369	0.447
YT	0.538431	0.313
***Gender:* Male**	1.024006	0.864
Background:		
Defence	0.561818	0*
Other	0.635216	0.002*
Party of Appointment:		
Liberal	1.116199	0.431
Social Democrat	0.945887	0.807
Constant: (Female + Provincial Court + Alberta + Crown + Conservative)	0.702862	0.132

Base outcome: exclude
* indicates significance at the 5% level
** indicates significance at the 10% level
Log Likelihood = -862.809
Number of observations = 1,470
pseudo R2= 0.0336
AIC = 1765. 619

The overall conclusion to be drawn from these models is that professional background, court level, and jurisdiction help to predict exclusionary decisions; gender and party of appointment do not.

As we explore more fully in Part IV, below, in our view, the significance of professional background and jurisdiction provides support for the attitudinal model of adjudication. In other words, judges' practice background and (in some cases) jurisdiction influence their decision as to whether to exclude unconstitutionally obtained evidence under section 24(2) of the Charter regardless of legal considerations and case characteristics. Court level, in contrast, is likely an artifact of the fact that, on average, superior courts try more serious criminal offences than provincial courts. While this is not an aspect of attitudinal judging, it does support the hypothesis that, regardless of doctrinal admonitions to the contrary, judges are less inclined to exclude evidence obtained from Charter violations for more serious crimes.

D. INTERNAL VARIABLES

1. NON-DOCTRINAL VARIABLES

We next tested for the effect of case-specific, "internal" variables on the decision to admit or exclude evidence obtained in violation of the Charter. These variables may be grouped into two categories. The first consists of case characteristics that might plausibly influence the exclusionary decision but are not directly considered in the doctrine. In other words, they fall (mostly) outside the scope of positive law. We examined the accused's gender, the type of offence, the type of evidence obtained, and whether the judge considered the seriousness of the offence to be a significant factor ("treatment of offence seriousness").

The latter variable requires further explanation. As discussed in Part I(B), above, the jurisprudence is ambiguous on whether crime severity counts in the Grant analysis. Some courts take the view that it is a neutral factor. Others have held that, all else equal, courts should be more reluctant to exclude evidence in more serious cases than less serious ones.[147] We therefore coded decisions as giving this factor either a neutral treatment (offence seriousness treated as insignificant or not discussed) or a positive one (offence seriousness treated as significant).

147. Note that the judge classified the offence as being anything less than moderately serious in only twenty-four out of 1,472 cases (1.6%). The evidence was excluded in all but two of these cases, and in only half of those twenty-four cases did the judge state that the relative non-seriousness of the offence weighed in favour of admission.

To assess the influence of these variables, we ran a logistic regression. Table 18, below, shows the results of the estimation. The baseline case is a trial in the Provincial Court of Alberta with multiple accused (at least one of each gender) charged with a child pornography offence. The evidence sought to be excluded is child pornography, and the judge has treated offence seriousness as a neutral factor. The baseline judicial characteristics remain a female prosecutor appointed by a conservative government.

As shown in Table 18, below, this regression confirmed the continuing significance of jurisdiction for British Columbia, Newfoundland, Nova Scotia, and Quebec, compared to Alberta. Professional background also remains significant in the same manner as before. Among the new internal variables, gender of the accused is significant, raising the odds of exclusion substantially. As discussed in Part I(A)(1), above, this is consistent with research suggesting that criminal courts treat female defendants more leniently than males.

The "treatment of offence seriousness" variable also proved significant, raising the odds of admission dramatically (in the order of two to four times). Notably, when we added this variable to the model, the previously observed difference between provincial and superior courts disappeared. As we elaborate in Part IV(B), below, this supports the inference that the difference between provincial and superior courts' exclusion rates stems from the more serious nature of the offences tried in the latter.

Lastly, with one exception, neither offence type nor evidence type proved significant.[148] The exception is for evidence characterized as "statements of the accused," which substantially increases the odds of exclusion. However, as discussed in Part I(B) (and further elaborated in Part III(D)(2)), above, the characterization of evidence as a statement of the accused (as compared to any other type of evidence) weighs in favour of exclusion under positive law. The subcategorizations that we used for non-statement evidence (e.g., child pornography, drugs, firearms, impaired driving samples) are not doctrinal factors and do not appear to have any significant effect on the exclusionary decision.[149]

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148. At the court of appeal level, in contrast, Hausegger, McNabb, and Riddell found that weapons and drugs (as well as statements) were more likely to be admitted, controlling for other variables. *Supra* note 4 at 14, Tables 3 & 4.

