

Do non-legal factors
affect the decision
to exclude or admit
unconstitutionally
obtained evidence?

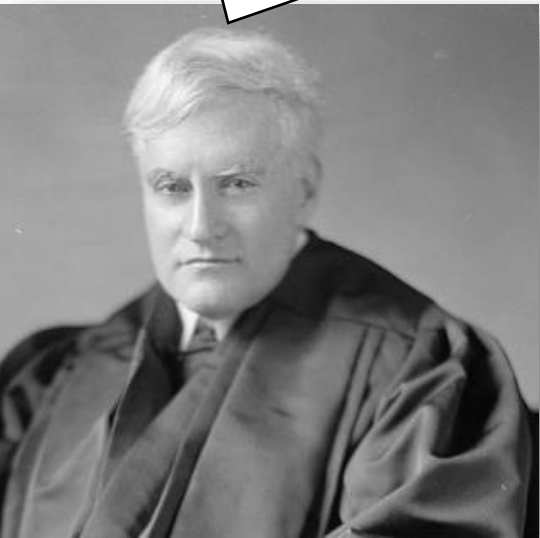
Steven Penney &
Moin Yahya
Faculty of Law
University of Alberta



Before the *Charter*



The criminal is to
go free because
the constable has
blundered [?]



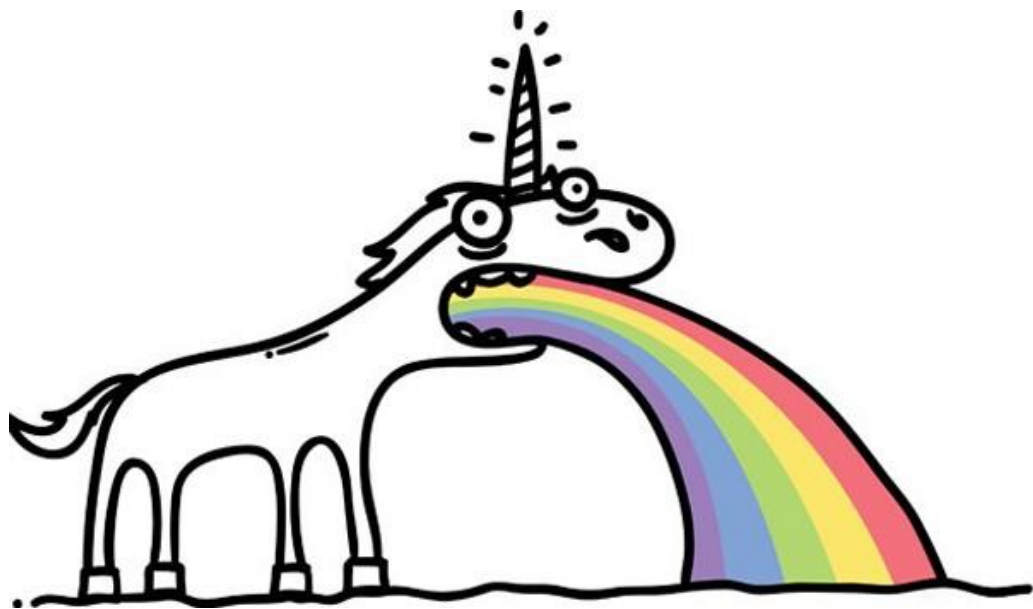
People v Defore,
242 NY 13 (CA,
1926), Cardozo J

Are you *sure* you
want to do this?



24(2) Where ... a court concludes that evidence was **obtained in a manner** that infringed [the *Charter*] ... the evidence shall be excluded if it is established that ... the admission of it in the proceedings would **bring the administration of justice into disrepute.**







In what percentage of reported cases did trial judges exclude evidence that they found was obtained in violation of the Charter?

