

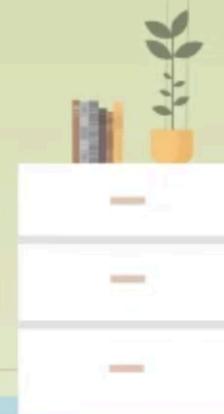
Richard Jochelson

A Truncated Year in Review

Kathleen Kerr-Donohue

Brayden McDonald

Robson Crim



Agenda



Statistics (SCC & MBCA)

Kathleen Kerr-Donohue – SCC

Brayden McDonald – MBCA



R v Balfour & Young 2019 MBQB 167

Kathleen (Facts)

Brayden (Law)



SCC case analysis with Professor Jochelson

Methodology

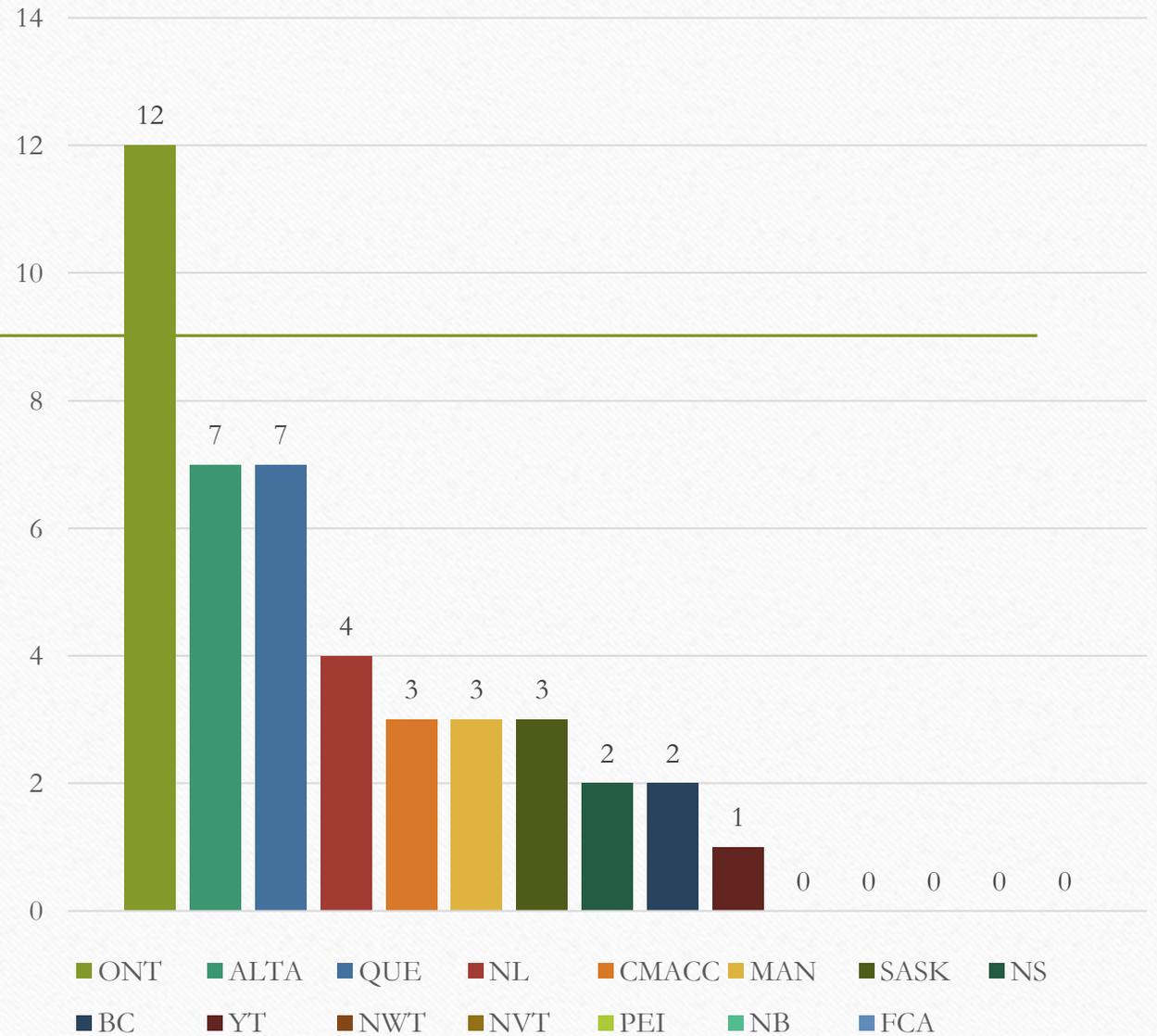
- Sources: CanLII, Westlaw, Lexis
- Sorted thematically into a document
- Stats derived from document