149. This finding contradicts previous research showing differential exclusion rates for various types of physical evidence, including distinctly lower exclusion rates for guns. See Madden, "Marshalling," *supra* note 3 at 242-46; Asselin, "Trends," *supra* note 3, Table 8; Jochelson, Huang & Murchison, *supra* note 3, Table 6; Johnson, Jochelson & Weir, *supra* note 3, Table 21. These studies, it should be noted, did not test for statistical significance and did not control for other variables.

TABLE 18: MULTINOMIAL LOGIT RESULTS OF EXCLUSIONARY DECISION (ADMIT OR EXCLUDE) AS DEPENDENT VARIABLE AND JUDICIAL CHARACTERISTICS, COURT LEVEL, AND NON-DOCTRINAL CASE CHARACTERISTICS AS INDEPENDENT VARIABLES

Variables	*Relative Odds Ratio*	*P-value*
***Court:* Superior**	1.08803	0.648
Province:		
BC	0.531926	0.031*
MB	0.852064	0.729
NB	2.14179	0.333
NL	0.307042	0.019*
NS	0.228967	0.013*
NT	1.72E-12	0.989
NU	3.514507	0.478
ON	0.783404	0.242
PE	6.57E-07	0.992
QC	0.457976	0.003*
SK	0.788976	0.441
YT	0.411827	0.16
***Judge's Gender:* Male**	0.934513	0.647
Judge's Background:		
Defence	0.521822	0*
Other	0.682223	0.016*
Judge's Party of Appointment:		
Liberal	1.094424	0.548
Social Democrat	1.028585	0.906
Accused's Gender:		
Female 0.389352 0.031*		
Male	1.211707	0.61
Offence Type:		
Domestic	4.85E-06	0.988
Drugs	0.655501	0.574

TABLE 18: MULTINOMIAL LOGIT RESULTS OF EXCLUSIONARY DECISION (ADMIT OR EXCLUDE) AS DEPENDENT VARIABLE AND JUDICIAL CHARACTERISTICS, COURT LEVEL, AND NON-DOCTRINAL CASE CHARACTERISTICS AS INDEPENDENT VARIABLES

Guns	1.40923	0.671
Impaired	0.549157	0.429
Morals	0.291248	0.377
Other	0.886825	0.883
Property	0.411158	0.309
Regulatory	0.382445	0.33
Sex	0.968365	0.967
Theft	1.46E+07	0.993
Violence	0.907291	0.897
Weight of offence:		
N/A	2.57778	0*
Significant	3.810689	0*
Evidence type:		
Digital	2.206563	0.335
Drugs	0.725682	0.699
Guns	0.64252	0.618
Images	0.610751	0.649
Multiple	0.66168	0.618
Other	1.460846	0.645
Sample	0.845428	0.839
Statement	0.208466	0.053**
Witness	1.647087	0.668
Constant: Provincial Court + Alberta + Conservative + Both Genders + Child Porn Offence + Child Porn Evidence + Offence Insignificant	0.607367	0.449

Base outcome: exclude

* indicates significance at the 5% level

** indicates significance at the 10% level

Log Likelihood = -784.969

Number of observations = 1,470

pseudo R2= 0.1208

AIC = 1659.94

2. DOCTRINAL VARIABLES

I. NATURE OF THE EVIDENCE

As mentioned, the pre-Grant jurisprudence drew a sharp distinction between (1) statements of the accused and compelled bodily samples, and (2) other evidence. Evidence from the former category was almost always subject to an exclusionary presumption; evidence from the latter was not. Consistent with this dichotomy, our sample of 2007 cases shows high exclusion rates for statements (n=27, 85.2%) and samples (n=51, 86.3%) and a substantially lower rate for other evidence (n=84, 64.3%).[150] As a result of Grant, most would have predicted a sharply reduced exclusion rate for samples (indeed, the Court in Grant strongly hinted at this) and unchanged exclusion rates for statements (which are still subject to an exclusionary presumption) and other evidence (which Grant did not directly affect).

Our data mostly confirms these predictions. The 2013–2018 exclusion rate is 73% for bodily samples, 86.3% for statements, and 63.45% for other evidence.[151] Comparing the two time periods, only the exclusion rates for bodily samples are significantly different.[152] The post-Grant bodily sample rate, however, is higher than many would have predicted immediately after Grant. Though substantially lower than the rate in 2007 (86%), it remains higher than the overall rate. Given the Court's expressed preference in Grant for the admission of this kind of evidence, this is perhaps a surprising result. But as noted in Part I(B), above, many lower courts have found that the taking of bodily samples (overwhelmingly, breath samples from impaired driving stops) often involves serious police misconduct that intrudes substantially on drivers' liberty interests. In light of this jurisprudence, the 73% exclusion rate (very close to the overall rate) is less surprising.