- A. 25%
- B. 35%
- C. 50%
- D. 70%



❖ 2013-2018

❖ 1,472 decisions

❖ All provinces,
territories, and
levels of trial court

❖ Reported vs.
unreported

	A	B	C	D	E	F	G	H	I	J	K	L	M	N
	style	cite	year_dec	judge	area	appoint	year_app	court	juris	sex_j	party	id_2	id_3	sex_a
	Freedom	2017 QCCQ 15045	2017	Bachand Pierre	other		1990	provincial	qc	male	qclib	con	lib	male
	Pouliot	2017 QCCM 144	2017	Lalande Michel	other		1996	provincial	qc	male	qcpq	lib	sd	male
	Nowazek	2017 YKSC 8	2017	Ducharme Todd	defence	2009/06/18	2009	superior	yt	male	conservative	con	con	male
	Gelowitz	2017 BCPC 325	2017	Whonnock Karen	other	8/8/2016	2016	provincial	bc	female	bclib	con	lib	male
	Belanger	2017 QCCQ 15014	2017	Warolin Peggy	other	6/8/2017	2017	provincial	qc	female	qclib	con	lib	male
	Bampoe	2013 ONCJ 355	2013	Zuker Marvin A	other	7/1/1978	1978	provincial	on	male	onpc	con	con	male
	Honcia	2015 SKPC 177	2015	Henning Bruce D	other	2/15/1978	1978	provincial	sk	male	sknd	lib	sd	male
	AMB	2014 SKPC 78	2014	Henning Bruce D	other	2/15/1978	1978	provincial	sk	male	sknd	lib	sd	female
	Mitchell	2013 BCPC 214	2013	Klinger Wilfred W	other	2/1/1979	1979	provincial	bc	male	bcs	con	con	male
	Knox	2014 ABQB 608	2014	Veit Joanne B	other	6/18/1981	1981	superior	ab	female	liberal	lib	lib	male
	Millett	2017 ABQB 9	2017	Veit Joanne B	other	6/18/1981	1981	superior	ab	female	liberal	lib	lib	male
	Driedger	2015 YKTC 39	2015	Schmidt Dennis	other	6/3/1905	1981	provincial	yt	male	bcs	con	con	male
	Bernhardt	2017 YKTC 28	2017	Lilles Heino	other	n/a	1987	provincial	yt	male	ykndp	lib	sd	male
	Girouard	2015 MBPC 14	2015	Corrin Brian M	other	3/4/1988	1988	provincial	mb	male	mbnd	lib	sd	male
	Shepard	2015 QCCM 33	2015	Tremblay Pierre-Armand	other	4/1/1988	1988	provincial	qc	male	qclib	con	lib	male
	Walterson	2017 MBPC 39	2017	Corrin Brian M	other	3/4/1988	1988	provincial	mb	male	mbnd	lib	sd	male
	Barkwell	2017 MBPC 9	2017	Corrin Brian M	other	3/4/1988	1988	provincial	mb	male	mbnd	lib	sd	female
	Barkwell	2017 MBPC 9	2017	Corrin Brian M	other	3/4/1988	1988	provincial	mb	male	mbnd	lib	sd	female