Disclaimer #1

- Subjectivity of classification

SCC Data

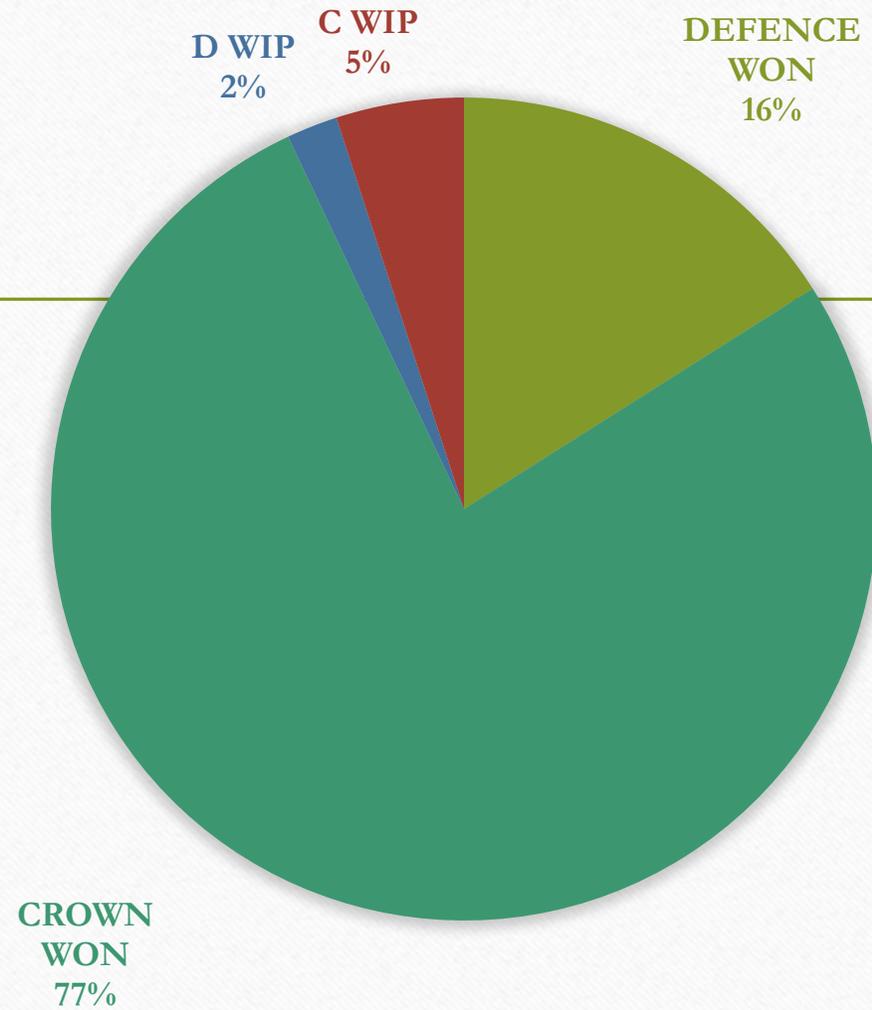
Breakdown by
Province & Court



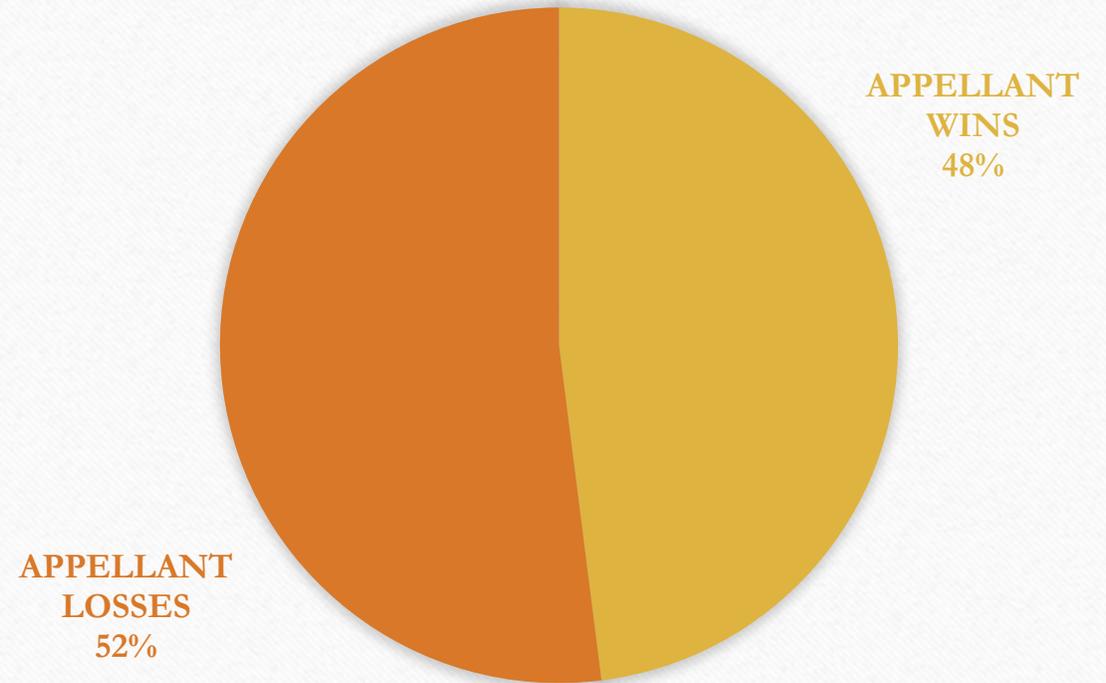
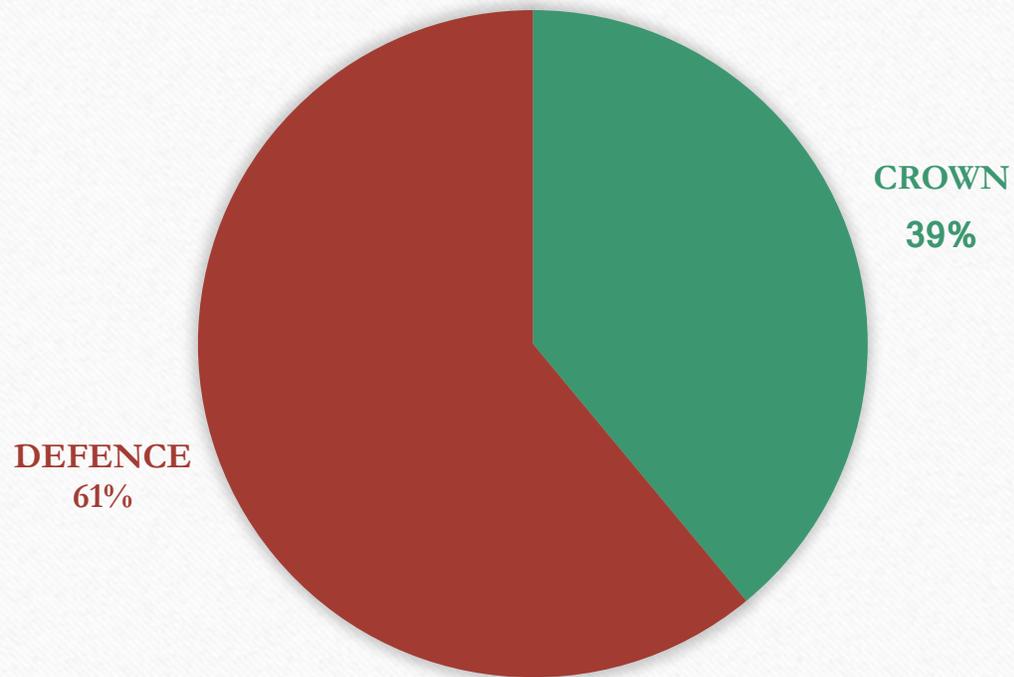
SCC Data