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150. The difference between the average exclusion rates for sample, statement, and other is statistically significant at the 5% level, with t-statistics of 2.76 and 2.11 respectively. The difference between the exclusion rates for sample and statement are not statistically significant at the 5% or 10% level, with a t-statistic of 0.1.
151. The differences between these rates of exclusion are statistically significant at the 5% level, with t-statistics of 3.82 when comparing sample with others, 6.18 when comparing statement with others, and 3.54 when comparing statement with sample.
152. The t-statistic was 2.02, which is significant at the 5% level.

II. "OBTAINED IN A MANNER" THAT VIOLATES THE *CHARTER*

As mentioned in Part I(B), above, evidence is not eligible for exclusion under section 24(2) unless it was "obtained in a manner" that violated the Charter.[153] We did not include cases in our database if this criterion was not met. However, in most included cases (85%), the court did not discuss the issue, presumably because the prosecution did not contest it. It was assumed by the court and parties, in other words, that the evidence was obtained in a manner infringing at least one Charter right. Not surprisingly, when the issue was contested, the exclusion rate (61.3%) was significantly lower than the average rate (70.4%).[154] This can be explained by the fact that when the connection between the violation and the state's acquisition of the evidence is weak, the court is (all else equal) more likely to find that admitting the evidence would not bring the administration of justice into disrepute.[155]

III. *GRANT* FACTORS

As mentioned in Part I(B), above, in Grant, the Court decreed that three factors drive the exclusionary discretion: the seriousness of the Charter-infringing police conduct, its impact on the claimant's Charter-protected interests, and society's interests in an adjudication on the merits. As shown in Table 19, below, our data unsurprisingly confirm that trial judges exclude evidence significantly more than the average when they characterize the Charter-infringing state conduct as "serious" (91.7%); "moderate" violations result in excluded evidence less than half of the time (45.9%); and "slight" infringements even less frequently (11.7%).[156]

TABLE 19: THE NUMBER AND RATE OF EXCLUSION BY SERIOUSNESS OF STATE MISCONDUCT

	Moderate	N/A	Serious	Slight
Number	90	43	870	33
Rate	45.9	93.5	91.7	11.7

153. Charter, *supra* note 1, s 24(2).
154. The t-statistic for the difference between the two exclusion rates was 3.24, which is statistically significant at the 5% level.
155. See generally Grant, *supra* note 74 at para 122; Côté, *supra* note 84 at paras 66-70.
156. When comparing the mean exclusion rate for N/A (seriousness not assessed) with moderate, the t-statistic is 8.99; serious versus moderate the t-statistic is 18.06; slight versus moderate, the t-statistic is 11.37; serious versus N/A, the t-statistic is 0.37; slight versus N/A, the t-statistic is 15.92; and slight versus serious, the t-statistic is 36.45. These are all statistically significantly different from each other at the 5% level, with the exception of serious versus N/A.

Table 20 similarly shows that exclusion is highly probable when judges gauge the violation's impact on the claimant to be "serious" (92.4%). "Moderate" effects are associated with only a modest diminishment of exclusion (64.6%) compared to the overall rate, and "slight" impacts rarely result in exclusion (13.9%).[157]

TABLE 20: THE NUMBER AND RATE OF EXCLUSION BY IMPACT OF VIOLATION ON ACCUSED

	Moderate	N/A	Serious	Slight
Number	113	65	810	48
Rate	64.6	90.3	92.4	13.9

As mentioned in Part I(B), above, a finding that evidence would have been discovered without the Charter breach diminishes (but does not extinguish) its impact on the accused.[158] However, as indicated in Table 21, below, courts assessed the discoverability question in only 17% of cases, excluding evidence at a rate of 18.4% when they found that the evidence was discoverable and 97.8% when it was not.[159]

TABLE 21: THE NUMBER AND RATE OF EXCLUSION BY WHETHER EVIDENCE WAS DISCOVERABLE

	N/A	Discoverable	Not Discoverable
Number	918	29	89
Rate	75.1	18.4	97.8

As discussed in Part I(B), above, under the "adjudication on the merits" category, judges consider the evidence's reliability and importance to the prosecution's case. The more reliable and important the evidence, the more likely it will be

157. When comparing the mean exclusion rate for N/A (impact not assessed) with moderate, the t-statistic was 5.75; serious versus moderate, the t-statistic is 10.51; slight versus moderate, the t-statistic is 17.16; serious versus N/A, the t-statistic is 0.53; slight versus N/A, the t-statistic is 18.5; and slight versus serious, the t-statistic is 38.85. These are all statistically significantly different from each other at the 5% level, with the exception of serious versus N/A.

