

Robson Crim Year in Review

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I. INTRODUCTION

This paper examines the jurisprudence of the Manitoba Court of Appeal [MBCA] and the Supreme Court of Canada [SCC], across a period from October of 2018 to February of 2020, inclusive. Although originally envisioned as a year in review article, we continued to update the dataset beyond the original 12-month timeframe, so as to provide the reader with the most up to date information. The goal was to create an overview of recent developments in criminal law jurisprudence relevant to the Manitoban jurisdiction.

The paper begins with a detailed description of the research method and parameters used. Statistical findings are then presented by court. Next, the thematic categories and the process of their development are explained for the SCC, after which a number of specific cases from each category are discussed. This process is repeated for the MBCA. Lastly, there is some brief commentary and interpretation of trends that emerged from the data, though this paper is intended to be mainly descriptive rather than interpretive. Appendices I and II contain lists of all of the cases included in the dataset, arranged by the thematic category to which they were assigned.

It is our hope that this work will provide some useful insights and information to practicing members of the Manitoba Bar, as well as academia. In selecting statistical metrics and specific cases for presentation, we endeavored to favour the practical. For instance, cases addressing commonly relied on legal tests or principles were selected for additional discussion over those which may have been more conceptually interesting, but less useful from a practitioner's standpoint. As discussed below, there is a subjective element inherent in such determinations, especially as usefulness is largely situational. Nonetheless, we tried to keep the practitioner in mind when developing the paper that follows, particularly in deciding which cases to highlight.

A. Methodology

It was decided that both quantitative and qualitative analyses were necessary in developing a comprehensive year in review. To narrow the scope of the data, the analysis was limited to the SCC and the MBCA. Data was collected beginning in October 2019, and collection continued until March 5, 2020. Cases were put into a data table that was sorted chronologically by the date of oral or written judgement. Cases were drawn from two sources: CanLII, a free public database from the Canadian Legal Information Institute, and WestlawNext, a subscription-based database by Thomson Reuters Canada. All reported judgements issued between October 1, 2018 and February 25, 2020 were included.

A set of variables to be recorded for each case was developed to form the foundation for the statistical analysis. These variables included the date of judgement, the case name, parties acting as appellant and respondent, themes, a brief description, hearing judges, the court of origin, whether the claim came before the court by leave or right, the appeal result, and the docket and citation information. When thematic categories were later developed, these were also recorded on the table for each case. Not all of the recorded variables were relied upon in the following analyses. In cases from the MBCA, not all of these variables were available or as relevant as they were in the SCC cases. Accordingly, the final statistics and themes developed for the SCC and the MBCA differ to some extent. In total, 155 cases were included in the dataset and of these, 52 cases were heard by the SCC and 103 were heard by the MBCA.

Once all of the cases were included in the table, statistics were drawn from the established variables and following this, the cases were thematically grouped into categories. Once all of the cases were categorized, one noteworthy case, at a minimum, was selected from each category for further analysis. Development of thematic categories began with the identification of broad trends within the ‘themes’ variable column of the table. Cases were then assigned to thematic categories depending on what we considered to be the predominant subject matter. The process was then repeated to further refine the thematic categories.

The primary limitation to the data was the potential for human error. Additionally, for the categorization of cases, while researchers attempted to be objective in the classification process, there were undoubtedly elements of subjectivity and bias. This was particularly true where a case could have been categorized in more than one section. In order to keep the data

reliable, it was decided against having any cases included more than once. As such, cases were placed into the section that appeared to be the most relevant.

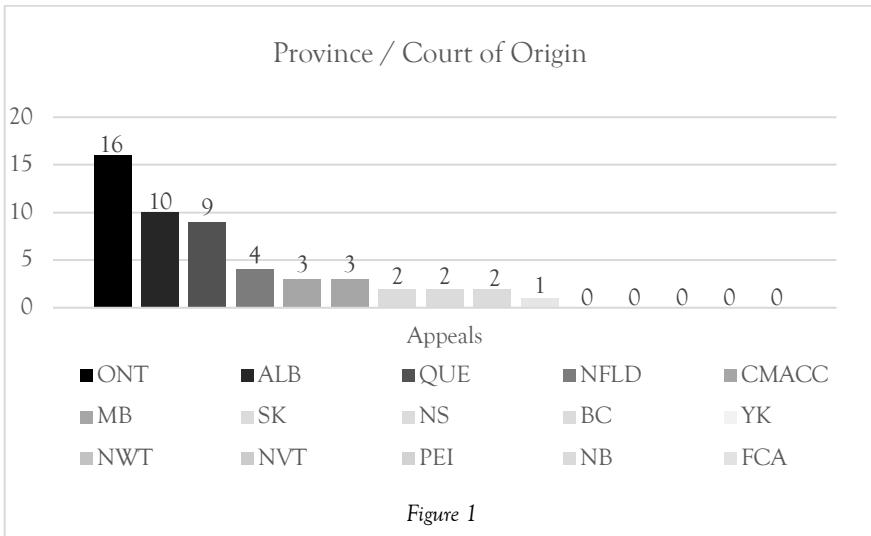
II. RESEARCH FINDINGS: SCC

A. Province/Court of Origin

Of the 52 cases heard by the SCC during the timeframe, the majority originated from the province of Ontario, with 30.8% (n=16/52) of appeals originating from Ontario courts. This rate was followed by Alberta and then Quebec, with 19.2% (n=10/52) and 17.3% (n=9/52), respectively. Newfoundland and Labrador had the fourth highest rate of appeal with 7.7% (n=4/52).

Both the province of Manitoba and the Court Martial Appeal Court of Canada [CMACC] had three appeals heard by the SCC (5.8% each). Saskatchewan, Nova Scotia, and British Columbia were tied for sixth place with 3.8% (n=2/52) of all appeals originating from their courts. Finally, there was one appeal originating from the Yukon (2.0%).

There were no appeals originating from the Northwest Territories, Nunavut, Prince Edward Island, New Brunswick, or from the Federal Court of Appeal within the timeframe.



1. *R v Fedyck*: A defence-initiated appeal on an unreasonable verdict. The SCC agreed with the reasons of the MBCA and dismissed the appeal.¹
2. *R v CJ*: A Crown-initiated appeal on an unreasonable verdict. The SCC agreed with the dissent of one judge of the MBCA. The appeal was allowed, and the conviction was restored.²
3. *R v Friesen*: Another Crown-initiated appeal on a sentencing decision. The appeal was successful.³

B. Right of Appeal vs Leave to Appeal

The breakdown of appeals between right of appeal and leave to appeal was relatively balanced. 56.0% (n=29/52) of all cases were brought to the SCC as of right, with the remaining 44.0% (n=23/52) being heard after leave was granted.

C. Appellant vs Respondent Rates

Defence appeals significantly outnumbered Crown appeals at the SCC. In total, 66.0% (n=35/53) of all appeals were defence-initiated, with the remaining 34.0% (n=18/53) having been advanced by the Crown. Of the 35 defence appeals heard by the SCC, just nine were successful (25.7%; n=9/35). Conversely, of the 18 Crown appeals, 14 were successful (77.8%; n=14/18), demonstrating a considerably higher rate of appellate success for the Crown.

In terms of overall appellant and respondent success rates, the data was nearly balanced, with appellants having only a marginally higher rate of success. Irrespective of whether appeals were Crown or defence-initiated, the data showed that appellants were successful at a rate of 50.9% (n=27/53), whereas respondents succeeded at a rate of 49.1% (n=26/53).⁴

D. Overall Success Rates

Inclusive of both respondent and appellant success, the Crown was significantly more successful at the SCC overall, achieving a favourable outcome at a rate of 71.7% (n=38/53). Conversely, the defence achieved favourable outcomes in 20.8% (n=11/53) of all cases. Additionally, four

¹ *R v Fedyck*, 2019 SCC 3 [*Fedyck*].

² *R v CJ*, 2019 SCC 8 [*CJ*].

³ *R v Friesen*, 2020 SCC 9 [*Friesen*].

⁴ (Appellant success rates include partial success/in-part wins).

appeals were deemed to have mixed outcomes and as such, two were counted as defence appeals and two as Crown (3.8% each).⁵

Further, where the defence achieved success, it did so as the appellant party 81.8% (n=9/11) of the time and as the respondent party 18.2% (n=2/11) of the time. When factoring in partial successes (i.e. mixed outcomes), the success rate was 84.6% (n=11/13) for appellants and 15.4% (n=2/13) for respondents. Conversely, the Crown succeeded 36.8% (n=14/38) of the time as appellants and 63.2% (n=24/38) of the time as respondents. When factoring for partial successes, these rates become 40.0% (n=16/40) as appellants and 60.0% (n=24/40) as respondents.

III. RESEARCH FINDINGS: MBCA

Due to differences in the nature of reported information from the SCC cases, data collected on the MBCA cases was less in depth.

A. Appellants

As was the case before the SCC, the majority of appeals heard by the MBCA were advanced by the defence. The proportion was vastly higher however, as 92.2% (n=95/103) of appeals were advanced by the defence and 7.8% (n=8/103) by the Crown. Appellant/respondent success rate was one area where the SCC and the MBCA saw a significant statistical divergence. The appellant party enjoyed full success on appeal in 18.5% (n=19/103) of cases over the timeframe. If partial successes are counted, then this rate rises to 28.2% (n=29/103). This stands in stark contrast to the nearly symmetrical SCC success proportions enjoyed by appellants and respondents before the SCC.

B. Success and Failure by Party

Despite advancing the majority of appeals by a significant margin, the defence was only successful in 12.6% (n=13/103) of appeals, whereas the Crown succeeded 77.7% (n=80/103) of the time. The remaining 9.7% (n=10/103) not captured in the previous two statistics encapsulates those cases where the Court allowed an appeal in part, representing a partial success for both parties, to some extent. Narrowing the data further, the defence success rate in cases where it was the appellant was 13.7%

⁵ (A partial success refers to appeals which were only allowed in-part).