**CANADIAN
CRIMINAL
CASES**

THIRD SERIES

202

**CANADIAN
CRIMINAL
CASES**

THIRD SERIES

201

**CANADIAN
CRIMINAL
CASES**

THIRD SERIES

200

**CANADIAN
CRIMINAL
CASES**

THIRD SERIES

199

**CANADIAN
CRIMINAL
CASES**

THIRD SERIES

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**CANADIAN
CRIMINAL
CASES**

THIRD SERIES

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Grant factors



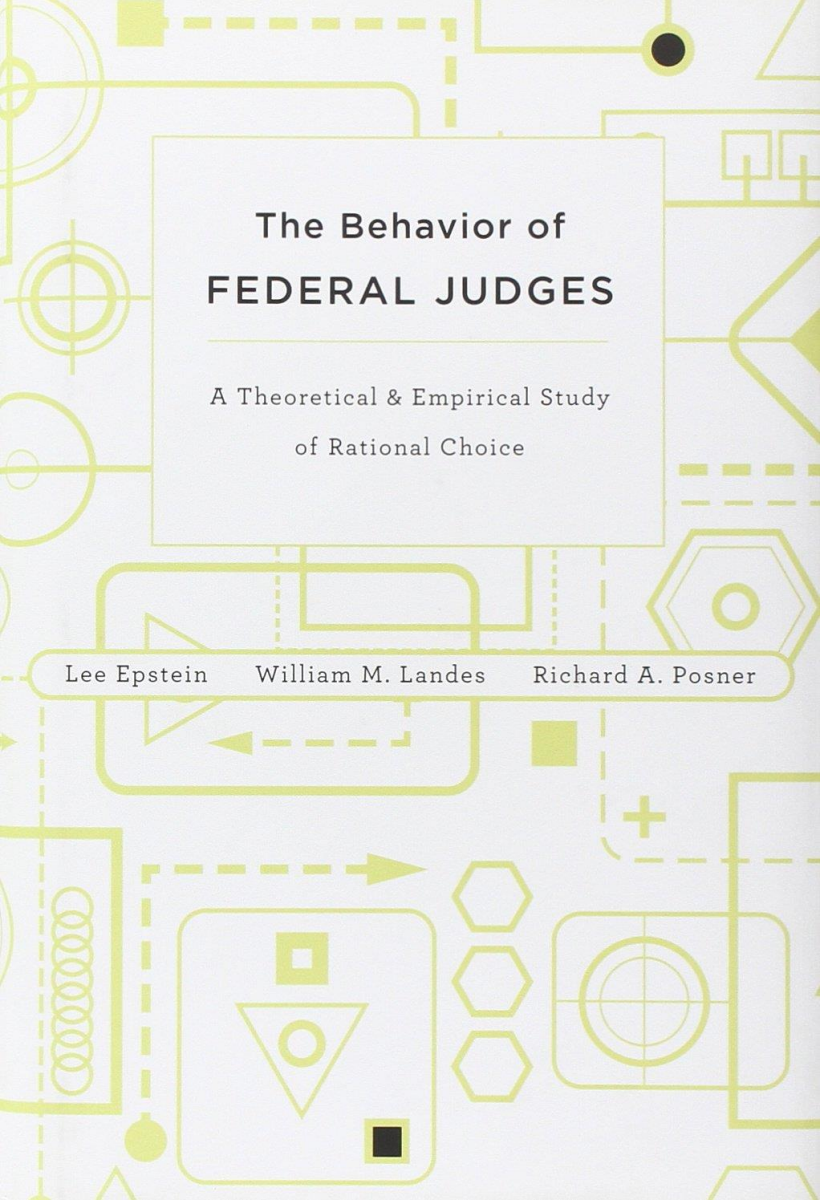
Seriousness of
misconduct



Impact on
accused



Adjudication
on merits



The Behavior of **FEDERAL JUDGES**

A Theoretical & Empirical Study
of Rational Choice

Lee Epstein William M. Landes Richard A. Posner

❖ The “attitudinal”
model of adjudication

❖ Party of appointment

❖ Other factors (gender,
professional
background)