158. When the evidence was found to be not discoverable, the judge characterized the impact of the violation as being "serious" 91% of the time (81/89).

159. The t-statistic for comparing the mean exclusion rate for "not discoverable" with "discoverability assumed" (N/A) is 5.03; not discoverable versus N/A, the t-statistic is 16.11; and discoverable versus not discoverable, the t-statistic is 14.50. All of these differences are statistically significant at the 5% level.

admitted. Though they may also consider the seriousness of the offence, this factor is doctrinally equivocal. It may be interpreted as either a neutral factor or one that weighs (at least slightly) in favour of admission.

Somewhat surprisingly, trial judges referred to reliability in only 61% of cases. This may be explained by the fact that reliability issues arise almost exclusively with statement evidence, which comprise only 13% of cases. As shown in Table 22, below, when the evidence was found to be reliable, the exclusion rate was 64.1%. Evidence deemed unreliable was almost always excluded (96.1%).[160] However, we can assume that in cases in which the issue was not mentioned, the evidence was reliable. Adding these cases to those where reliability was expressly found yields an exclusion rate of 69.5%, only 1% lower than the overall rate. It thus appears that, while unreliable evidence is almost always excluded, the fact that evidence is prima facie reliable has little if any effect on the section 24(2) decision.

TABLE 22: THE NUMBER AND RATE OF EXCLUSION BY RELIABILITY OF EVIDENCE

	N/A	Reliable	Unreliable
Number	408	579	49
Rate	78.8	64.1	96.1

As expected, the more important a judge considers the evidence to be, the less likely it will be excluded (see Table 23, below). The effect of this factor appears to be modest, however. In 39% of cases, judges did not even refer to it. In these cases, evidence was excluded 74.1% of the time. In an equal proportion of cases (39%), judges considered the impugned evidence to be "critical," yet still excluded evidence 68% of the time.

Counterintuitively, the exclusion rate was lower (52.4%) when judges gauged the evidence to be merely "important."[161] We speculate that this anomaly can be explained by the significantly higher than average exclusion rate for "over

160. The t-statistics for comparing the mean exclusion rate for reliable with N/A (reliability not assessed) is 5.92; unreliable versus N/A is 2.63; and reliable versus unreliable is 4.94. These are all statistically significant differences at the 5% level.

161. The t-statistics for comparing the mean exclusion rate for important with critical is 3.99; moderate versus critical is 2.63; N/A (importance not assessed) versus critical is 2.33; slight versus critical is 3.42; moderate versus important is 5.18; N/A versus important is 5.56; slight versus important is 5.50; N/A versus moderate is 1.93; slight versus moderate is 0.32; and slight versus N/A is 2.33. These are all statistically significant differences at the 5% level, except the N/A comparison with moderate, which is significant at the 10% level, and the slight with moderate comparison, which is statistically insignificant.

0.80" impaired driving cases (74.0%),[162] where the prosecution's case typically collapses when bodily sample evidence is excluded.[163]

TABLE 23: THE NUMBER AND RATE OF EXCLUSION BY EVIDENTIARY IMPORTANCE

	Critical	Important	Moderate	N/A	Slight
Number	393	89	62	430	62
Rate	68.0	52.4	84.9	74.1	87.3

Lastly, offence seriousness does not appear to play a significant role in section 24(2) trial decisions as a matter of positive law. As shown in Table 24, below, in almost a third of cases, the judge did not refer to it. The exclusion rate in these cases (70.8%) was only fractionally greater than the overall rate (70.4%). When offence seriousness was considered, judges classified the offence as "serious" 90.5% of the time. The exclusion rate in these cases was only slightly lower (68.5%) than the overall rate. This could be interpreted as a signal that courts have generally interpreted Grant as effectively nullifying this factor.

TABLE 24: THE NUMBER AND RATE OF EXCLUSION BY OFFENCE SERIOUSNESS

	Moderate	N/A	Serious	Slight
Number	42	478	494	22
Rate	80.8	70.8	68.5	91.7

However, as discussed in Part III(D)(1), above, we also coded for how judges treated the offence seriousness factor. As shown in Table 25, below, most (56%) did not speak to the question. The exclusion rate for this group was 71.2%. Of those who did, 27% said that it was not significant; the remaining 73% said it was "significant" or "weighty." In the former group, the exclusion rate was 85.3%; in the latter, it was 60.9%.[164] This suggests that judges who do express a

162. The average exclusion rate for all other categories of offences was 67.3%, and the t-statistic for the difference between the average exclusion rate for the impaired category and all others was 2.85, which is statistically significant at the 5% level.