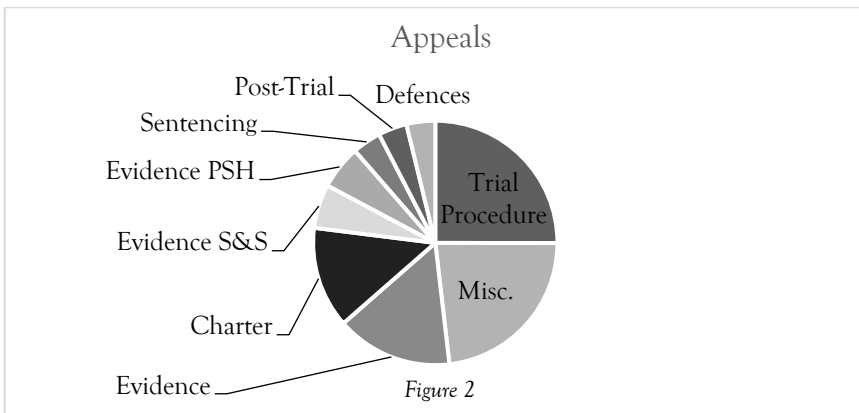
(n=13/95). If partial successes are factored in, this rate increases to 20.4% (n=21/103). In contrast, the Crown was successful in 75.0% (n=6/8) of the appeals it advanced. Notably, in the two cases where the Crown’s appeal was not allowed outright, the Court allowed the appeal in part. This means that the Crown enjoyed some degree of success in every appeal it filed. Conversely, this means that the defence had no outright successes as a respondent on appeal, managing a partial success in only 25.0% (n=2/8) of appeals brought by the Crown.

In a broad sense, these patterns echo those seen in the SCC data. The defence was the more active party in bringing appeals, but the Crown saw greater success both overall and relative to the appeals it brought. However, these patterns manifested with greater polarity in the MBCA jurisprudence.

IV. CATEGORIES: SCC

Ultimately, the following seven categories were generated for the SCC: Trial Procedure, Charter, Evidence, Defences, Sentencing, Post-Trial/Prison Law, and Miscellaneous. Additionally, two subcategories, Past Sexual History and Search and Seizure, were created under Evidence.

The largest category was the Trial Procedure section, with 25.0% (n=13/52) of all appeals being placed there. This was followed by the Miscellaneous section with 23.1% (n=12/52), Evidence with 15.4% (n=8/52), and Charter with 13.4% (n=7/52). Following this, both of the Evidence subcategories were tied, each with 5.8% (n=3/52). Finally, the Defences, Sentencing, and Post-Trial sections each accounted for 3.8% (n=2/52) of all appeals.



V. CASE ANALYSIS: SCC

A. Charter

Of the 52 cases heard at the SCC, seven were categorized under Charter.⁶ While the cases varied greatly with respect to which sections of the *Canadian Charter of Rights and Freedoms* they were challenging, several stood out as being particularly significant for their precedential value.

R v Le dealt primarily with arbitrary detention (section 9 of the *Charter*) and was significant in the degree with which it brought social context into the analysis, particularly with respect to racialized minorities.⁷ In *Le*, the accused and some other men (all from racialized minority groups) were in a backyard when several officers entered, without warrant or consent, and began to question the men and demand proof of identity.⁸

When the accused stated he did not have any identification, an officer asked what he was carrying in his bag and the accused fled.⁹ He was then pursued, arrested, and found to be in possession of a firearm, drugs, and cash.¹⁰ The SCC was tasked with determining, for the purposes of a section 9 analysis, when the appellant was detained.¹¹ Applying the factors from *R v Grant* for arbitrary detention, the Court found that *Le*'s detention began the moment the police entered the yard.¹² Further, there was neither statutory or common law power authorizing his detention at that time, thereby making it an arbitrary detention.¹³

When factoring psychological detention into its section 9 analysis, and more specifically, the application of the reasonable person standard, the Court held that a reasonable person in the shoes of the accused is presumed to be aware of racial contexts.¹⁴ The Court thereby acknowledged that race and minority status would affect the perceptions of a reasonable person.¹⁵

⁶ See *R v Morrison*, 2019 SCC 15 [*Morrison*]; *R v Le*, 2019 SCC 34 [*Le*]; *R v Stillman*, 2019 SCC 40 [*Stillman*]; *R v Poulin*, 2019 SCC 47 [*Poulin*]; *R v KJM*, 2019 SCC 55 [*KJM*]; *R v Doonanco*, 2020 SCC 2 [*Doonanco*]; *R v Boudreault*, 2018 SCC 58 [*Boudreault*].

⁷ *Supra* note 6.

⁸ *Ibid* at para 1.

⁹ *Ibid* at para 2.

¹⁰ *Ibid*.

¹¹ *Ibid* at para 5.

¹² *Ibid* at para 32.

¹³ *Ibid* at para 30.

¹⁴ *Ibid* at para 82.

¹⁵ *Ibid* at para 73.

Here, the Court accepted that social science research has soundly established that racialized and low-income communities are disproportionately policed.¹⁶ Furthermore, the Court held that it is within this context that courts must conduct section 9 analyses.¹⁷

In *R v KJM*, the Court was asked to consider the unreasonable delay framework, set out in *R v Jordan*, in the context of young offenders.¹⁸ Specifically, the Court considered whether section 11(b) of the *Charter* necessitates that a lower presumptive ceiling be established for cases under the *Youth Criminal Justice Act*.¹⁹ The majority found that the existing ceilings are capable of accommodating the enhanced need for timeliness in youth cases.²⁰ They further noted that this consideration can be assessed under the second branch of the current test.²¹

Justices Abella, Brown, and Martin were in dissent of the majority decision, finding that, given the increased vulnerability and reduced moral blameworthiness of youth, a lower presumptive ceiling was warranted.²² Ostensibly, however, the majority did not close the door on future analysis in this regard, noting that the *Jordan* framework applies to youth cases unless and until it can be demonstrated that a need for a lower ceiling exists.²³

In *R v Boudreault*, the SCC held that the implementation of a mandatory victim fine surcharge amounted to cruel and unusual punishment, contrary to section 12 of the *Charter*, particularly for impoverished and marginalized offenders.²⁴ The Court, therefore, found the mandatory victim fine surcharge set out in section 737 of the *Criminal Code* to be unconstitutional.²⁵

As it stood, the surcharge was being applied to offenders regardless of the severity of the crime, the characteristics of the offender, or the effects of the crime on victims, leaving judges with no discretion to waive or decrease

¹⁶ *Ibid* at paras 94, 97.

¹⁷ *Ibid* at para 97.

¹⁸ *Supra* note 6.

¹⁹ *Ibid* at para 3.

²⁰ *Ibid* at para 4.

²¹ *Ibid*.

²² *Ibid* at paras 122, 143.

²³ *Ibid* at para 64.

²⁴ *Supra* note 6 at paras 3–4.

²⁵ *Ibid* at para 4.

it.²⁶ The majority found that this risked some impoverished offenders receiving an effectively indeterminate sentence.²⁷

In total, six of the eight *Charter* cases were defence appeals (75.0%), with the remaining two being Crown appeals (25.0%).²⁸ That said, it should be noted that one case, *R v Morrison*, was counted twice in the dataset as it was a cross appeal.²⁹ Thus, it was counted both as a defence appeal and as a Crown appeal.

B. Defences

Just two of the 52 cases heard by the SCC were categorized under Defences.³⁰ In *R v Blanchard*, the accused was charged with failing to provide a breath sample.³¹ At trial, the judge accepted the defence argument of extreme intoxication akin to automatism and the Crown conceded the availability of the defence.³² The Crown conceded this again at the Court of Appeal.³³ The majority of the Court of Appeal, however, rejected the defence and held that the trial judge had erred in law by allowing it to proceed and convicted Blanchard.³⁴

The SCC allowed the defendant's appeal and noted that, considering the Crown's concessions in the courts below, the Court of Appeal had erred in raising and deciding the availability of the automatism defence.³⁵ The SCC restored the acquittal but limited their analysis to *Blanchard*, expressly refraining from deciding the availability of this defence for future cases.³⁶

C. Evidence

There were eight appeals heard by the SCC that were placed in the Evidence category.³⁷ Half of these appeals were defence-initiated, and the

²⁶ *Ibid* at paras 1–2.

²⁷ *Ibid* at para 3.

²⁸ See *Morrison*, *supra* note 6; *Le*, *supra* note 6; *Stillman*, *supra* note 6; *KJM*, *supra* note 6; *Doonanco*, *supra* note 6; *Boudreault*, *supra* note 6. See also *Poulin*, *supra* note 6; *Morrison*, *supra* note 6.

²⁹ *Supra* note 6.

³⁰ See *R v Gagnon*, 2018 SCC 41; *R v Blanchard*, 2019 SCC 9 [*Blanchard*].

³¹ *Supra* note 30 at para 1.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ See *R v Normore*, 2018 SCC 42 [*Normore*]; *R v Gubbins*, 2018 SCC 44 [*Gubbins*]; *R v Ajise*,

other half were Crown-initiated.³⁸ There were four successful appeals, all initiated by the Crown.

In *R v Gubbins*, the SCC articulated that breathalyzer maintenance records do not have to be disclosed by the Crown unless it can be established that they are relevant to the defence.³⁹ There had previously been conflicting jurisprudence regarding the treatment of breathalyzer maintenance records.⁴⁰ While the Court conceded that there may be instances where an accused will be able to establish relevancy, they also noted that there would be a high bar in achieving it.⁴¹

In coming to this conclusion, the Court distinguished between first-party and third-party records, which trigger different legal tests, and held that breathalyzer maintenance records fall into the latter category.⁴² They noted that the rules for third-party disclosure are meant to strike a balance between the right of an accused to make full answer and defence and the need to place limits on disclosure where necessary.⁴³ One such limit, according to the SCC, is to prevent “fishing expeditions” by the defence.⁴⁴ Ostensibly, requests for breathalyzer maintenance records may be looked at with some suspicion by the courts.

In *R v Cyr-Langlois*, the appellant had been charged with driving while over the legal limit.⁴⁵ At trial, however, defence counsel alleged that the accused had not been continuously observed by police for the requisite period leading up to the test, as was protocol.⁴⁶ Defence counsel further argued that the discontinuity in observation rebutted the presumption of accuracy in the breathalyzer results.⁴⁷

2018 SCC 51 [Ajjise]; *R v Cyr-Langlois*, 2018 SCC 54 [Cyr-Langlois]; *R v Quartey*, 2018 SCC 59 [Quartey]; *R v Calnen*, 2019 SCC 6 [Calnen]; *R v JM*, 2019 SCC 24 [JM]; *R v SH*, 2020 SCC 3 [SH].

³⁸ See *Gubbins*, *supra* note 37; *Ajjise*, *supra* note 37; *Quartey*, *supra* note 37; *SH*, *supra* note 37. See also *Normore*, *supra* note 37; *Cyr-Langlois*, *supra* note 37; *Calnen*, *supra* note 37; *JM*, *supra* note 37.