Global Win | Loss

- Defence Won: 15.9%
- Crown Won: 77.3%
- Defence Won (In Part): 2.3%
- Crown Won (In Part): 4.5%



SCC DATA | Appeals Filed vs. Won

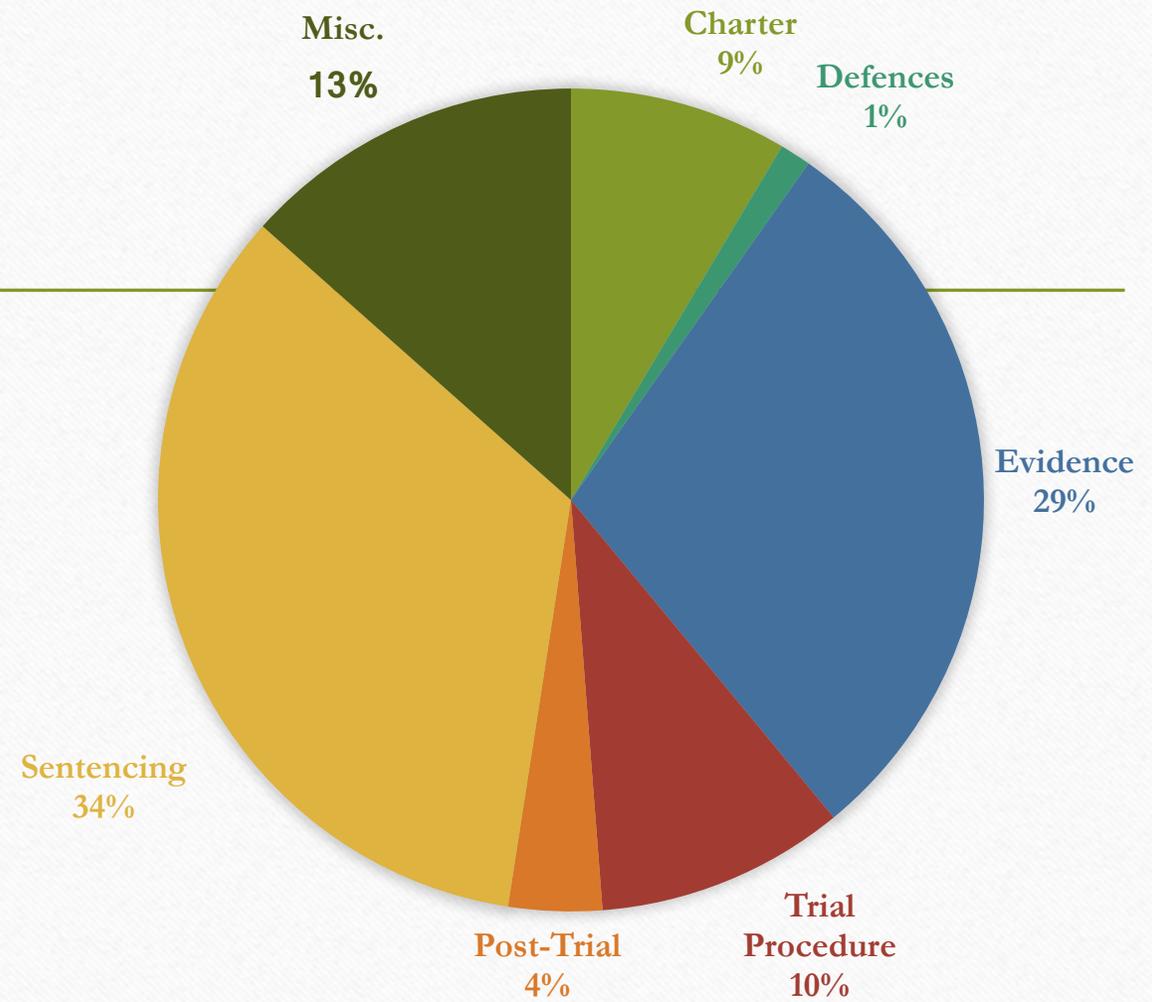