163. Judges gauged the bodily sample evidence to be "critical" to the prosecution's case in 78% of cases where some characterization was given. Statements (17%) and other evidence (65%) were less often characterized as critical.

164. The t-statistic for the difference between the mean exclusion rate for N/A (significance of offence seriousness not discussed) with insignificant is 4.14; significant versus insignificant is 6.54; and significant versus N/A is 3.81. These are all statistically significantly different from each other at the 5% level.

view on the factor's significance are more likely to exclude (factor insignificant) or admit (factor significant) than judges who do not. And as shown in Table 18, above, our regression model including non-doctrinal variables suggests that offence seriousness exerts some influence on exclusionary decisions regardless of doctrinal treatment.

TABLE 25: THE NUMBER AND RATE OF EXCLUSION BY TREATMENT OF "OFFENCE SERIOUSNESS" FACTOR

	N/A	Insignificant	Significant
Number	586	191	259
Rate	71.2	85.3	60.9

We combined all of these factors into one regression as shown in Table 26, below. Consistent with the findings discussed above, exclusion was significantly favoured when: (1) the state misconduct was serious, (2) the impact of the violation on the accused's Charter-protected interests was serious, (3) the evidence was non-discoverable, (4) the evidence was unreliable, (5) the evidence was less than important to the prosecution's case, or (6) the evidence was a statement or bodily sample. Admission was significantly favoured when: (1) the evidence was expressly found to have been obtained in a manner that violates the Charter, (2) the misconduct was slight, (3) the impact on the accused was slight, (4) the evidence was discoverable, and (5) the seriousness of the offence was treated as a significant factor. The classification of an offence as "serious" also weighed in favour of admission (but is significant only at the 10% level).

TABLE 26: MULTINOMIAL LOGIT RESULTS OF EXCLUSIONARY DECISION (ADMIT OR EXCLUDE) AS DEPENDENT VARIABLE AND GRANT FACTORS AS INDEPENDENT VARIABLES

Admit	Relative odds	P-value
Court		
Superior	1.262714	0.432
Seriousness of State Misconduct		
Serious	0.071202	0*
Slight	8.675451	0*
Impact on Accused		
Serious	0.155953	0*
Slight	12.14447	0*

Reliability of Evidence		
Reliable	1.33811	0.348
Unreliable	0.080759	0.048*
Importance of Evidence		
Important	1.372963	0.383
Moderate	0.145135	0.002*
Slight	0.059873	0*
Obtained in Manner?		
Yes	1.739669	0.077**
Discoverability of the Evidence		
No	0.100285	0.013*
Yes	6.857355	0*
Seriousness of Offence		
N/A	6.175271	0.011*
Serious	3.730522	0.054**
Slight	0.10138	0.14
Category of Evidence		
Sample	0.245928	0*
Statement	0.20985	0.001*
Treatment of Offence Seriousness		
N/A	1.622164	0.313
Significant	2.864326	0.009*
Constant[165]	0.250916	0.106

Base Outcome: Admit

* indicates significance at the 5% level

** indicates significance at the 10% level

Log Likelihood = -253.58

Number of observations = 1,472

pseudo R2= 0.7165

AIC = 555.18

165. The constant is a trial in provincial court where the "obtained in a manner" issue is "not discussed (N/A)"; seriousness of the state misconduct is "moderate"; discoverability of the evidence is "not discussed (N/A)"; impact on the accused's Charter-protected interests is "moderate"; importance of the evidence to the Crown is "critical"; reliability of the evidence is "not discussed (N/A)"; seriousness of the offence is "moderate"; treatment of offence seriousness is "insignificant," and the type of evidence category was "non-statement, non-sample."

IV. DISCUSSION

A. EXTERNAL VARIABLES

Our analysis suggests that the decision about whether to exclude unconstitutionally obtained evidence at trial is influenced by certain extra-legal factors but not others. Consistent with most previous studies of Canadian judges, we found little evidence that party of appointment plays a significant role. In some respects, this may be surprising. Whether evidence should be excluded as a remedy for rights violations has generally been viewed as a contentious policy question dividing conservatives and liberals.[166] The governing doctrine also ostensibly gives trial judges wide latitude to admit or exclude evidence as they see fit: They are free to make factual findings, frame the governing doctrinal factors, and weigh those findings and factors in the context of an open-ended balancing test.