³⁹ *Supra* note 37 at paras 2, 29–33.

⁴⁰ *Ibid* at paras 30–31.

⁴¹ *Ibid* at para 57.

⁴² *Ibid* at paras 1–2.

⁴³ *Ibid* at para 29.

⁴⁴ *Ibid*.

⁴⁵ *Supra* note 37 at paras 6–7.

⁴⁶ *Ibid* at paras 8–9.

⁴⁷ *Ibid* at paras 1, 8.

In order to rebut the presumed accuracy of breathalyzer results, an accused must adduce evidence tending to show that malfunctioning or improper operation of the approved instrument casts doubt on the reliability of the results.⁴⁸ The SCC held that this claim had not been made out by the defence, as any claim of compromised reliability was based on abstract, rather than concrete, evidence.⁴⁹ While the Court acknowledged that theoretical evidence can, in some instances, cast doubt on reliability, arguments that are too speculative or mere hypothetical possibilities will fail to rebut the presumption.⁵⁰

1. Evidence: Past Sexual History

Evidence of Past Sexual History emerged as a subcategory of Evidence, with three cases revolving around the application of section 276 of the *Code*. Two of the three cases were defence appeals and one was a Crown appeal.⁵¹

The SCC, in *R v Goldfinch*, was tasked with determining whether an accused's evidence of past sexual history ought to be admitted under section 276 of the *Code*.⁵² The accused endeavored to include evidence establishing a "friends with benefits" relationship, which he alleged had existed between himself and the complainant.⁵³ The SCC dismissed the appeal and held that the evidence which the accused sought to admit did not meet the requirements of the section.⁵⁴

More specifically, the SCC held that the defence failed to meet the requirements of subsection 276(1) because the "friends with benefits" narrative served no purpose other than to bolster the inference that, because the complainant had consented in the past, she was more likely to have consented in the present case.⁵⁵ While the Court acknowledged that there are instances where evidence of previous sexual activity between parties is relevant, the evidence in *Goldfinch* was neither relevant under subsection 276(1), nor did its exclusion compromise the accused's right to make full

⁴⁸ *Ibid* at para 12.

⁴⁹ *Ibid* at paras 14–15.

⁵⁰ *Ibid* at paras 14, 16.

⁵¹ See *R v Barton*, 2019 SCC 33; *R v Goldfinch*, 2019 SCC 38 [*Goldfinch*]. See also *R v RV*, 2019 SCC 41 [*RV*].

⁵² *Supra* note 51.

⁵³ *Ibid* at para 3.

⁵⁴ *Ibid* at paras 4–5.

⁵⁵ *Ibid* at para 5.

answer and defence under subsection 276(2).⁵⁶

In *R v RV*, the SCC again considered an accused's application of section 276.⁵⁷ This time, it was in the context of allowing the defence to question the complainant, who was pregnant, on her sexual activity during the estimated period of conception.⁵⁸ At trial, the complainant had testified that she was a virgin prior to the alleged assault and the Crown relied on the complainant's pregnancy to establish the *actus reus* of the offence.⁵⁹ The accused sought to question the complainant on whether someone else could have caused her pregnancy.⁶⁰

While acknowledging that this line of questioning has the potential to tread on "dangerous ground", the SCC nevertheless determined that the accused's section 276 application ought to have been allowed.⁶¹ Since the Crown had relied on the pregnancy to establish guilt, the SCC noted that the presumption of innocence warrants an accused be allowed to test such "critical, corroborating physical evidence before it can be relied on to support a finding of guilt."⁶² The proposed questioning was relevant and any concerns as to the impact on the complainant could be mitigated by, for example, keeping the cross-examination narrow in scope.⁶³

Although the Court ruled that the accused's section 276 application should have been allowed, they ultimately found that there had been no miscarriage of justice because the cross-examination that had occurred at trial nevertheless allowed for an adequate challenge of the Crown's case.⁶⁴

2. Evidence: Search and Seizure

Although unreasonable search and seizure analyses are conducted under the umbrella of the *Charter*, they have been included here as a subset of the Evidence category. This is because we felt that the search and seizure issues raised in the cases, though analyzed in a *Charter* context, are of a fundamentally evidentiary nature. In total, three cases were placed in this category. One was a Crown appeal and the remaining two were defence

⁵⁶ *Ibid* at paras 47, 49, 61, 69.

⁵⁷ *Supra* note 51.

⁵⁸ *Ibid* at para 4.

⁵⁹ *Ibid* at paras 4, 7.

⁶⁰ *Ibid* at para 4.

⁶¹ *Ibid* at paras 7-8.

⁶² *Ibid* at para 7.

⁶³ *Ibid* at paras 6-8.

⁶⁴ *Ibid* at para 9.

appeals.⁶⁵ Among these cases, two related specifically to an appellant's reasonable expectation of privacy (REP) in digital content, in the context of child luring or child pornography charges.⁶⁶

In one such case, *R v Reeves*, the primary question before the Court was whether the appellant had a REP in a shared family computer.⁶⁷ The appellant's spouse contacted police after she discovered child pornography on the family computer.⁶⁸ The attending officer did not have a warrant, but the spouse consented to police entry into the home and to the subsequent seizure of the computer.⁶⁹

At trial, Reeves successfully argued improper seizure under section 8 of the *Charter*, sought exclusion of the evidence on the computer under section 24(2), and was acquitted.⁷⁰ On Crown appeal, the evidence was admitted and a new trial was ordered.⁷¹ Reeves appealed to the SCC, which allowed his appeal and restored his acquittal.⁷² The Court affirmed that he had a REP in the computer, which was not nullified by the consent of Reeves' wife.⁷³

Likewise, in *R v Mills*, the appellant had been exchanging messages online with an officer posing as an underage girl as part of a police sting.⁷⁴ Without prior authorization, the officer created screenshots of the conversations with Mills who was subsequently arrested after making arrangements for a sexual encounter.⁷⁵

At the SCC, the appellant claimed that his section 8 *Charter* rights had been infringed because the screenshots captured private communication in which he asserted a REP.⁷⁶ The Court reiterated that, in order to claim protection under section 8, an accused must show both a subjectively held and objectively reasonable expectation of privacy in the subject matter of

⁶⁵ See *R v Omar*, 2019 SCC 32. See also *R v Reeves*, 2018 SCC 56 [*Reeves*]; *R v Mills*, 2019 SCC 22 [*Mills*].

⁶⁶ See *Reeves*, *supra* note 65; *Mills*, *supra* note 65.

⁶⁷ *Supra* note 65 at paras 1–2.

⁶⁸ *Ibid* at para 6.

⁶⁹ *Ibid* at para 7.

⁷⁰ *Ibid* at para 3.

⁷¹ *Ibid*.

⁷² *Ibid* at paras 4–5.

⁷³ *Ibid* at para 4.

⁷⁴ *Supra* note 65 at para 2.

⁷⁵ *Ibid* at paras 2–3.

⁷⁶ *Ibid* at para 3.

the search.⁷⁷

While the Court found that Mills demonstrated a subjective expectation of privacy in the communication, they nevertheless found that his expectation was not objectively reasonable.⁷⁸ The Court further noted that section 8 jurisprudence in this area is predicated on police obtaining prior authorization, in order to avoid potential privacy breaches.⁷⁹ In *Mills*, however, that potential did not exist.⁸⁰ The police had created a fictitious child and waited for adult strangers to reach out to them.⁸¹ Key to this finding was the fact that the individual Mills was communicating with was both a child and a stranger to him.⁸²

The Court further elaborated on this concept by considering the normative standards regarding REP that had been articulated by the Court in *R v Tessling*.⁸³ Namely, the Court noted that adults cannot expect that their privacy standards extend to online communications between themselves and children who they do not know.⁸⁴ Both cases dealt with a topical issue that will likely continue to require clarification by the courts as technology increasingly brings individuals into contact with the criminal justice system.

D. Trial Procedure

13 of the 52 appeals were placed in the Trial Procedure section, making it the most populated section overall.⁸⁵ Eight of these were defence appeals, with the remaining five being Crown appeals.⁸⁶ Just one defence appeal

⁷⁷ *Ibid* at paras 12, 20.

⁷⁸ *Ibid* at paras 20, 22.

⁷⁹ *Ibid* at para 28.

⁸⁰ *Ibid*.

⁸¹ *Ibid* at paras 23–24.

⁸² *Ibid* at para 22.

⁸³ *Ibid* at para 23.

⁸⁴ *Ibid* at para 23.

⁸⁵ See *R v Awashish*, 2018 SCC 45 [Awashish]; *R v Beaudry*, 2019 SCC 2 [Beaudry]; *R v George-Nurse*, 2019 SCC 12 [George-Nurse]; *R v Snelgrove*, 2019 SCC 16 [Snelgrove]; *R v Myers*, 2019 SCC 18 [Myers]; *R v D'Amico*, 2019 SCC 23 [D'Amico]; *R v MRH*, 2019 SCC 46 [MRH]; *R v Kernaz*, 2019 SCC 48 [Kernaz]; *R v Kelsie*, 2019 SCC 17 [Kelsie]; *R v Wakefield*, 2019 SCC 26 [Wakefield]; *R v WLS*, 2019 SCC 27 [WLS]; *R v Shlah*, 2019 SCC 56 [Shlah]; *R v Thanabalasingham*, 2019 SCC 21 [Thanabalasingham].