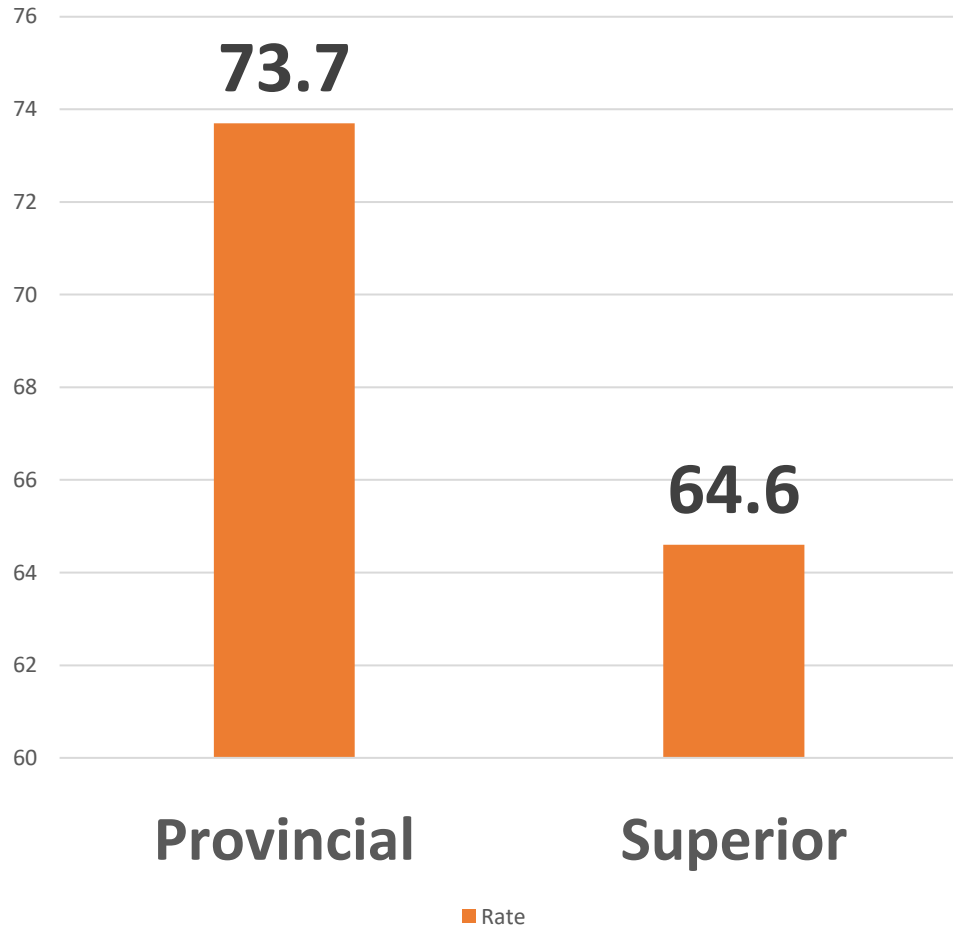
❖ Trial vs appeal

❖ US vs Canada

A red speech bubble with a white border and a small tail pointing towards the bottom-left corner. The word "results" is written in white, bold, lowercase letters inside the bubble.

results

Exclusion Rate by Court Level (%)



<i>Liberal</i>	
Decisions	443
Exclusion Rate	69.8%
<i>Conservative</i>	
Decisions	407
Exclusion Rate	68.3%
<i>Social Democrat</i>	
Decisions	177
Exclusion Rate	77%