Why, then, is party of appointment not significantly correlated with exclusion? Unfortunately, our study cannot provide an answer. As indicated, previous research has suggested several possibilities, including a tradition of non-ideological judicial appointments in Canada, the tendency of trial courts to adjudicate non-ideologically, and the weak predictive value of partisanship and other ideology measures in criminal cases.[167]

We also found that judicial gender was not predictive of exclusion. While we observed some significant pairwise differences (in provincial courts, liberal-appointed female judges were more likely to admit than most other gender-party combinations), gender was not significant in our regression models. In other words, once we controlled for other external factors, judicial gender was no longer significant. Previous research has revealed no consistent overarching judicial gender effect in either adjudication generally or in criminal cases. Our analysis is consistent with this pattern.

Professional background, in contrast, did correlate strongly with the exclusion decision. Former prosecutors are less likely to exclude evidence than former non-criminal practitioners, who are in turn less likely to exclude evidence than former criminal defence lawyers. This finding is consistent with research in the United States showing similar correlations between professional background

166. See generally Kent Roach, Due Process and Victims' Rights: The New Law and Politics of Criminal Justice (University of Toronto Press, 1999) at 46-47, 76-77; Lane V Sunderland, "Liberals, Conservatives, and the Exclusionary Rule" (1980) 71:4 J Crim L & Criminology 343.

167. See discussion in Part 1(A), above.

and rulings in criminal cases generally.[168] We cannot say whether this stems from pre-professional selection bias, post-professional experience, or a combination of both. But our study supports the widespread anecdotal impression that prosecutors and defence lawyers are different (both from each other and from non-criminal lawyers)[169] and that this difference carries over into the judicial role.

While we do not purport to suggest ideal criteria for judicial selection, our findings could be interpreted as supporting the appointment of judges from a variety of professional backgrounds, including a roughly equal ratio of former defence lawyers and former prosecutors. There is no reason to think that either prosecutors or defence counsel should not be appointed in significant numbers. Indeed, heavy criminal caseloads (especially in provincial court) suggest that a criminal practice background is desirable. Any substantial change in the ratio of prosecutors to defence counsel, however, would likely shift the exclusion rate (and potentially other decisions in criminal cases) away from the status quo.

Jurisdiction also correlates with exclusion, at least for British Columbia, Newfoundland, Nova Scotia, and Quebec (more likely to exclude evidence) in relation to Alberta (less likely). This also tracks anecdotal experience. The reasons for this are not obvious and are not explained by differential distributions in party of appointment. The most that we can say is that there are aspects of the political, legal, or judicial cultures in these provinces that lead to more "liberal" or "conservative" outcomes in at least this area of the law, regardless of party of appointment and other factors.

Whether this is normatively optimal is a matter of opinion. On the one hand, jurists have long asserted that jurisdictional differences in the administration of criminal justice are a legitimate and desirable aspect of Canadian federalism.[170] On this view, the ability of judges and other justice system actors to apply the law in a manner sensitive to local conditions reflects and respects regional diversity and provincial autonomy. Moreover, the exclusionary discretion embodied in section 24(2) hinges on the justice system's reputation, which presumably stems at least in part from its standing in the local community.

On the other hand, the power to enact and regulate the enforcement of laws relating to the criminal justice system lies exclusively with Parliament under section 91(27) of the Constitution Act, 1867.[171] The decision to give Parliament

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168. See *supra* notes 31-32.
169. See generally Abbe Smith, "Are Prosecutors Born or Made?" (2012) 25 Geo J Leg Ethics 943.
170. See R v Regan, 2002 SCC 12 at para 71; Dennis Baker, "The Provincial Power to (Not) Prosecute Criminal Code Offences" (2016) 48 Ottawa L Rev 417 at 441-42.
171. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

exclusive authority over this realm was deliberately designed to foster national unity.[172] Even more important, to the extent that the provinces play a role in the administration of criminal and quasi-criminal law enforcement, their role is circumscribed by the Charter in the same manner that it is for the federal government.[173] In this context, it may be reasonable to expect that remedies for fundamental rights violations be equally available to Canadians regardless of provincial boundaries.

B. INTERNAL VARIABLES

As discussed, consistent with previous literature suggesting favourable treatment for female criminal defendants, judges are more likely to exclude evidence when the accused is a woman. It is doubtful that judges are conscious of this bias. Even if they were, we do not know whether they would be able to disabuse themselves of it.[174] Nevertheless, it does not seem desirable that the accused's gender should influence the decision about whether to exclude unconstitutionally obtained evidence.

We also found compelling evidence that the exclusionary decision is affected by the seriousness of the offence. Judges who indicated that offence seriousness was a significant consideration were much more likely to admit the evidence than those who did not. Moreover, when we included the "treatment of offence seriousness" variable in our regression model, the exclusion rate differential between provincial and superior courts disappeared. In other words, judges trying more serious offences (disproportionately in superior courts) are, all else equal, more inclined to admit evidence than those trying less serious ones.