⁸⁶ See *George-Nurse*, *supra* note 85; *Snelgrove*, *supra* note 85; *Myers*, *supra* note 85; *D'Amico*, *supra* note 85; *Kernaz*, *supra* note 85; *Wakefield*, *supra* note 85; *WLS*, *supra* note 85; *Shlah*, *supra* note 85. See also *Awashish*, *supra* note 85; *Beaudry*, *supra* note 85; *MRH*, *supra* note 85; *Kelsie*, *supra* note 85; *Thanabalasingham*, *supra* note 85.

succeeded at the SCC.⁸⁷ Three Crown appeals were successful.⁸⁸ Jury instruction constituted a significant trend within this section, with four of the 13 appeals arguing that the trial judge had given erroneous instructions.⁸⁹

The only successful defence appeal, *R v Myers*, is of significant precedential value, as the SCC took the opportunity to comprehensively articulate the bail review process (namely, the 90-day review) under section 525 of the *Code*.⁹⁰ Prior to this, there had been uncertainty with respect to the correct approach due to competing lines of authority.⁹¹

Among other things, the majority found that, contrary to arguments put forward by the Crown, unreasonable delay is not a threshold requirement for reviewing detention.⁹² In their analysis, the Court held that Parliament did not intend to narrow the application of section 525 reviews to only include cases of exceptional circumstances, based on unreasonable delay.⁹³ Indeed, the Court found that, while section 525 mandates that judges consider whether continued detention is justified, it merely states that they may consider whether there has been delay.⁹⁴

The Court then proceeded to set out the correct approach for section 525 reviews, which clarified that 90-day bail reviews are meant to be an automatic process.⁹⁵ Further, the obligation to apply for a section 525 hearing lies solely with the jailor or, in some provinces, the prosecution.⁹⁶ What is more, the application is automatically triggered at either the 30-day mark for summary offences or at the 90-day mark for indictable offences.⁹⁷ There is no contemporaneous obligation on a detainee to request their hearing to take place.⁹⁸

The Court further stipulated that the section mandates a judge to fix a date and give notice for the hearing, as soon as possible, upon receiving the

⁸⁷ See *Myers*, *supra* note 85.

⁸⁸ See *Thanabalasingham*, *supra* note 85; *MRH*, *supra* note 85; *Kelsie*, *supra* note 85.

⁸⁹ See *Snelgrove*, *supra* note 85; *MRH*, *supra* note 85; *Kelsie*, *supra* note 85; *Shlah*, *supra* note 85.

⁹⁰ *Supra* note 85 at para 15.

⁹¹ *Ibid* at para 14.

⁹² *Ibid* at para 29.

⁹³ *Ibid*.

⁹⁴ *Ibid* at para 32.

⁹⁵ *Ibid* at para 44.

⁹⁶ *Ibid* at para 34.

⁹⁷ *Ibid* at para 35.

⁹⁸ *Ibid* at para 44.

application from the jailor or prosecutor.⁹⁹ Additionally, the SCC reiterated that the overarching question at any section 525 hearing is whether the continued detention of the accused in custody is justified within the meaning of subsection 515(10) of the *Code*.¹⁰⁰

E. Sentencing

Just two of the 52 cases heard by the SCC categorized under Sentencing. One was Crown-initiated and the other was a defence appeal.¹⁰¹ Both appeals were successful. In the latter of the two cases, *R v Rafilovich*, the SCC was asked to answer the question of when, if ever, a sentencing judge should order a fine instead of forfeiture in respect to property that was used, with prior judicial authorization, to pay for the reasonable costs of an accused's legal defence.¹⁰²

In *Rafilovich*, the accused, whose assets had been seized under the proceeds of crime regime, applied under subsection 462.34(4)(c)(ii) of the *Code* to have some of his funds returned to pay for his legal expenses.¹⁰³ The accused later plead guilty and, after this, the Crown asked that the judge apply a discretionary fine in the amount that had been returned to Rafilovich.¹⁰⁴

The SCC clarified that it could not have been Parliament's intention to return funds for reasonable legal expenses on the one hand and, on the other, to allow for a fine in lieu of forfeiture of the same funds.¹⁰⁵ As such, the SCC held that, in most cases, ordering a fine instead of a forfeiture would undermine the intentions of Parliament.¹⁰⁶ However, they did outline several contexts where it could be appropriate.¹⁰⁷ For instance, where it is discovered that the accused did not have genuine financial need, where the released funds were inappropriately administered, or where there are significant changes of circumstance between the release of funds and the accused's sentencing.¹⁰⁸

⁹⁹ *Ibid* at para 39.

¹⁰⁰ *Ibid* at para 45.

¹⁰¹ See *Friesen*, *supra* note 3. See also *R v Rafilovich*, 2019 SCC 51 [*Rafilovich*].

¹⁰² *Supra* note 101 at para 7.

¹⁰³ *Ibid* at paras 1, 4.

¹⁰⁴ *Ibid* at paras 1, 15.

¹⁰⁵ *Ibid* at para 9.

¹⁰⁶ *Ibid* at paras 9–11.

¹⁰⁷ *Ibid* at paras 9–10.

¹⁰⁸ *Ibid*.

F. Post-Trial Procedure/Prison Law

Just two cases were included under the Post-Trial Procedure/Prison Law section: *R v Bird* was a defence appeal and was unsuccessful, while *R v Penunsi* was a Crown appeal which was successful.¹⁰⁹ Similar to *Myers*, *Penunsi* was significant because the SCC took the opportunity to clarify an area of law where there had previously been conflicting authority.¹¹⁰ Specifically, *Penunsi* answered the question of whether judicial interim release (JIR) provisions under Part XVI of the *Code*, and thereby arrest powers, apply to peace bond provisions.¹¹¹

The Court held that the statutory language in the *Code* demonstrated parliamentary intent for arrest and interim release provisions to apply to peace bond proceedings.¹¹² The JIR provisions in Part XVI were therefore found to be applicable to peace bonds, with modification, taking into account the policy objectives of “timely and effective justice, and minimal impairment of liberty.”¹¹³

G. Miscellaneous

The Miscellaneous section was the second most populated category and included a diverse range of themes.¹¹⁴ Many of the cases included in this section focused on issues that could have readily placed them into multiple categories. However, it was decided that cases would not be included in more than one section in order to avoid skewing the data.

In total, 12 cases were placed into the Miscellaneous section, nine of which were defence appeals and the remaining three being Crown-initiated.¹¹⁵ Among these cases, only five were successful at the

¹⁰⁹ See *R v Bird*, 2019 SCC 7. See also *R v Penunsi*, 2019 SCC 39 [*Penunsi*].

¹¹⁰ *Supra* note 109.

¹¹¹ *Ibid* at para 1.

¹¹² *Ibid* at paras 57, 59.

¹¹³ *Ibid* at para 61.

¹¹⁴ See *R v Youssef*, 2018 SCC 49 [*Youssef*]; *R v Vice Media*, 2018 SCC 53 [*Vice*]; *R v Culotta*, 2018 SCC 57 [*Culotta*]; *Fedyck*, *supra* note 1; *CJ*, *supra* note 2; *R v Jarvis*, 2019 SCC 10 [*Jarvis*]; *R v Demedeiros*, 2019 SCC 11 [*Demedeiros*]; *R v Larue*, 2019 SCC 25 [*Larue*]; *Fleming v Ontario*, 2019 SCC 45 [*Fleming*]; *R v James*, 2019 SCC 52 [*James*]; *R v Javanmardi*, 2019 SCC 54 [*Javanmardi*]; *R v Collin*, 2019 SCC 64 [*Collin*].

¹¹⁵ See *Youssef*, *supra* note 114; *Vice*, *supra* note 114; *Culotta*, *supra* note 114; *Demedeiros*, *supra* note 114; *Larue*, *supra* note 114; *Fleming*, *supra* note 114; *Javanmardi*, *supra* note 114; *Collin*, *supra* note 114; *Fedyck*, *supra* note 1. See also *Jarvis*, *supra* note 114; *James*, *supra* note 114; *CJ*, *supra* note 2.

SCC.¹¹⁶ Two cases stand out for their precedential impact.

First, in *R v Jarvis*, a teacher was discovered to be recording female students using a camera pen.¹¹⁷ While the girls were fully clothed and in a public space, the recordings were largely focused on their upper bodies, particularly their breasts.¹¹⁸ Subsequently, Jarvis was charged with voyeurism under subsection 162(1) of the *Code*.¹¹⁹ The only issue before the SCC was whether the girls had a REP for the purposes of subsection 162(1).¹²⁰ In their analysis, the Court took a broad and contextual approach to answer in the affirmative.¹²¹

For the purposes of subsection 162(1) of the *Code*, the Court acknowledged that the students being recorded were in circumstances where they could reasonably expect not to be the subjects of such recordings, giving rise to a REP.¹²² The Court subsequently provided a non-exhaustive list of factors for determining whether a person who is observed or recorded is in circumstances that give rise to a REP.¹²³

Finally, though *Fleming v Ontario* was a civil action against the Ontario government and several named officers of the Ontario Provincial Police (OPP), the Court took the opportunity to decide on an important ancillary police powers issue.¹²⁴ In *Fleming*, the arrest of the accused was a tactical decision by police to pre-empt possible violent clashes at a protest.¹²⁵ Fleming was arrested for breaching the peace.¹²⁶

The SCC found that the accused's arrest was not authorized by law and clarified that the ancillary powers doctrine does not give police the power to arrest someone, who is acting lawfully, for the purpose of preventing a potential breach of the peace.¹²⁷ After applying the ancillary powers doctrine to the facts of the case, the SCC found that such a drastic measure, which severely restricted the liberty of a law-abiding individual, was not reasonably

¹¹⁶ See *Jarvis*, *supra* note 114; *Fleming*, *supra* note 114; *James*, *supra* note 114; *Jawanmardi*, *supra* note 114; *CJ*, *supra* note 2.

¹¹⁷ *Supra* note 114 at paras 7, 22.

¹¹⁸ *Ibid* at para 10.

¹¹⁹ *Ibid* at paras 12, 20.

¹²⁰ *Ibid* at paras 4, 71.

¹²¹ *Ibid* at paras 91-92.

¹²² *Ibid* at para 28.

¹²³ *Ibid* at para 29.

¹²⁴ *Supra* note 114 at para 6.

¹²⁵ *Ibid* at paras 1, 9-18.

¹²⁶ *Ibid* at para 6.

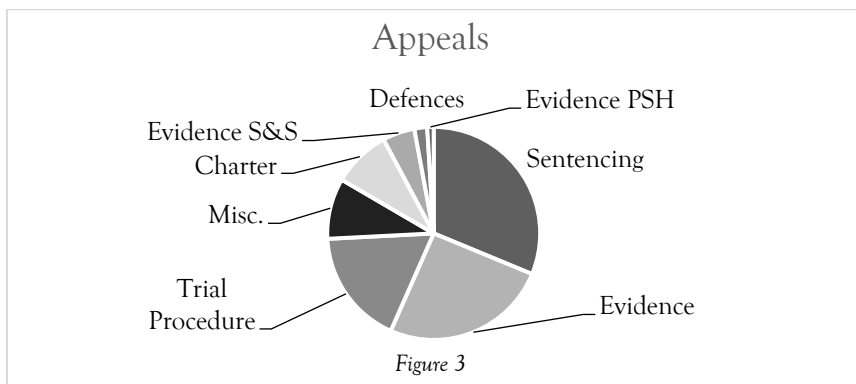
¹²⁷ *Ibid* at paras 7-8.

necessary for the fulfillment of their police duties.¹²⁸ The Court further noted that other, less-intrusive powers already exist at common law that would have been capable of preventing breaches of the peace.¹²⁹

VI. CATEGORIES: MBCA

The thematic categories differed slightly for the MBCA from their SCC counterparts. Whereas the SCC cases yielded seven categories, the MBCA cases yielded six. Despite this, the categories remained largely the same. There were an insufficient number of cases to form a Post-Trial/Prison Law category, as was done for the SCC jurisprudence. All of the remaining thematic categories represented at the SCC level are repeated here.