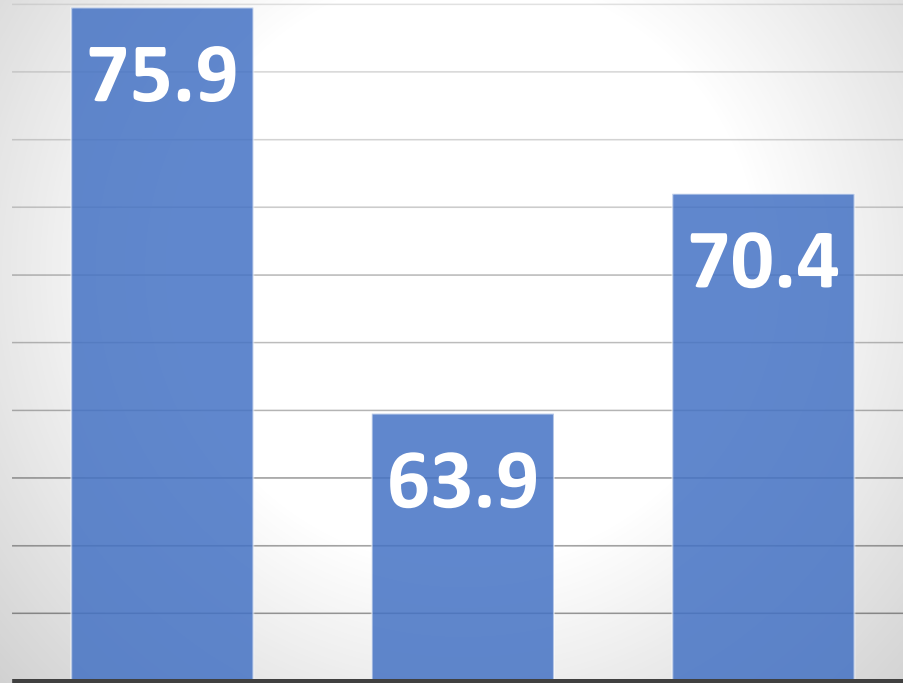
Exclusion rate by party of appointment

Exclusion rate by judges' gender

	Female	Male
Decisions	261	775
Rate	70%	70.5%








Professional background (%)



DEFENCE CROWN OTHER

Exclusion rate by jurisdiction (%) (provinces with >100 decisions)

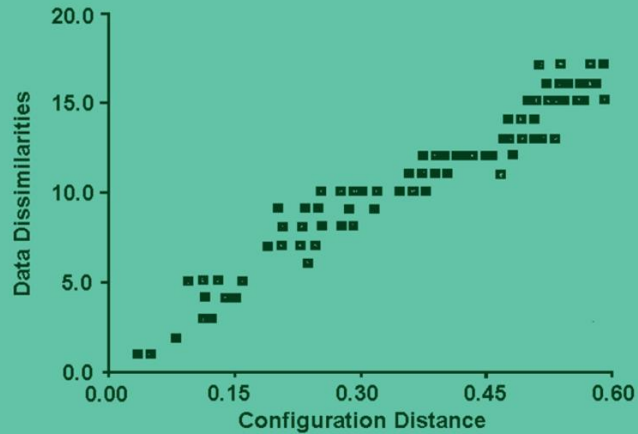
	 AB	 BC	 ON	 QC	 SK
Number	165	128	678	256	108
Rate	63.6	73.4	67.6	77.0	71.3

Bryan F. J. Manly
Jorge A. Navarro Alberto

Multivariate Statistical Methods

A Primer

Fourth Edition



 CRC Press
Taylor & Francis Group

A CHAPMAN & HALL BOOK



Why?



- ❖ Non-ideological appointments?
- ❖ Trial court restraint?
- ❖ Criminal cases less ideological?
- ❖ Caveat