Whether this is normatively desirable is also contentious. To the extent that excluding probative evidence is a social cost (by making it more difficult to convict the factually guilty), that cost is undoubtedly greater for more serious offences than less serious ones.[175] On the other hand, the regular admission of

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172. See Reference re Assisted Human Reproduction Act, 2010 SCC 61 at paras 68, 77; Mark Carter, "Criminal Law in the Federal Context" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, The Oxford Handbook of the Canadian Constitution (Oxford University Press, 2017) 475 at 476.
173. See Charter, *supra* note 1, s 32(1).
174. See generally Jerry Kang et al, "Implicit Bias in the Courtroom" (2012) 59 UCLA L Rev 1124; Doron Teichman & Eyal Zamir, "Judicial Decision-Making: A Behavioral Perspective" in Eyal Zamir & Doron Teichman, eds, The Oxford Handbook of Behavioral Economics and the Law (Oxford University Press, 2014) 664 at 684-86.
175. See David M Paciocco, "Section 24(2): Lottery or Law—The Appreciable Limits of Purposive Reasoning" (2011) 58 Crim LQ 15 at 52-55.

unconstitutionally obtained evidence in serious cases would likely erode law enforcement's incentive to comply with the Charter, increasing the harms caused by rights violations to the factually guilty and innocent alike.[176]

As discussed, the Court has not issued a firm and consistent directive as to whether offence seriousness should be considered. The Court should clarify its position by directing trial judges to either count or not count offence seriousness in the exclusionary calculus. As the American experience demonstrates, even under the latter scenario, admission is still likely to be more common for the most serious offences. But a clear policy choice by the Court would likely limit this effect. If the Court chooses the opposite policy, trial judges could transparently weigh offence seriousness in the balance.

V. CONCLUSION

In one sense, our study is very narrow. We examined only trial decisions involving a single question of constitutional criminal procedure: Whether evidence obtained in violation of the Charter should be excluded under section 24(2). However, trial judges confront this question many hundreds of times annually,[177] and their decision often dramatically influences the trial's outcome. The decision is also a product of an open-ended balancing inquiry instantiating the liberal/due process versus conservative/crime control policy spectrum. Statistical analyses of the factors influencing this decision provide some insight on the extent to which judges' decisions are shaped by non-legal, "Realist" factors.

The focus of previous research in this vein has been on judicial ideology. We found no significant correlation between party of appointment and section 24(2) trial decisions. This is broadly consistent with previous research showing that party of appointment (1) does not strongly influence trial decisions in the United States; and (2) is not strongly predictive of case outcomes in Canadian appeal cases.

Nor did we find any significant effect for judicial gender: Female and male judges' exclusion rates are essentially the same, even when controlling for other

176. See John AE Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24 (Part III)" (2000) 44 Crim LQ 223 at 229-31; Penney, *supra* note 77 at 138-39; Kent Roach, Constitutional Remedies in Canada, 2nd ed (Thomas Reuters Canada, 2019) at para 10.1730.

177. Recall from note 122 that we estimated that there were approximately 1,903 unreported decisions during the six-year period of our dataset, coupled with 1,472 reported ones. This yields an average of approximately 563 decisions per year.

factors. This finding is also generally consistent with previous studies finding no strong, overarching judicial gender effect in criminal or non-criminal cases.

We did find significant effects, however, for two attitudinal factors that have received less attention in the literature: professional background and jurisdiction. Positive law does not dictate that accused persons have a better chance of having evidence excluded when being tried by a former criminal defence lawyer than by a former prosecutor. Nor does it support the finding that exclusion should be more common in British Columbia and Quebec than in Alberta. Yet these factors do appear to exert substantial influence on the exclusionary decision, as does the accused's gender.

That said, there is little doubt that positive law plays an important (and quite possibly dominant) role in exclusionary decisions. Our analysis of internal doctrinal variables shows that trial judges apply the law in the manner prescribed by the Supreme Court, with one possible and partial exception. While the doctrine states that offence seriousness should have (at most) a modest influence on section 24(2) decisions, our analysis suggests that it often plays a substantial role.