Sentencing formed the largest category, accounting for 31.1% of the total (n=32/103). Evidence had the next highest proportion at 25.2% (n=26/103). The Past Sexual History and Search and Seizure subcategories comprised a relatively small proportion of the whole at 0.97% (n=1/103) and 4.9% (n=5/103), respectively. However, when Evidence and its subcategories are taken collectively, they account for the same proportion of the dataset as Sentencing. The third most populous category was Trial Procedure, which included 17.5% (n=18/103) of the total cases. These three categories were the largest by a significant margin. The largest category after Trial Procedure was Miscellaneous, accounting for 9.7% (n=10/103). This was followed by *Charter* with 8.7% (n=9/103) and Defences with 1.9% (n=2/103).



¹²⁸ *Ibid* at para 88.

¹²⁹ *Ibid* at paras 91-92.

VII. CASE ANALYSIS: MBCA

This section takes a more in-depth look at the MBCA cases that were recorded. The sample was comprised of 103 cases. Generally, cases were highlighted for their jurisprudential impact and particular attention was paid to those cases which altered, stated, or restated tests and criteria relied upon by practitioners. In other sections, cases were highlighted as demonstrative of a wider trend in the jurisprudence or because they were representative of many other cases in the same category.

A. Charter

The Charter section includes cases which focused primarily on *Charter* issues, with the exception of search and seizure issues under section 8. These were given their own sub-category under the Evidence heading. A total of nine cases were included, making up a relatively small proportion of the total case volume (8.7%). A diverse range of *Charter* rights were examined by the Court, but two dominant threads emerged, appearing in over three quarters of the cases. The first was arbitrary detention and the second was unreasonable delay.

Arbitrary detention claims appeared with the highest frequency, being considered¹³⁰ by the Court in five of the nine cases. The jurisprudential relevance of these cases is limited, as the issues revolved around the specific facts of each case, rather than raising wider issues of substantive law. Despite the relative prevalence of section 9 related arguments, success was low for appellants; the only successful arbitrary detention argument was advanced by the Crown in *R v Omeasoo et al.*¹³¹

Officers in that case were investigating a reported road-rage incident involving firearms.¹³² They spotted the two accused at a restaurant and questioned them briefly, despite the two accused conforming to only a couple aspects of the witness description that the officers had been given.¹³³ The officers' questions and quick look into the vehicle disclosed nothing

¹³⁰ See *R v Tummillo*, 2018 MBCA 95; *R v S(WEQ)*, 2018 MBCA 106; *R v Omeasoo et al.*, 2019 MBCA 43 [*Omeasoo*]; *R v Clemons*, 2020 MBCA 4 [*Clemons*]; *R v Ong*, 2020 MBCA 14.

¹³¹ *Ibid.*

¹³² *Ibid* at para 5.

¹³³ *Ibid* at paras 5–10.

and the two accused were told they were free to go.¹³⁴ However, one of the officers then went to use the restaurant's bathroom, which he had just watched one of the accused leave from.¹³⁵ He discovered a bullet in the urinal.¹³⁶ On this basis, the accused were arrested and searched, turning up both guns and drugs.¹³⁷

The trial judge found a number of *Charter* breaches.¹³⁸ On the issue of arbitrary detention, it was held that, even after the finding of the bullet, the officers only had grounds for investigative detention, not an arrest.¹³⁹ The Court of Appeal found that the trial judge erred in this respect by failing to consider the evidence collectively and in context.¹⁴⁰ Though the Crown's appeal was allowed, it raised a number of other issues as well.¹⁴¹ As such, it cannot be said that this success was rooted in the section 9 argument alone. It is noteworthy, however, given that none of the remaining arbitrary detention appeals, all made by the defence, were successful.

The second dominant thread, unreasonable delay, appeared in four of the nine cases.¹⁴² The most significant of these is *R v KGK*, where the Court of Appeal considered how the time taken by a trial judge in rendering a decision is to be accounted for under the unreasonable delay framework established in *Jordan*. There was significant disagreement within the Court of Appeal, with each appellate judge providing reasons that differed from the others in some way. Ultimately, Cameron and Monnin JJA both concluded that the time it takes a judge to render a decision is subject to section 11(b) of the *Charter*, but not to the 18 and 30-month ceilings set out in *Jordan*.¹⁴³ In a lengthy and detailed dissent, Hamilton JA argued, among other things, that the ceilings should apply.¹⁴⁴

¹³⁴ *Ibid* at para 10.

¹³⁵ *Ibid* at paras 8, 11.

¹³⁶ *Ibid* at para 11.

¹³⁷ *Ibid* at paras 5–12.

¹³⁸ *Ibid* at para 17.

¹³⁹ *Ibid* at para 17.

¹⁴⁰ *Ibid* at para 39.

¹⁴¹ *Ibid* at paras 4, 19–25.

¹⁴² See *Tumillo*, *supra* note 130; *R v KGK*, 2019 MBCA 9 [KGK]; *R v Giesbrecht*, 2019 MBCA 35; *Clemons*, *supra* note 130.

¹⁴³ *Ibid* at paras 173, 286.

¹⁴⁴ *Ibid* at paras 59–172.

B. Defences

Defences comprised the smallest full category that was compiled, with only two cases comprising 1.9% of the dataset. In both cases, the Court of Appeal was called upon to review a trial judge's dismissal of an accused's arguments. In *Spicer*, the accused was convicted of dangerous driving causing death.¹⁴⁵ The defence tried to argue that he was distracted by a vehicle in an oncoming lane, which was allegedly flashing its high beams.¹⁴⁶ Interestingly, the Court did not dismiss the argument in and of itself. Rather, the Crown's reliance on expert evidence and the testimony of another driver who saw no flashing high-beams led them to conclude that the trial judge had sufficient grounds for dismissing the argument.¹⁴⁷ The only other case assigned to this category, *CDJM*, dealt with an attempted self-defence argument in the context of a boy assaulting a peer with a machete at school.¹⁴⁸ Not surprisingly, the argument failed.¹⁴⁹

C. Evidence

The Evidence category comprises almost one third of the total caseload, accounting for 32 of the 103 cases recorded. For thematic reasons, two further sub-categories were included within Evidence: Search and Seizure and Evidence of Past Sexual History. These numbers demonstrate that evidentiary issues continue to occupy a significant amount of the Court's time. Many of these appeals went beyond mere challenges to weight, with the Court of Appeal addressing many issues of substantive law. Furthermore, several appeals asked the Court to examine the application of widely used evidentiary rules and tests.

In a rare example of a successful defence appeal, the Court in *Dowd* was asked to engage with the rule in *Browne v Dunn*.¹⁵⁰ The issue was whether the use of the rule in *Browne v Dunn* against the accused by the trial judge, without an objection by the Crown or input from counsel, resulted in trial unfairness.¹⁵¹ Dowd was accused of sexual assault and sexual interference against a child at a bonfire party.¹⁵² It was not disputed that Dowd had taken

¹⁴⁵ *R v Spicer*, 2019 MBCA 117 [*Spicer*].

¹⁴⁶ *Ibid* at para 6.

¹⁴⁷ *Ibid* at paras 9–11.

¹⁴⁸ *R v CDJM*, 2019 MBCA 52 [*CDJM*].

¹⁴⁹ *Ibid* at paras 6–10.

¹⁵⁰ *R v Dowd*, 2020 MBCA 23 [*Dowd*].

¹⁵¹ *Ibid* at para 1.

¹⁵² *Ibid* at para 2.

the complainant to his motor-home.¹⁵³ However, he denied the allegations, testifying that he had taken the complainant to use the bathroom at the request of another adult at the party, either Mrs. K or Mrs. M.¹⁵⁴ Neither Mrs. K nor Mrs. M were cross-examined on this point. Neither party raised or addressed it at trial, but the trial judge found a breach of the rule in her reasons, drawing two negative inferences against the accused for failing to call the witnesses.¹⁵⁵ The accused was convicted and sentenced.¹⁵⁶

The Court of Appeal found that unfairness had occurred as a product of the trial judge's actions.¹⁵⁷ In these circumstances, the trial judge's unilateral application of the rule, without informing either party and allowing them to make submissions, amounted to an ambush at trial.¹⁵⁸ This is precisely what the rule in *Browne v Dunn* was meant to avoid.¹⁵⁹ Accordingly, the Court set aside the convictions and ordered a new trial.¹⁶⁰

Lewin deals with the application of the commonly raised test established in *R v W(D)*, [1991] 1 SCR 742, 12 WBC (2d) 551.¹⁶¹ In *Lewin*, the accused was able to successfully challenge the trial judge's *W(D)* analysis, securing a new trial.¹⁶² This is remarkable because much of the analysis relied on credibility findings, which are owed substantial deference on appeal. The accused took issue with the trial judge's application of the third step of the *W(D)* analysis, which requires the trier of fact to determine whether the accepted evidence is sufficient to establish guilt beyond a reasonable doubt.¹⁶³ The Court found that the trial judge had erred in law by relying on evidence in the third stage of the test that she had explicitly rejected at an earlier stage.¹⁶⁴ The effect of the error was to shift the onus onto the accused.¹⁶⁵ As the Court states in its reasons, "[t]he lack of credibility of an accused does not equate to proof of guilt beyond a reasonable doubt."¹⁶⁶

¹⁵³ *Ibid* at para 3.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid* at para 7.

¹⁵⁶ *Ibid* at para 3.

¹⁵⁷ *Ibid* at paras 30, 32.

¹⁵⁸ *Ibid*.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid* at para 41.

¹⁶¹ *R v Lewin*, 2020 MBCA 13 [*Lewin*].

¹⁶² *Ibid* at paras 3–4.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid* at para 21.

¹⁶⁵ *Ibid* at para 22.

¹⁶⁶ *Ibid* at para 22.

For counsel looking to appeal a decision grounded in a W(D) analysis, this is definitely a case to keep in mind.

