**Unofficial English Translation of the Judgment of the Court**

|  |  |
| --- | --- |
| Freddi c. R. | 2021 QCCA 249 |
| COURT OF APPEAL |
|  |
| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF  | MONTREAL |
| No.: | 500-10-006845-182 |
| (500-36-008577-176, 500-01-127663-158) |
|  |
| DATE : |  February 15, 2021 |
|  |
|  |
| CORAM: | THE HONOURABLE | FRANÇOIS DOYON, J.A.MARTIN VAUCLAIR, J.A.JOCELYN F. RANCOURT, J.A. |
|  |
|  |
| SHANA FREDDI |
| APPELLANT – Accused  |
| v. |
|  |
| HER MAJESTY THE QUEEN |
| RESPONDENT – Prosecutor  |
|  |
|  |
| JUDGMENT |
|  |
|  |

1. The appellant appeals from a judgment of the Superior Court, District of Montreal (the Honourable Madam Justice Hélène Di Salvo), rendered orally on August 2, 2018 (reasons for judgment transcribed on August 20, 2018), allowing the prosecution’s appeal and quashing the judgment of the Court of Québec dated May 24, 2017, which had acquitted her of the charge of operating a motor vehicle with a blood alcohol level exceeding the legal limit.
2. For the reasons of Doyon, J.A., with which Vauclair and Rancourt, JJ.A. agree, **THE COURT**:
3. **ALLOWS** the appeal;
4. **QUASHES** the judgment of the Superior Court;
5. **RESTORES** the acquittal entered by the Court of Québec.

|  |
| --- |
|  |
|  |  |
|  | FRANÇOIS DOYON, J.A. |
|  |  |
|  |  |
|  | MARTIN VAUCLAIR, J.A. |
|  |  |
|  |  |
|  | JOCELYN F. RANCOURT, J.A. |
|  |
| Mtre Ulrich Gautier |
| For the Appellant |
|  |
| Mtre Laurent-Alexandre Duclos-Bélanger |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS |
| For the Respondent  |
|  |
| Date of hearing:Reserved: | October 22, 2020December 1, 2020 |

|  |
| --- |
|  |
|  |
| REASONS OF DOYON, J.A. |
|  |
|  |

1. Is the possibility of using a portable telephone (“cell phone”) relevant for assessing reasonable delay before having access to counsel? This is the central issue in this appeal.
2. The appellant appeals from a judgment of the Superior Court, District of Montreal (the Honourable Madam Justice Hélène Di Salvo), rendered orally on August 2, 2018 (reasons for judgment transcribed on August 20, 2018), *R. c. Freddi*, 2018 QCCS 4395, which allowed the prosecution’s appeal and quashed the judgment of the Court of Québec dated May 24, 2017 (the Honourable Julie Riendeau). Riendeau, J.C.Q. had allowed Ms. Freddi’s application, had ordered the exclusion of evidence—namely the results of a breathalyzer test—on the ground that she had been deprived of her right to counsel under s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), and, accordingly, had acquitted her of the charge of operating a motor vehicle with a blood alcohol level exceeding the legal limit.
3. A colleague on this Court granted leave to appeal on questions of law alone pursuant to s. 839 *Cr.C.*: *Freddi c. R*., 2018 QCCA 1682.