Further empirical research on judicial decision-making in Canada, especially at the trial level, would be welcome. Perhaps the most obvious avenue would be to apply similar methodologies to other key decisions in criminal cases and other types of litigation. One might predict, for example, that in comparison to former criminal defence lawyers, former prosecutors are more likely to convict and to impose harsher sentences. Future studies might also investigate the possible influence of additional external variables (such as judicial age and experience)[178] or explore additional measures of judicial ideology.[179]

178. See *e.g.* Hoffman et al, *supra* note 28.
179. See generally Cross, *supra* note 9 at 20-21.

TABLE A: SUBCATEGORIES AND LEVEL OF COURT THAT ARE STATISTICALLY SIGNIFICANTLY DIFFERENT FROM EACH OTHER, INCLUDING THE T-STATISTIC AND LEVEL OF SIGNIFICANCE

Subcategory One	*Compared*	*to*	*Subcategory Two*				
Court Level	*Background*	*Gender*	*Court Level*	*Background*	*Gender*	*t-statistic*	*Level of Significance*
Provincial	**Defence**	**Male**	**Provincial**	**Crown**	**Female**	2.1	5
Provincial	**Defence**	**Male**	**Provincial**	**Crown**	**Male**	2.5	5
Provincial	**Other**	**Female**	**Provincial**	**Crown**	**Female**	2.1	5
Provincial	**Other**	**Female**	**Provincial**	**Crown**	**Male**	2.4	5
Provincial	**Other**	**Male**	**Provincial**	**Crown**	**Female**	1.7	10
Provincial	**Other**	**Male**	**Provincial**	**Crown**	**Male**	2.1	5
Superior	**Defence**	**Male**	**Superior**	**Crown**	**Male**	1.8	10

TABLE B: THE NUMBER AND RATE OF EXCLUSION BY LEVEL OF COURT, JUDGES' GENDER, AND JUDGES' PARTY OF APPOINTMENT ("N/A" CATEGORY OMITTED)

		Provincial			*Superior*	
		Conservative	**Liberal**	**Social Democrat**	**Conservative**	**Liberal**
Male	**Number**	217	336	163	253	123
	Rate	70.5	74.4	76.1	66.0	61.0
Female	**Number**	43	102	67	83	74
	Rate	81.4	65.7	79.1	62.7	68.9
Total	**Number**	260	438	230	336	197
	Rate	72.3	72.4	77.0	65.2	64.0

TABLE C: THE VARIOUS PROVINCIAL COURT SUBCATEGORIES THAT ARE STATISTICALLY SIGNIFICANTLY DIFFERENT FROM EACH OTHER, INCLUDING THE T-STATISTIC AND LEVEL OF SIGNIFICANCE

Subcategory One Compared to	*Subcategory Two*		
Gender & Party	*Gender & Party*	*t-statistic*	*Level of Significance*
Female Social Democrat	**Female Liberal**	1.88	10
Male Social Democrat	**Female Liberal**	1.81	10
Male Liberal	**Female Liberal**	1.7	10
Female Liberal	**Female Conservative**	1.9	10

TABLE D: THE NUMBER AND RATE OF EXCLUSION BY LEVEL OF COURT, JUDGES' BACKGROUND, AND JUDGES' PARTY OF APPOINTMENT

		Provincial			*Superior*	
		Conservative	**Liberal**	**Social Democrat**	**Conservative**	**Liberal**
Crown	**Number**	67	143	54	87	38
	Rate	70.2	63.6	64.8	58.6	63.2
Defence	**Number**	87	189	83	54	42
	Rate	72.4	76.2	83.1	72.2	71.4
Other	**Number**	106	106	93	195	117
	Rate	73.6	77.4	78.5	66.2	61.5
Total		260	438	230	336	197
		72.3	72.4	77.0	34.8	64.0

TABLE E: VARIOUS SUBCATEGORIES BY COURT LEVEL THAT ARE STATISTICALLY SIGNIFICANTLY DIFFERENT FROM EACH OTHER, INCLUDING THE T-STATISTIC AND LEVEL OF SIGNIFICANCE

Subcategory One	*Compared To*	*Subcategory Two*			
Court Level	*Background*	*Court Le vel*	*Background*	*t-statistic*	*Level of Significance*
Provincial	**Other Liberal**	**Provincial**	**Crown Social Democrat**	1.65	10
Provincial	**Other Conservative**	**Provincial**	**Crown Liberal**	1.71	10
Provincial	**Defence Social Democrat**	**Provincial**	**Crown Conservative**	1.74	10
Provincial	**Other Social Democrat**	**Provincial**	**Crown Social Democrat**	1.76	10
Provincial	**Defence Social Democrat**	**Provincial**	**Crown Social Democrat**	2.31	5
Provincial	**Non-criminal Liberal**	**Provincial**	**Crown Liberal**	2.36	5
Provincial	**Non-criminal Social Democrat**	**Provincial**	**Crown Liberal**	2.46	5
Provincial	**Defence Liberal**	**Provincial**	**Crown Liberal**	2.50	5
Provincial	**Defence Social Democrat**	**Provincial**	**Crown Liberal**	3.12	5
Superior	**Defence Conservative**	**Superior**	**Crown Conservative**	1.73	10