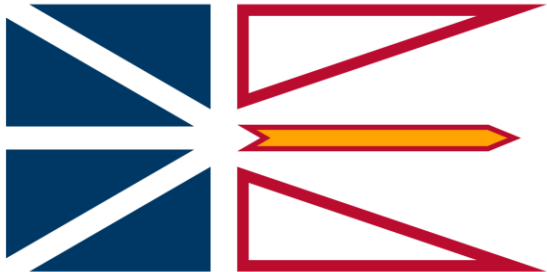


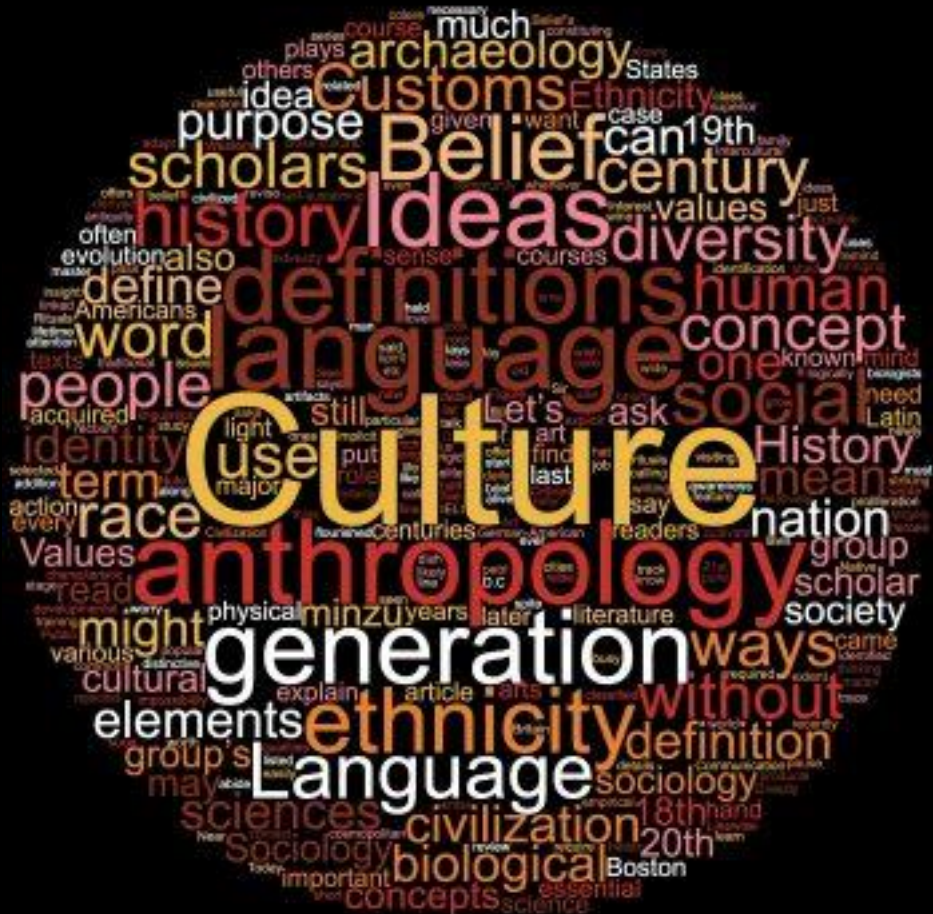


- ❖ Pre-professional selection bias?
- ❖ Post-professional experience?
- ❖ Implications for selecting judges?



More likely
to admit
than ...





**NOT SURE IF THAT'S A GOOD
THING**

OR A BAD THING

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land
ward

Manitoba

Nova Scotia
Nouvelle-Écosse

Ontario

Quebec

Saskatchewan

**.... bring the
administration
of justice into
disrepute.**





CANADIAN CHARTER OF RIGHTS AND FREEDOMS



or omission, it constituted an offence under Canadian or international law or was contrary to the general principles of law recognized by the community of nations; (d) if finally acquired by the offender, not to be used for it again and, if finally found guilty and punished for the offence, not to be used or punished for it again; and (e) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment. 24. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment. 25. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence. 26. A party to a civil or criminal proceeding who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

27. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or

of Parliament shall be printed and published in English and French and both language versions are equally authoritative. (3) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. 29. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. (2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. 30. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any federal or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French. (2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French. 31. Nothing in sections 29 to 31 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, in either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. 32. Nothing in sections 29 to 31 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any

Enforcement

33. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

34. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 4, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. 35. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to derogate from the exercise of any other rights or freedoms that exist in Canada. 36. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. 37. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. 38. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools. 39. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be. 40. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

41. (1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. (2) Notwithstanding subsection (1), section 31 shall not have effect

Wherein Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein. 4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. (2) In case of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be. 5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada. (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province. (3) If the rights specified in subsection (2) are subject to (a) any laws or programs of general application in force in a province other than those that discriminate among persons primarily on