SCC DATA | Appeals Filed vs. Won

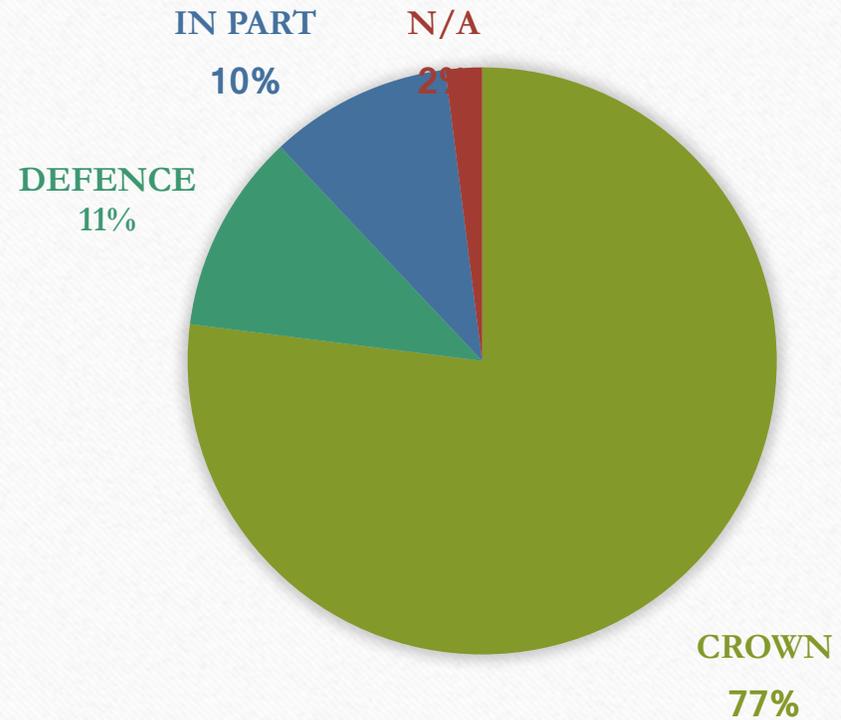
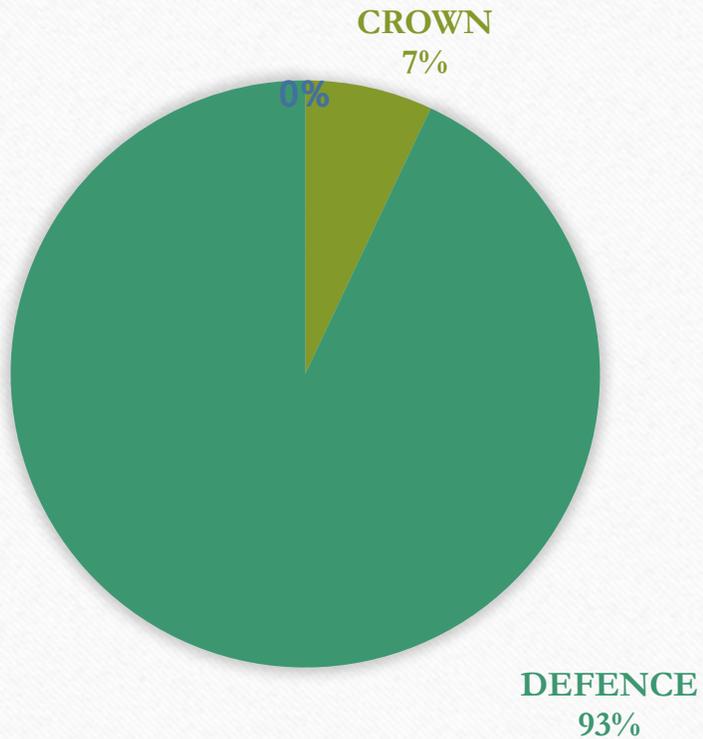
- Defence Wins:
 - Appellants: 75%
 - Respondents: 25%
- Crown Wins:
 - Appellants: 42%
 - Respondents: 58%