1. Evidence: Past Sexual History

In the Supreme Court jurisprudence discussed above, the admission of evidence concerning the past sexual history of sexual offence complainants was identified as an emerging theme. While such issues appeared before the Supreme Court in a noticeable quantity (5.8%), there was only one such case reported before the Manitoba Court of Appeal. In *Catellier*, the Court of Appeal upheld the decision of the trial judge dismissing the accused's application to cross-examine the complainant on her past sexual history.¹⁶⁷ In point of fact, the trial judge did not actually dismiss the accused's application outright, as he was allowed to cross-examine on some of the complainant's past sexual history.¹⁶⁸ Though the trial judge permitted this insofar as it was necessary to advance the defence of honest but mistaken belief in consent, undermine the complainant's credibility, and demonstrate a motive to fabricate, she found that much of the information that the accused sought to elicit served only to advance the "twin myths" regarding sexual assault complainants.¹⁶⁹ In upholding her decision, the Court of Appeal noted that the trial judge had explained why she was dismissing each of the accused's requests and that she adequately balanced the competing interests of the right to full answer and defence with the "complainant's privacy and dignity, as well as the danger of prejudice."¹⁷⁰

2. Evidence: Search and Seizure

Section 8 issues formed a small proportion of the dataset, with five cases comprising 4.9% of the total. Even within the Evidence category, the Search and Seizure subcategory only amounts to 15.6% of cases.

The Court of Appeal continued to fill in the boundaries of REP in *Okemow*.¹⁷¹ While it is trite to say that there is a reasonable expectation of privacy in a residence, the issue before the Court was whether the accused had a REP in a house that he neither owned nor resided at.¹⁷² Upon reviewing the evidence, the Court found that, although the accused had a

¹⁶⁷ *R v Catellier*, 2018 MBCA 107 [Catellier].

¹⁶⁸ *Ibid* at para 4.

¹⁶⁹ *Ibid* at paras 3-4.

¹⁷⁰ *Ibid* at para 5.

¹⁷¹ *R v Okemow*, 2019 MBCA 37 [Okemow].

¹⁷² *Ibid* at paras 16-21.

subjective expectation of privacy, it lacked objective reasonableness.¹⁷³ The trial judge's ruling was upheld and the accused was found to lack the standing to advance a section 8 claim.¹⁷⁴ Similarly, the warrantless search of the residence conducted by police was determined to be lawful.¹⁷⁵

The MBCA had the opportunity to clarify the process for disclosure of information, from a confidential informant, to a judge or justice authorizing a search warrant in *Pilbeam*.¹⁷⁶ The accused in that case was convicted of possession for the purpose of trafficking after police executed a search warrant for his residence, yielding cocaine and drug paraphernalia.¹⁷⁷ The Information to Obtain (ITO) was based on the information of a confidential informant.¹⁷⁸ At trial, the accused challenged the search warrant under section 8, arguing that the grounds relied on by the officer were objectively insufficient.¹⁷⁹ He also argued that there were drafting deficiencies in the ITO that were contrary to the officer's duty of full, fair and frank disclosure of material facts.¹⁸⁰ Following a *Garofoli* review, the trial judge upheld the search warrant.¹⁸¹

After reviewing the record, the Court determined that the ITO established objectively reasonable grounds.¹⁸² The drafting deficiencies alleged by the accused related to a number of facts that the officer explicitly withheld from the authorizing justice, citing the need to protect the identity of the confidential informant.¹⁸³ In addressing this argument, the Court took the opportunity to delineate its expectations in terms of disclosure of information relating to a confidential informant within an ITO.¹⁸⁴ The fundamental principle that the Court distilled from the existing *Garofoli* jurisprudence is that "the state cannot have its cake and eat it too", as the judge or justice authorizing a search warrant is included in the circle of informant privilege.¹⁸⁵ Officers must disclose all material information from

¹⁷³ *Ibid* at paras 37, 43.

¹⁷⁴ *Ibid* at para 43.

¹⁷⁵ *Ibid* at para 3.

¹⁷⁶ *R v Pilbeam*, 2018 MBCA 128 [*Pilbeam*].

¹⁷⁷ *Ibid* at para 2.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid* at paras 2-3.

¹⁸⁰ *Ibid* at para 23.

¹⁸¹ *Ibid* at paras 3-4, 23.

¹⁸² *Ibid* at para 22.

¹⁸³ *Ibid* at para 31.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid* at para 28.

or about a confidential informant in an ITO.¹⁸⁶ Redaction of information, in collaboration with the Crown, will occur afterward in order to protect the informant before disclosure to the defence is made.¹⁸⁷

Despite this, the Court qualified its position by stating that the failure of the police to follow this approach will not, alone, form grounds for a successful challenge.¹⁸⁸ It is not entirely clear how this qualification is to be read with the absolute language used by the Court in describing the disclosure obligations of police, especially given that the ITO was upheld in this case. The Court seemed to indicate that, although the manner of disclosure in this case should not be commonplace, this was an exceptional instance where none of the withheld information was material.¹⁸⁹ The success of this attempt by the Court to bring greater clarity to this area of the law remains to be seen.

D. Trial Procedure

Trial Procedure is a broad category in which we attempted to capture all of those matters relating to the way that a trial is conducted, rather than issues of the actual evidence or arguments before the court. Included are cases raising a range of issues, such as jurisdiction, jury charges, prejudice and admission of fresh evidence. Though not nearly as significant in number as evidence or sentencing cases, the Trial Procedure category still accounts for a large proportion of the dataset, with 18 cases amounting to 17.5%. Thus, it is clear that trial conduct itself is a reasonably strong ground of appeal.

In some cases, the Court of Appeal was called upon to review its own conduct and the conduct of members of the judiciary, rather than their rulings. In both *Van Wissen* and *Hermtier*, Justice Monnin was confronted with motions to recuse.¹⁹⁰ In *Woroniuk*, the Court allowed an appeal by the accused regarding the imposition of a curfew condition as part of his sentence.¹⁹¹ The sentencing judge had attached the condition after adjourning and placing a private call to the preparer of the pre-sentence report.¹⁹² The judge acknowledged that there was no basis in law for this,

¹⁸⁶ *Ibid* at para 31.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid*.

¹⁸⁹ *Ibid* at paras 30, 32.

¹⁹⁰ *R v Van Wissen*, 2018 MBCA 100; *R v Hermtier*, 2019 MBCA 25.

¹⁹¹ *R v Woroniuk*, 2019 MBCA 77 [*Woroniuk*].

¹⁹² *Ibid* at para 3.

but he did so regardless.¹⁹³ Though the actions of the sentencing judge were found to be well-intentioned, the Court made it clear that this conduct was not to be condoned.¹⁹⁴ The Court further stressed that judges may only rely on the facts put before them, unless judicial notice can be taken.¹⁹⁵ They even went so far as to characterize what the trial judge had done as a “blatant disregard of a basic principle of justice”, causing “judicial resources to be expended to correct an error that the sentencing judge knew full well he was committing.”¹⁹⁶

Immigration consequences appear to be forming the basis of an increasing number of appeals, at least from the words of Beard JA in the introductory paragraph of *Cerna*.¹⁹⁷ There was some evidence of such a trend in the reported cases. The appeal in *Singh* and some of the cases logged under Sentencing, which are explored below, were all grounded in immigration consequences.¹⁹⁸ In *Cerna*, the accused appealed his convictions and made motions to withdraw a guilty plea and introduce fresh evidence.¹⁹⁹ He argued that the failure of trial counsel to advise him of the full consequences of a guilty plea, resulting in a non-appealable deportation order, amounted to a miscarriage of justice.²⁰⁰ The Court accepted the accused’s ignorance of the immigration consequences, as this was supported by the trial transcript and an affidavit by trial counsel.²⁰¹ Rather, the issue raised by the Crown was whether the accused had demonstrated subjective prejudice arising as a result.²⁰²

Despite a strong case on the part of the Crown, the Court found that prejudice had occurred and allowed the withdrawal.²⁰³ There was sufficient evidence to establish that the accused might have pled differently or on different conditions.²⁰⁴ In so ruling, the Court highlighted that the accused is not required to have a viable defence.²⁰⁵ This leaves the door open to “hail

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid* at para 5.

¹⁹⁵ *Ibid* at para 4.

¹⁹⁶ *Ibid* at paras 4, 6.

¹⁹⁷ *R v Cerna*, 2020 MBCA 18 at para 1 [*Cerna*].

¹⁹⁸ *R v Singh*, 2019 MBCA 105.

¹⁹⁹ *Supra* note 197 at paras 1-4.

²⁰⁰ *Ibid* at paras 1-3.

²⁰¹ *Ibid* at para 30.

²⁰² *Ibid* at para 31.

²⁰³ *Ibid* at para 50.

²⁰⁴ *Ibid* at para 49.

²⁰⁵ *Ibid* at para 38.

Mary” defences where an accused credibly demonstrates a reasonable possibility that he or she may have acted differently with awareness of the full consequences.²⁰⁶

E. Sentencing

Sentencing accounted for the same amount of the total as Evidence and its sub-categories, with 32 cases comprising 31.1% of the caseload. Sentencing also offered relatively fertile ground for the MBCA to render substantive rulings. Notably, this is where the defence enjoyed the greatest success on appeal; five of the 13 successful defence appeals were sentencing appeals, the highest proportion of success by category.

The Court added to the jurisprudence on some of the fundamental aspects of sentencing in several cases. In *R v Fehr*, the Court upheld a harsh sentence that significantly departed from the established range.²⁰⁷ The accused was sentenced to three years of incarceration for obstruction of justice, which she pled guilty to as part of a deal with the Crown.²⁰⁸ This was done to avoid a charge of counselling to commit murder for trying to contract the killing of a child to avoid making support payments.²⁰⁹ The Court ruled that, in recognizing the underlying plot as aggravating, the sentencing judge had considered the circumstances of the offence, not the higher counselling to commit charge, and therefore no error was made.²¹⁰ In CCC, the Court applied recent Supreme Court jurisprudence on collateral consequences to find that vigilante violence by the partner of a sexual assault complainant against the accused should have been considered by the sentencing judge.²¹¹ However, in this case, the error did not impact the otherwise appropriate sentence and the appeal was dismissed.²¹²

In both *Yare* and *Norris*, the Court considered immigration consequences in the collateral consequence context.²¹³ In *Yare*, the Crown appealed the sentence imposed because the judge, after finding the appropriate sentence to be one year of imprisonment, reduced the sentence to less than 6 months so that the accused would not face certain deportation

²⁰⁶ *Ibid* at para 49.