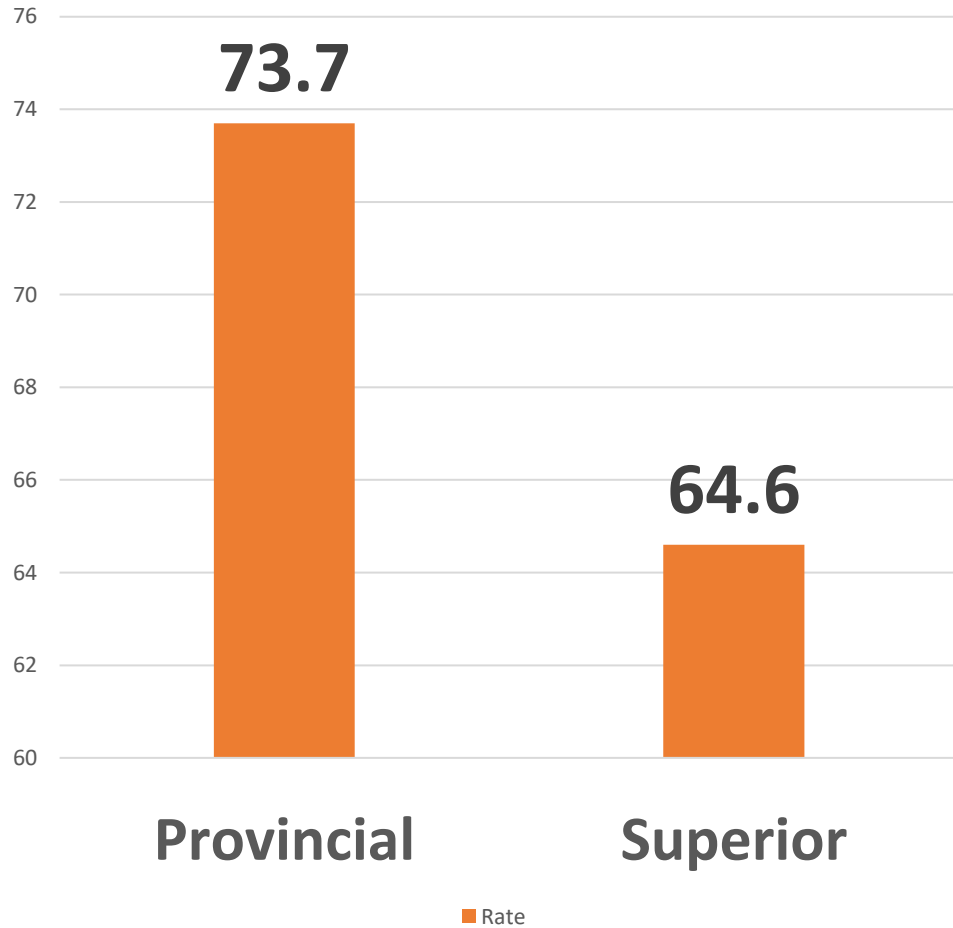
CRIME SCENE DO NOT CROSS



Exclusion rate by treatment of offence seriousness (%)

	n/a	neutral	significant
#	586	191	259
Rate	71.2	85.3	60.9

Exclusion Rate by Court Level (%)





**NOT SURE IF THAT'S A GOOD
THING**

OR A BAD THING

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10 Steps to the Process of **Cost Benefit Analysis**

1. Project goals and objectives
2. Note alternatives
3. List stakeholders
4. Choose which metrics to use
5. Determine the outcome of costs and benefits
6. Use a common currency
7. Figure out the discount rate
8. Find the net present value of the product
9. Do sensitivity analysis
10. Make decisions





HOLD
POLICE
ACCOUNTABLE

VANCOUVER
POLICE

VANCOUVER
POLICE

VANCOUVER
POLICE





More likely
to exclude
than ...





Ladies
NIGHT

A neon sign with the word "Ladies" in a pink cursive script and "NIGHT" in a blue blocky font. A small yellow crown is positioned above the letter "i" in "Ladies". The sign is set against a dark blue background.



Offence type	Relative Odds	p-value
Domestic	4.85E-06	0.988
Drugs	0.655501	0.574
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



Evidence	Relative Odds	p-value
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



The End

THANK
YOU