MBCA Data | By Theme

- Thematic breakdown
- Sample size = 82



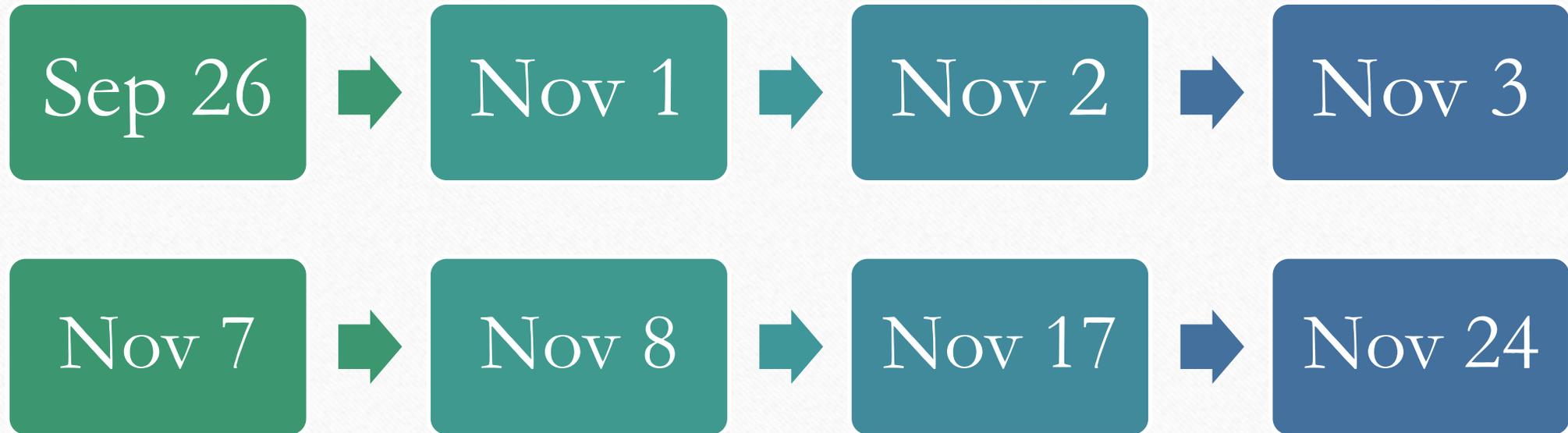
MBCA Data | Appeals Filed vs. Won



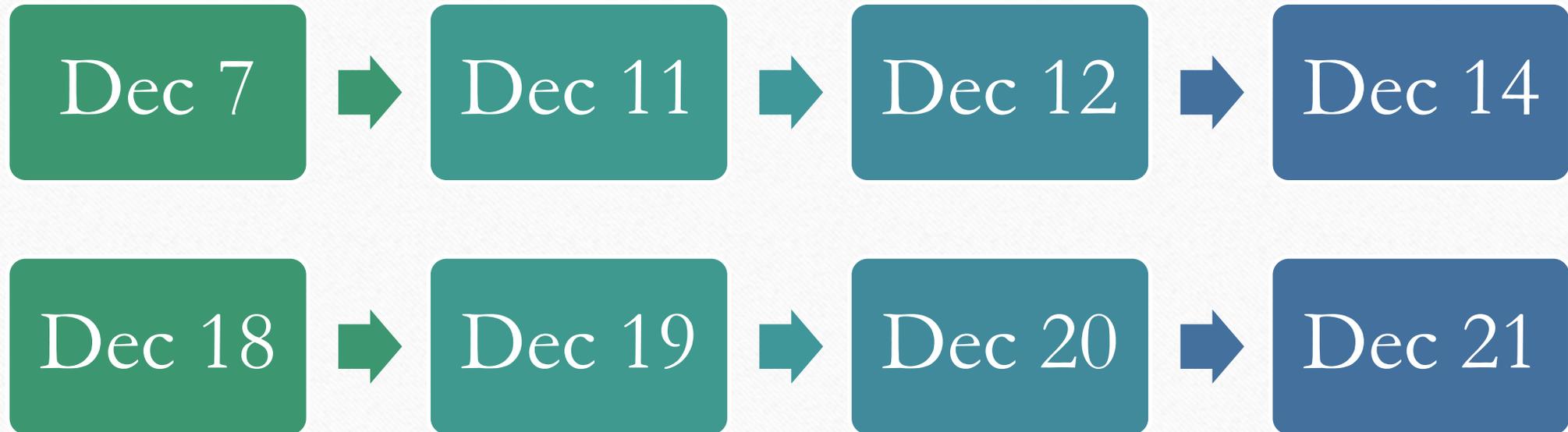
MBCA Data | Appellant Success Rate

- Rate of Success for Appellants:
- Crown won 67% of appeals it filed
- Defence won 12% of appeals it filed

R v Balfour and Young



R v Balfour and Young



R v Balfour and Young



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Balfour and Young - Analysis