²⁰⁷ *R v Fehr*, 2018 MBCA 131 [*Fehr*].

²⁰⁸ *Ibid* at paras 1–2.

²⁰⁹ *Ibid* at para 6.

²¹⁰ *Ibid* at para 21.

²¹¹ *R v CCC*, 2019 MBCA 76 [CCC] at para 32.

²¹² *Ibid* at paras 36, 40.

²¹³ *R v Yare*, 2018 MBCA 114 [*Yare*]; *R v Norris*, 2019 MBCA 101 [*Norris*].

consequences.²¹⁴ In *Norris*, the accused appealed for a one-day reduction on the sentence of one of his charges, so that immigration consequences would not be triggered, as the judge had not been fully informed of these consequences at the time.²¹⁵ As noted above, immigration consequences appear to be forming the basis of an increasing number of appeals. Interestingly, the appeals in both *Yare* and *Norris* were allowed. All of this suggests that the judiciary is still uncertain of how immigration consequences are to figure into legal decision making.

A number of cases also raised issues of exceptional circumstances. In *Dalkeith-Mackie*, the Court overturned a sentencing judge's finding of exceptional circumstances.²¹⁶ The accused participated in a convenience store robbery with a co-accused.²¹⁷ The sentencing judge made his finding on the grounds that the accused was only the lookout, was participating to fuel a drug addiction, did not participate in assaulting the clerk, and had been highly successful in rehabilitative programming since the offence.²¹⁸ However, in the view of the MBCA, these circumstances did not meet the high bar of exceptionality.²¹⁹ As a direct result of this decision, the Court would be asked to revisit exceptional circumstances in *R v Grewal*.²²⁰

The accused in *Grewal* alleged that the law surrounding exceptional circumstances was uncertain because the decision of the Court in *Dalkeith-Mackie* conflicted with past MBCA jurisprudence.²²¹ He argued that the Court should reverse the sentencing judge's refusal to find exceptional circumstances.²²² Like the accused in *Dalkeith-Mackie*, the accused in *Grewal* had pled guilty to robbery, which was committed to fuel a drug addiction, and had performed very well in rehabilitative programming afterward.²²³ In considering the accused's assertion, the Court came to the conclusion that the decision in *Dalkeith-Mackie* had not altered the law on this topic and was consistent with past decisions.²²⁴ In advancing his argument, the accused

²¹⁴ *Ibid* at paras 10-13.

²¹⁵ *Supra* note 213 at paras 3-4.

²¹⁶ *R v Dalkeith-Mackie*, 2018 MBCA 118 [*Dalkeith-Mackie*].

²¹⁷ *Ibid* at para 4.

²¹⁸ *Ibid* at para 27.

²¹⁹ *Ibid* at paras 28-29.

²²⁰ *R v Grewal*, 2019 MBCA 108 [*Grewal*].

²²¹ *Ibid* at para 13.

²²² *Ibid* at paras 9, 13.

²²³ *Ibid* at paras 2, 5.

²²⁴ *Ibid* at paras 14-16.

had conflated the parameters of a finding of exceptional circumstances with the application of those parameters in a given case.²²⁵ In doing so, the Court set out a succinct summary of the law regarding exceptional circumstances, which will hopefully provide greater clarity on this subject going forward.

In addition to addressing issues of established law and principles, the Court also addressed some novel ones. Such an example can be found in *JHS*.²²⁶ The accused in that case alleged a number of errors on the part of the sentencing judge, but recognized the possibility that none would be sufficient to ground appellate intervention.²²⁷ Consequently, he argued that the Court ought to look at the cumulative effect of the errors, which together amounted to a reviewable error.²²⁸ The Court declined to do so, finding no authority supporting the assertion that a series of non-reviewable errors can become reviewable when considered in aggregate.²²⁹

F. Miscellaneous

This is the final category of cases for discussion. Whereas other categories were created based on salient themes that emerged from the associated cases, this one was intended as a catchall for those cases which did not fit anywhere else. Some of these cases had very narrow ratios, such as commenting on the essential elements of a particular offence. Others were too broad, with several issues, which could have potentially fallen in different categories, but no dominant one. Some cases were also very brief, providing too little detail to form a basis for discussion. The ‘Miscellaneous’ category contains ten cases, forming 9.7% of the dataset.

A prime example of a narrow case is *Gowenlock*.²³⁰ This case may be of particular interest to practitioners, as it deals with the ability of judges to order costs against counsel personally. In this case, the pre-trial judge ordered costs against counsel due to missed timelines.²³¹ This was the first instance of a challenge to such an order, made pursuant to the *Criminal Proceedings Rules of the Manitoba Court of Queen’s Bench*, SI/2016-34.²³² Consequently, *amicus* had to be appointed and the Court embarked on

²²⁵ *Ibid* at para 16.

²²⁶ *R v JHS*, 2019 MBCA 24 [*JHS*].

²²⁷ *Ibid* at paras 15-16.

²²⁸ *Ibid* at para 16.

²²⁹ *Ibid* at para 19.

²³⁰ *R v Gowenlock*, 2019 MBCA 5 [*Gowenlock*].

²³¹ *Ibid* at para 2.

²³² *Ibid* at paras 2, 4-5.

setting out the framework and tests for such orders.²³³ The decision is rather lengthy, though the Court summarizes a five-point procedure to be followed in determining whether an order should be made.²³⁴ Hopefully this test will see little use. However, counsel who find themselves in the position of contesting an order for costs personally will find this helpful.

Van Wissen No 2 is illustrative of the opposite sort of case.²³⁵ The accused included 24 grounds in his notice of appeal.²³⁶ Ultimately, the Court reduced these to 4 issues: admission of evidence, jury instruction, unreasonable verdict, and whether the trial was rendered unfair by the conduct of the trial judge.²³⁷ Given the varied nature of the issues raised, there was no particular category where this case clearly belonged, nor was any one issue of particular legal significance. Incidentally, the appeal was dismissed on all grounds.²³⁸

It should also be noted that immigration consequences appeared again in this category. In *Tsui*, the accused appealed the decision of a summary conviction appeal (SCA) judge who denied his motion to extend his time to appeal.²³⁹ The accused was an international student who had plead guilty to impaired driving.²⁴⁰ Afterwards, he was unable to renew his study permit, as he had been deemed inadmissible to Canada.²⁴¹ He also failed to have his inadmissibility reviewed and had a refugee claim rejected.²⁴² Before the SCA judge, the accused expressed the basis of his appeal as being a miscarriage of justice arising from a guilty plea that was not fully informed.²⁴³ The SCA judge denied his motion, finding that the accused had only initiated the appeal process after pursuing all other immigration options and failing.²⁴⁴ This led the SCA judge to conclude that the accused never possessed a bona fide intention to seek leave to appeal.²⁴⁵ In the end,

²³³ *Ibid* at para 5.

²³⁴ *Ibid* at para 100.

²³⁵ *R v Van Wissen*, 2018 MBCA 110 [*Van Wissen No 2*].

²³⁶ *Ibid* at para 3.

²³⁷ *Ibid*.

²³⁸ *Ibid* at para 159.

²³⁹ *R v Tsui*, 2019 MBCA 41 [*Tsui*].

²⁴⁰ *Ibid* at para 2-3.

²⁴¹ *Ibid* at para 3.

²⁴² *Ibid* at paras 2-6.

²⁴³ *Ibid* at para 7.

²⁴⁴ *Ibid* at para 9.

²⁴⁵ *Ibid* at paras 7-9.

the MBCA found that the accused had not raised an arguable matter of substance and dismissed the appeal.²⁴⁶

VIII. CLOSING THOUGHTS AND CONCLUSION

Thus far, we have tried to present a mainly descriptive view of SCC and MBCA jurisprudence. The methods used to gather and present that data were outlined in detail. A broad statistical overview was then presented, followed by a description of the thematic categories that were developed, and some of the most significant cases that were placed in each. Before concluding, however, there were several trends that emerged from the data and jurisprudence which bear further comment.

Looking first at the statistical trends, a number of interesting patterns emerged. The defence was more active than the Crown in bringing appeals before both the SCC and the MBCA. Despite this, and also at both levels, the Crown enjoyed notably greater rates of success as both an appellant and a respondent. This trend manifested more extremely at the MBCA than at the SCC, as 66.0% of the appeals heard by the SCC were advanced by the defence, compared to 92.2% at the MBCA. At the same time, the defence only obtained successful outcomes in 20.8% of the appeals heard by the SCC and in 12.6% of those heard by the MBCA. The disparity between Crown and defence success decreases only nominally when each party's success rates on their own appeals are considered.

This data clearly demonstrates that there is a higher degree of risk on appeal for the defence than for the Crown. What the data does not demonstrate is the reason for this. It could be a result of asymmetry in resources and tactical objectives between these parties. However, it may also potentially be indicative of systemic disadvantage against accused persons. We do not purport here to provide an answer to this question. Rather, we note the significance of this trend and suggest that it is worthy of further study.

There were also thematic similarities in the jurisprudence between the two courts. Proportionally, the three most significant types of cases before the SCC were, in descending order, Trial Procedure, Miscellaneous, and Evidence. Together, these categories accounted for 75.1% of all of the cases heard. At the MBCA, the three most significant categories were, also in descending order, Sentencing, Evidence, and Trial Procedure. These

²⁴⁶ *Ibid* at para 19.

categories accounted for 87.4% of the cases heard. Thus, the preponderance of the courts' time has been occupied by a relatively narrow set of issues. Notably, there was also significant overlap in the predominant types of issues before the SCC and MBCA. Evidence and Trial Procedure cases constituted large proportions of the dataset before both courts. At the same time, however, there was some divergence: sentencing accounted for 31.1% of the cases before the MBCA, but only 3.8% before the SCC.

It is no coincidence that evidence and trial procedure issues are so frequently appealed, given their technical and detail-specific nature. Similarly, sentencing is arguably one of the more subjective tasks undertaken by courts. Why sentencing appeals are so strongly represented at the MBCA, relative to the SCC, is unclear.

Moving on to the jurisprudence itself, social context emerged as an underlying consideration in many of the decisions. Many of the cases that were selected for further analysis shared an undercurrent that brought social context into the courts' decision-making. Both the SCC and the MBCA appeared to dedicate considerable time to discussions of racial profiling, the disproportionate impacts of certain sentences on the impoverished, immigration consequences, the use of complainants' past sexual history, and the scope of privacy expectations. To some extent, this pattern may be reflective of the social debates underway in wider Canadian society. Conclusions of this nature are beyond the scope of this paper, but the increased attention paid to social factors in these courts' decisions is an important trend to be aware of.