- 3 Major principles implicated:
 1. Constitutional right to timely bail hearing
 2. Section 516(1): cannot remand for more than 3 clear days without consent
 3. Duty of court to ensure accused understand rights under s 516(1) and strictly adhere to requirements

Analysis (Cont'd)

- Balfour timed out 5 times:
 - 3/5 – no consent
 - 2/5 – 3 day rule violated
- Conclusion: Violation of s 11(e) of *Charter*
- Remedy: Costs and reimbursement of personal expenses ordered

Balfour and Young - Conclusions

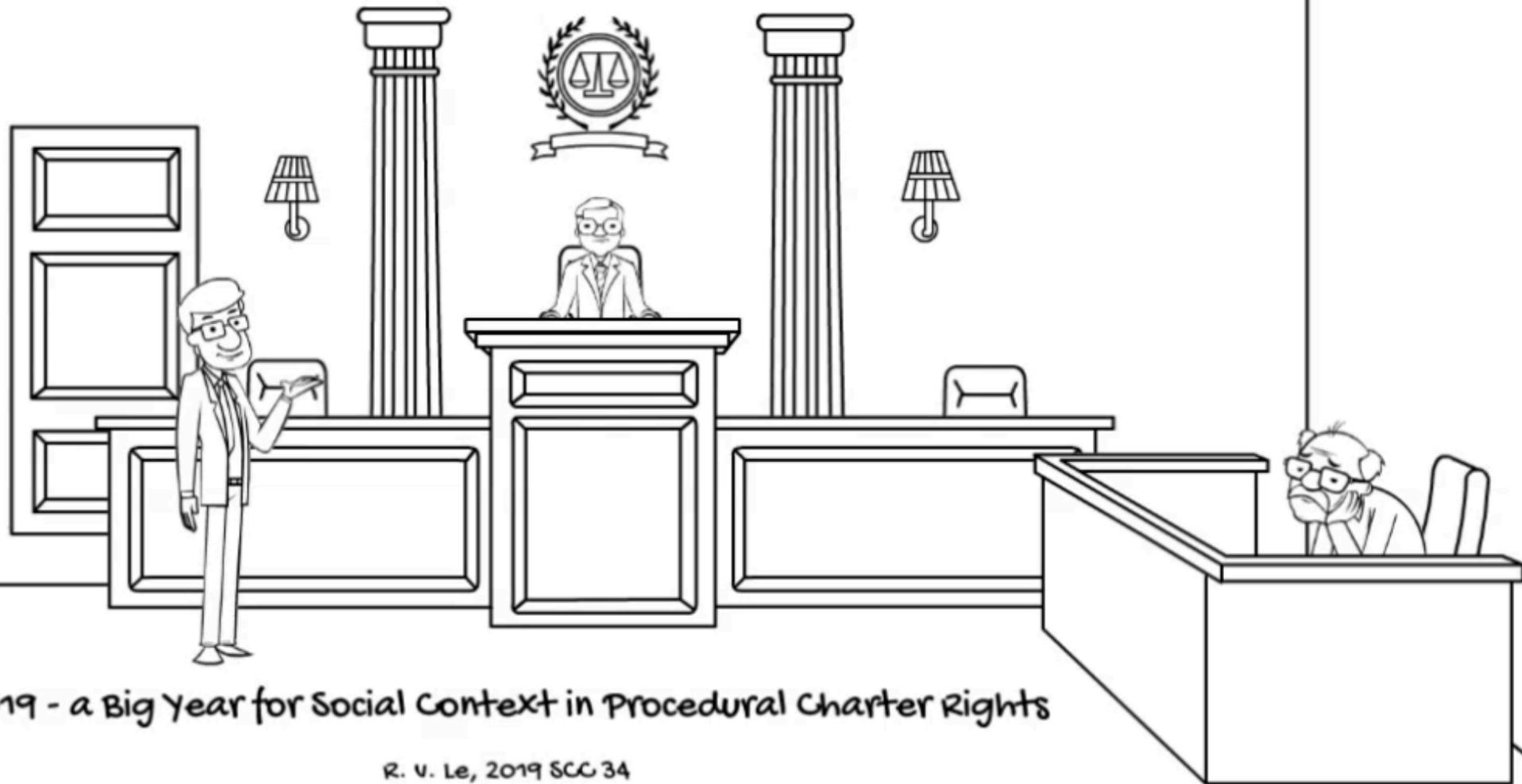
- Precedent set: potential floodgate issue?
- Exacerbation of the problem by new bail regime?

Section 9 Implications

Section 8 Implications

Section 24(2) Implications

Common Law Police Powers



2019 - a Big Year for Social Context in Procedural Charter Rights

R. v. Le, 2019 SCC 34

Fleming v. Ontario, 2019 SCC 45

R. v. Mills, 2019 SCC 22

R. v. Jarvis, 2019 SCC 10

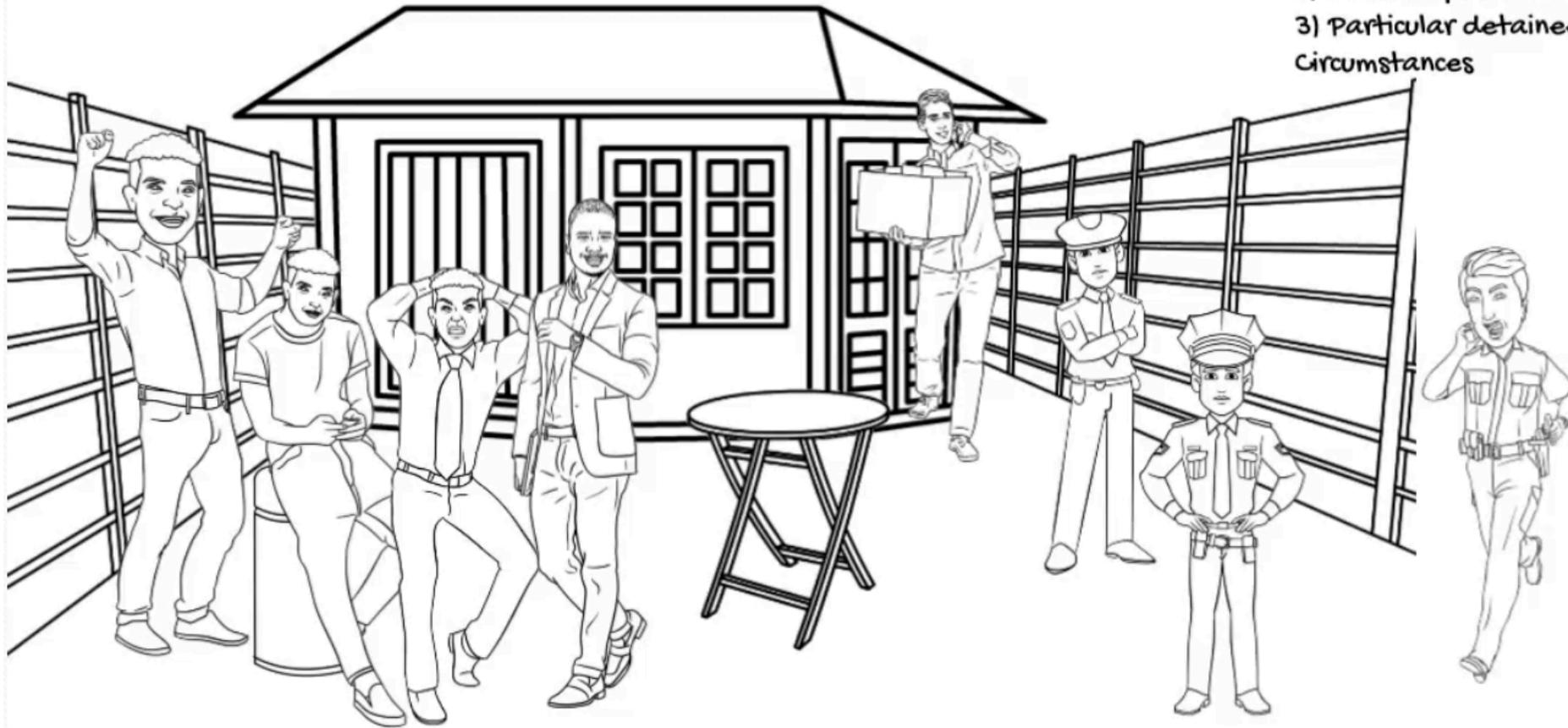
R. v. Reeves 2018 SCC 56

R v Le 2019

Expands the Grant detention test 2009

Psychological Detention:
"legally required to comply with a direction
or demand"
or
"a reasonable person in subject's shoes
would be obligated"

Three non-exhaustive factors go to
reasonableness test (para 31):
1) The circumstances reasonably
perceived by the individual
2) Nature of PO conduct
3) Particular detainee characteristics &
Circumstances



Le: The Timing of the Detention

Circumstances: private residence

Nature of PO conduct: trespassers, language, tone, power dynamic, physical proximity, timing, location, presence of others, fence size, irrelevance of reputation of community, duration, aggressive nature

Characteristics of Accused (objectively assessed): race and timing, sophistication, age and stature



Is the detention arbitrary under s.9?

reasonable suspicion (para. 38)?

(para 124)

the detention must be authorized by law;
the authorizing law itself must not be arbitrary; and,
the manner in which the detention is carried
out must be reasonable

(mystery of Collins criteria)

here no authorization
under common law or
under statute

Section 8 Observations:

REP is normative

leaves open guest in backyard scenarios

context sensitive



Section 24(2) Observations:

(1) the seriousness of the Charter -infringing conduct;

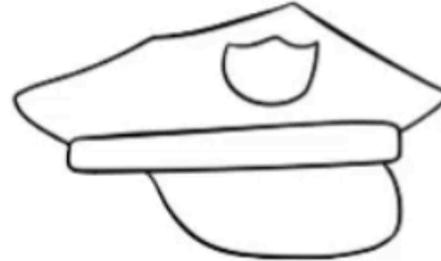
(2) the impact of the breach on the Charter -protected interests of the accused; and

(3) society's interest in the adjudication of the case on its merits.

para 142: "Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility"

para 147: "the officers were not acting in "good faith" simply because they were not engaged in racial profiling"

...to be excused as a "good faith" (and, therefore, minor) infringement of Charter rights, the state must show that the police "conducted themselves in [a] manner . . . consistent with what they subjectively, reasonably, and non-negligently believe[d] to be the law" (R. v. Washington, 2007 BCCA 540)



Fleming v. Ontario, 2019 SCC 45

Is there a common law power to arrest for apprehended breach of peace?