Our aim in creating this paper and the associated documents was to both enhance the literature in this area and provide some potentially useful information and tools for practitioners. Each year, the courts generate veritable mountains of jurisprudence. Sifting through it to find the most valuable needles in the haystack, without losing sight of the overall shape and context of the haystack itself, is no small task. We attempted to focus on the practical, choosing to present what we believed to be helpful as well as interesting. In the interest of transparency and openness, we have listed all of the cases we logged, sorted by category and highlighted by use, in the appendices that follow. The supporting documents that we developed during our research have also been posted.

As for the trends identified above, it remains to be seen how they will develop and change going forward. Neither the courts nor society are static; it may be that a similar endeavour undertaken in the upcoming years will

yield entirely different results. Regardless, it will be interesting to see how the jurisprudence of the SCC and the MBCA continues to evolve.

Appendix I

Charter – 13.4%

1. *R v Morrison*, 2019 SCC 15²⁴⁷
2. *R v Le*, 2019 SCC 34*
3. *R v Stillman*, 2019 SCC 40
4. *R v Poulin*, 2019 SCC 47
5. *R v KJM*, 2019 SCC 55*
6. *R v Doonanco*, 2020 SCC 2
7. *R v Boudreault*, 2018 SCC 58*

Defences – 3.8%

1. *R v Gagnon*, 2018 SCC 41
2. *R v Blanchard*, 2019 SCC 9*

Evidence – 15.4%

1. *R v Normore*, 2018 SCC 42
2. *R v Gubbins*, 2018 SCC 44*
3. *R v Ajise*, 2018 SCC 51
4. *R v Cyr-Langlois*, 2018 SCC 54*
5. *R v Quartey*, 2018 SCC 59
6. *R v Calnen*, 2019 SCC 6
7. *R v JM*, 2019 SCC 24
8. *R v SH*, 2020 SCC 3

Evidence: Past Sexual History – 5.8%

1. *R v Barton*, 2019 SCC 33
2. *R v Goldfinch*, 2019 SCC 38*
3. *R v RV*, 2019 SCC 41*

Evidence: Search and Seizure – 5.8%

1. *R v Reeves*, 2018 SCC 56*
2. *R v Mills*, 2019 SCC 22*
3. *R v Omar*, 2019 SCC 32

²⁴⁷ (*Morrison* was counted twice in the dataset as it was a cross appeal; thus, it was counted both as a defence appeal and as a Crown appeal).

Trial Procedure – 25.0%

1. *R v Awashish*, 2018 SCC 45
2. *R v Beaudry*, 2019 SCC 2
3. *R v George-Nurse*, 2019 SCC 12
4. ***R v Snelgrove*, 2019 SCC 16***
5. ***R v Myers*, 2019 SCC 18***
6. *R v D'Amico*, 2019 SCC 23
7. *R v Thanabalasingham*, 2019 SCC 21
8. ***R v MRH*, 2019 SCC 46***
9. *R v Kernaz*, 2019 SCC 48
10. ***R v Kelsie*, 2019 SCC 17***
11. *R v Wakefield*, 2019 SCC 26
12. *R v WLS*, 2019 SCC 27
13. ***R v Shlah*, 2019 SCC 56 ***

Sentencing – 3.8%

1. *R v Friesen*, 2020 SCC 9
2. ***R v Rafilovich*, 2019 SCC 51***

Post-Trial Procedure / Prison Law – 3.8%

1. *R v Bird*, 2019 SCC 7
2. ***R v Penunsi*, 2019 SCC 39***

Miscellaneous – 23.1%

1. *R v Youssef*, 2018 SCC 49
2. *R v Vice Media*, 2018 SCC 53
3. *R v Culotta*, 2018 SCC 57
4. *R v Fedyck*, 2019 SCC 3
5. *R v CJ*, 2019 SCC 8
6. ***R v Jarvis*, 2019 SCC 10***
7. *R v Demedeiros*, 2019 SCC 11
8. *R v Larue*, 2019 SCC 25
9. ***Fleming v Ontario*, 2019 SCC 45***
10. *R v James*, 2019 SCC 52
11. *R v Javanmardi*, 2019 SCC 54
12. *R v Collin*, 2019 SCC 64

*Included in above analysis.

Appendix II

Charter – 8.7%

1. *R v Tummillo*, 2018 MBCA 95
2. *R v S (WEQ)*, 2018 MBCA 106
3. ***R v KGK*, 2019 MBCA 9***
4. *R v Culligan*, 2019 MBCA 33
5. *R v Giesbrecht*, 2019 MBCA 35
6. ***R v Omeasoo et al*, 2019 MBCA 43***
7. *R v Gebru*, 2019 MBCA 73
8. *R v Clemons*, 2020 MBCA 4
9. *R v Ong*, 2020 MBCA 14 (s 9)

Defences – 1.9%

1. ***R v CDJM*, 2019 MBCA 52***
2. ***R v Spicer*, 2019 MBCA 117***

Evidence – 25.2%

1. *R v JMS*, 2018 MBCA 117
2. *R v Beaulieu*, 2018 MBCA 120
3. *R v Hall*, 2018 MBCA 122
4. *R v Mohamed*, 2018 MBCA 130
5. *R v Mason*, 2018 MBCA 138
6. *R v Atkinson et al*, 2018 MBCA 136
7. *R v RCRT*, 2018 MBCA 139
8. *R v Loonfoot*, 2018 MBCA 140
9. *R v JMB*, 2019 MBCA 14
10. *R v Merkl*, 2019 MBCA 15
11. *R v Houle*, 2019 MBCA 17
12. *R v Cleveland*, 2019 MBCA 49
13. *R v Williams*, 2019 MBCA 55
14. *R v Green*, 2019 MBCA 53
15. *R v Chief*, 2019 MBCA 59
16. *R v Dowd*, 2019 MBCA 80
17. *R v Pendl*, 2019 MBCA 89
18. *R v AJS*, 2019 MBCA 93
19. *R v Weldekidan*, 2019 MBCA 109
20. *R v Jovel*, 2019 MBCA 116

21. *R v Devloo*, 2020 MBCA 3
22. *R v Lewin*, 2020 MBCA 13*
23. *R v SRF*, 2020 MBCA 21
24. *R v Dowd*, 2020 MBCA 23*
25. *R v Kupchik*, 2020 MBCA 26
26. *R v Chan*, 2019 MBCA 38

Evidence: Past Sexual History – 0.97%

1. *R v Catellier*, 2018 MBCA 107*

Evidence: Search and Seizure – 4.9%

1. *R v Pilbeam*, 2018 MBCA 128*
2. *R v Land*, 2018 MBCA 132
3. *R v Penner*, 2019 MBCA 8
4. *R v Okemow*, 2019 MBCA 37*
5. *R v Plante*, 2019 MBCA 39

Trial Procedure – 17.5%

1. *R v Van Wissen*, 2018 MBCA 100*
2. *R v Ostrowski*, 2018 MBCA 125
3. *R v Hertier*, 2019 MBCA 25*
4. *R v Ewanochko*, 2019 MBCA 45
5. *R v Grant*, 2019 MBCA 51
6. *R v Froese*, 2019 MBCA 56
7. *R v Woroniuk*, 2019 MBCA 77*
8. *R v Asselin*, 2019 MBCA 94
9. *R v Desrochers*, 2019 MBCA 120
10. *R v McLeod*, 2019 MBCA 124
11. *R v Tade*, 2020 MBCA 5
12. *R v Robinson*, 2020 MBCA 12
13. *R v Hebert*, 2020 MBCA 16
14. *R v Cerna*, 2020 MBCA 18*
15. *R v Devloo*, 2018 MBCA 108
16. *R v Dignard*, 2019 MBCA 6
17. *R v Moslehi*, 2019 MBCA 79
18. *R v Singh*, 2019 MBCA 105*

Sentencing – 31.1%

1. *R v Ndlovu*, 2018 MBCA 113
2. *R v Candy*, 2018 MBCA 112
3. ***R v Yare***, 2018 MBCA 114*
4. ***R v Dalkeith-Mackie***, 2018 MBCA 118*
5. *R v Safaye*, 2018 MBCA 121
6. *R v JED*, 2018 MBCA 123
7. *R v PES*, 2018 MBCA 124
8. *R v DARK*, 2018 MBCA 133
9. ***R v Fehr***, 2018 MBCA 131*
10. *R v Bourget*, 2019 MBCA 10
11. *R v Provinciano*, 2019 MBCA 16
12. *R v Houle*, 2019 MBCA 20
13. ***R v JHS***, 2019 MBCA 24*
14. *R v McIvor*, 2019 MBCA 34
15. *R v Rose*, 2019 MBCA 40
16. *R v Gardiner*, 2019 MBCA 63
17. *R v Sadouy*, 2019 MBCA 66
18. *R v Catcheway*, 2019 MBCA 75
19. ***R v CCC***, 2019 MBCA 76*
20. *R v Fisher*, 2019 MBCA 82
21. *R v Reilly*, 2019 MBCA 84
22. *R v Barker*, 2019 MBCA 86
23. *R v Knott*, 2019 MBCA 97
24. ***R v Norris***, 2019 MBCA 101*
25. *R v Hebrada-Walters*, 2019 MBCA 102
26. *R v Todoruk*, 2019 MBCA 100
27. *R v Siwicki*, 2019 MBCA 104
28. ***R v Grewal***, 2019 MBCA 108*
29. *R v Pelletier*, 2019 MBCA 126
30. *R v Johnson*, 2020 MBCA 10
31. *R v Peters*, 2020 MBCA 17
32. *R v Ackman*, 2020 MBCA 24

Misc – 9.7%

1. ***R v Van Wissen***, 2018 MBCA 110*
2. ***R v Gowenlock***, 2019 MBCA 5*
3. *R v Klippenstein*, 2019 MBCA 13

4. *R v FCW*, 2019 MBCA 19
5. *R v Ewert*, 2019 MBCA 29
6. *R v Hya*, 2019 MBCA 42
7. ***R v Tsui*, 2019 MBCA 41***
8. *R v Hominuk*, 2019 MBCA 64
9. *R v Dyck*, 2019 MBCA 81
10. *R v Ponace*, 2019 MBCA 99

**Included in above analysis*