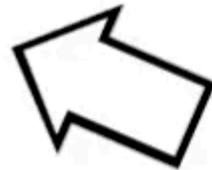
Future Issues:

- 1) possibility that police may have some other common law powers short of arrest to prevent an apprehended breach of the peace (para 107)
- 2) possibility of different balancing under non procedural CCRF rights (para 111)
- 3) possibility that common law could get s.1 treatment (para 113)



Preventative power that is evasive of review (para 77):

"proposing a power that would enable the police to interfere with the liberty of someone who they accept is acting lawfully and who they do not suspect or believe is about to commit any offence."



Ancillary Powers test for common law police powers:
Contains Charter balancing values (para. 111)

Threshold: does the power create a prima facie interference with liberty

Step 1: PP within the general scope of a statutory or common law police duty?

ie preserving the peace, preventing crime, and protecting life and property

Step 2: Justifiable exercise of PP:

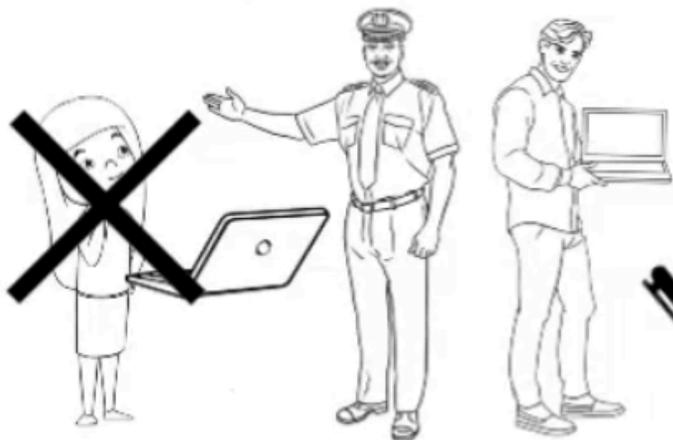
1. the importance of the performance of the duty to the public good
2. the necessity of the interference with individual liberty for the performance of the duty; and
3. the extent of the interference with individual liberty

Reasonable Expectation of Privacy

Threshold s.8 Issue

- (1) subject matter;
- (2) direct interest in the subject matter;
- (3) subjective expectation of privacy; and
- (4) was this objectively reasonable, in totality of the circumstances

R. v. Mills, 2019 SCC 22



Luring case

main issue is step 4 in Rep test

-vulnerability of children

-internet as predatory opportunity

"adults cannot reasonably expect privacy online with children they do not know"

(para 23)

-interesting Martin J dissent- electronic interception analysis

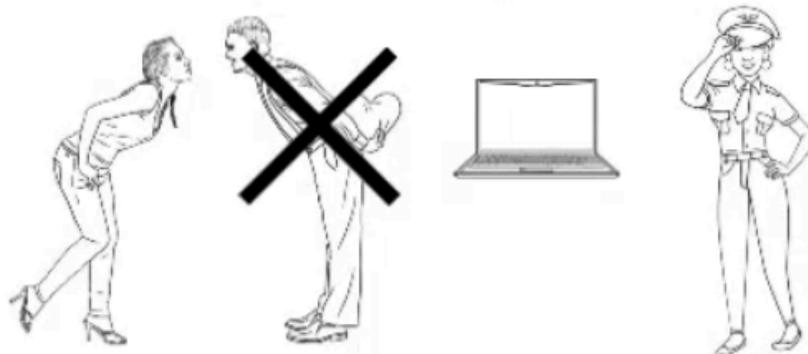
R. v. Jarvis, 2019 SCC 10

REP as informing voyeurism adopts s.8 values as normative (para 68) factors:

- (1) The location
- (2) The nature-observation or recording.
- (3) Awareness of observation or consent
- (4) The manner of observation or recording
- (5) The subject matter/content of obs/rec
- (6) Any rules, regulations or policies
- (7) The relationship
- (8) The purpose
- (9) The personal attributes of viewee

Côté, Brown and Rowe JJ - only 1, 3, 5, 8 are in the Code - other factors in sentencing

R. v. Reeves 2018 SCC 56



para 35 "unique and heightened privacy interests in personal computer data"

para 39 "The joint ownership of the computer does not render Reeves' subjective expectation of privacy objectively unreasonable"

para 55 "equal and overlapping privacy interests" of spouse does not establish third party consent

Moldaver dissent - found an ancillary police power "Common Law Power to Enter a Shared Residence to Take a Statement" para 75

High Level Overview

Sections 8, 9, 24(2) being contextualized

Normativity, social context, vulnerability analyses

For stats & case annotations visit Robsoncrim.com



Future Challenges: 24(2) balancing, detention standards & objectivity, normativity in REP, CCRF values in actus, ancillary powers