## BACKGROUND

1. On September 19, 2015, at 3:19 a.m., an officer of the Sûreté du Québec equipped with a radar device captured the speed of the appellant’s vehicle; it was doing 122 km/h in a 50 km/h zone on the Bonaventure Expressway. As a result, the appellant was intercepted. Traffic was light and visibility was good. It was not raining and the pavement was dry.
2. The police officer smelled alcohol and noted that the appellant’s eyes were glassy and bloodshot. There were six people in the vehicle, which only had five seats. One passenger was on the floor in the back of the vehicle. The appellant was driving and, when questioned, she said she had consumed alcohol. Since she had a probationary licence, she was not allowed to have any alcohol in her blood.
3. The officer therefore ordered her to provide a breath sample using an approved screening device (“ASD”). The appellant was polite, calm and, respectful. She followed instructions. A test was taken at 3:29 a.m. The result was a “fail”.
4. At 3:31 a.m. the appellant was arrested for operating a motor vehicle while impaired by alcohol. The officer read her her rights. She told the officer that she wanted to contact a lawyer. He answered that she could not do so there, only at the police station. According to his testimony, he did not believe she had a cell phone and he did not remember asking her whether she had one. In any event, the call to the lawyer could not be made before they arrived at the station. In cross-examination he said that making a phone call on the spot [translation] “is not a procedure applied for calling a lawyer,” because that was the Sûreté du Québec’s directive.
5. However, the prosecution later admitted that the officer did remember that the appellant had a cell phone, since she was sending text messages while he drove her home after the events.
6. In his testimony the officer also explained that he did not let the appellant contact a lawyer on the spot [translation] “for reasons of confidentiality” (the police vehicle was not set up for that) and to prevent her from fleeing with the police vehicle or accessing confidential information on its onboard computer if he left her alone in the vehicle to make the call.
7. The officer contacted a towing service that has exclusive rights in the territory. In his testimony he added that [translation] “most of the time, when you do business with [XXX] towing company, you know you’re in for a long wait”.
8. An employee of the towing service finally showed up at 4:07 a.m. and the police vehicle left at 4:12 a.m. with the appellant aboard.
9. At 4:27 a.m. the police officers and the appellant arrived at the Candiac police station. She finally got to call her lawyer in the room intended for that purpose at 4:48 a.m. The call lasted about five minutes.
10. She provided two breath samples at 4:57 a.m. and 5:17 a.m., and the breathalyzer test results showed 145 mg and 140 mg per 100 ml of blood, which led to charges under ss. 253(1)(*b*) and 255(1) *Cr.C.* in force at the time.

## THE JUDGMENTS BELOW

1. As mentioned above, because the judge of the Court of Québec was of the opinion that the appellant’s right to counsel had been violated, she ordered the exclusion of evidence obtained subsequently—namely the breathalyzer test results—and, accordingly, acquitted her.
2. The judge pointed out that the police officer was obliged to facilitate access to a lawyer, as the appellant had expressly asked him, [translation] “at the first reasonable opportunity” (which she made sure to underline in her judgment). That is the interpretation applied by the case law to the words “without delay” in s. 10(*b*) of the *Charter*: *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495. The judge, who noted that it took one hour and 17 minutes from the time the appellant asked to speak to a lawyer (3:31 a.m.) until she was permitted to do so at the police station (4:48 a.m.), pointed out that when a delay occurs, it is up to the prosecution [translation] “to demonstrate that such delay is reasonable”. She concluded, for a variety of reasons, that the prosecution had not discharged its burden of demonstrating that the delay was reasonable in the circumstances.
3. As far as the officer was concerned, it was a given that the right to counsel would only apply at the police station. According to him, to ensure the call’s confidentiality at the scene, he would have had to leave the appellant alone in the police vehicle (since it had no partition), which he could not do because she might have fled in it or accessed the confidential information in its onboard computer. According to the trial judge, however, it was [translation] “highly unlikely, even implausible” that the appellant [translation] “would behave the way the officer said he feared […]” given that she was calm and respectful, that she was following instructions and that the behaviour of the other passengers was [translation] “irreproachable.” She concluded that the officer’s explanations were [translation] “hardly convincing.”
4. The officer also raised the fact that [translation] “no telephone was available” as another reason for delaying the call. But the judge pointed out that this would have made no difference, because, according to him, in any event there was no way of guaranteeing the confidentiality of the call.
5. At no time did the officer ask the appellant or the vehicle’s other passengers if a cell phone was available, when, in fact, the appellant did have one. The officer was in a position to immediately provide the phone number for legal aid, which was written on the card used to inform the appellant of her rights, such that it would have been easy to make a call using a cell phone.
6. According to the trial judge, there was a safe space outside of the vehicles where the passengers and the officer could stand and watch what was going on. That is in fact what happened while the vehicle was being searched. Thus, the weather conditions could not explain the officer’s decision.
7. It would therefore have been possible to allow the appellant to call a lawyer at the scene of the interception; this shows that the prosecution did not prove that the delay was reasonable.
8. With respect to the remedy, the trial judge weighed the various factors accepted in the case law: the effect of admitting the evidence on society’s confidence in the justice system, taking into account the seriousness of the *Charter*-infringing state conduct, the impact of the violation on the accused’s rights, and society’s interest in having the case adjudicated on the merits.
9. She concluded that [translation] “the police conduct is worrisome”. The officer’s explanations [translation] “show that he did not stop to consider the possibility of facilitating the exercise of the right at issue” since they were in no way [translation] “based on a factual assessment of the situation”. His conduct was dictated instead [translation] “by habit” and his reasons [translation] “look like reasons that were made up after the fact to justify his inappropriate reaction”. It amounted to [translation] “an attempt to cover up his conduct”.
10. During the intervention, the police officer displayed [translation] “a profound ignorance of the right to counsel guaranteed by the *Charter*, a lack of concern or even disregard of what it involves”. Referring to the risk of self-incrimination, especially as the appellant was asking what would happen next, and to the significant vulnerability of a detained person, the trial judge concluded that admitting the breathalyzer test results as evidence would undermine public confidence in the administration of justice, and she ordered their exclusion.
11. The Superior Court judge did not share that opinion. She did not think the right to counsel had been infringed.
12. According to her, the trial judge erred in adding [translation] “an obligation for the police officer to ask whether the respondent was in possession of a cell phone” and even [translation] “to ask the other passengers the same thing”. She also pointed out that the appellant [translation] “never told” the officer that she had a cell phone, which they only found out at the police station.
13. She noted that police officers are under no obligation to provide detained persons with a cell phone, or inquire whether they have one. She stated that the trial judge also committed an error, when deciding whether the right to counsel had been violated, by failing to consider the fact that the officer had not tried to obtain any evidence before the appellant reached her lawyer. She did concede, however, that the trial judge took that into account when deciding whether or not to exclude the evidence.
14. She added:

[translation]

[30] A roadside call to a lawyer would no doubt raise a number of issues, including that of the safety of the officer, the detained person, or anyone else.

[31] There is also the fact that the call must be confidential.

1. According to her, the first reasonable opportunity to exercise the right to counsel requires [translation] “most of all the call’s confidentiality”.
2. She also criticized the trial judge for saying that it would have been possible to allow a call to a lawyer at the scene of the interception, despite the officer not even knowing at that time that the appellant had a cell phone. From her perspective, in this case [translation] “the possibility of a confidential call was purely hypothetical”. She believed that the officer could not realistically leave the appellant, who was under the influence of alcohol, alone in the police cruiser with a cell phone, which would have required that he step away from the vehicle in complete disregard of all safety rules. He could not [translation] “guess how a detained person would behave under the effect of the alcohol”.
3. She then cited *R. c. Piazza*, 2018 QCCA 948, to highlight the problems raised by a [translation] “roadside” consultation with counsel. She concluded that [translation] “there is no evidence that there would not have been an incident or problem had the respondent been left alone in the patrol car. That situation is hypothetical”.
4. Since the right was not infringed, she did not rule on the exclusion of evidence.

## ANALYSIS

1. This appeal was heard together with the appeal in *R. c. Tremblay*, 2021 QCCA 24 (“*Tremblay*”), in which judgment was rendered on January 13, 2021. The law is fully stated in that decision, and I will quote a few passages from it to simplify matters.
2. Both cases have much in common. The same principles of law are at stake. In both cases the detained person, who behaved irreproachably, asked to speak to a lawyer. In both cases that request was refused pursuant to a directive (or lack of a directive). In both cases the police officers explained their refusals by citing confidentiality and safety issues. In both cases the trial judge dismissed the officers’ testimonies ([translation] “reasons that were made up” and “an attempt to cover up his conduct” in this case and [translation] “theoretical possibilities that do not fit the present situation*”* in *Tremblay*). There is one significant difference, however: the Superior Court judge refused to intervene in *Tremblay*, contrary to what happened in this case.
3. In the present matter, the appeal must focus on the errors of law that the Superior Court judge may have committed.

#### Implementation of the right to counsel

1. I will reiterate the rule that was more fully described in *Tremblay*, a judgment to which the Court must refer: police officers are not obliged to let detained persons call their lawyer, at the scene, with a cell phone. They must, nevertheless, take that possibility into account in determining when the first reasonable opportunity to allow the detained person to have access to counsel occurs. Their duty is to consider the overall circumstances when making their decision, and purely theoretical reasons unconnected to the case will not suffice. That is clearly what the Court of Québec judge concluded.
2. In *Tremblay* I summed up the situation as follows:

 [translation]

[78] I stress the following point: the issue here is not that the respondent was not permitted to use her cell phone to call her lawyer. The problem is that the two police officers did not even consider this possibility, although it was their responsibility to do so. And why did they not consider this possibility? Due to the lack of a directive allowing them to do so. This is where the responsibility of the system comes into play, which leads to systemic conduct, one that is obviously likely to be repeated and aggravates the situation. All this comes twenty years after the judgments in *Clarkson* and *Manninen*, five years after *Archambault*, which requires exceptional circumstances to delay access to counsel, five years after the first in a series of judgments of the Court of Québec that reproached the police for not having let the detainee use his or her cell phone, and three years after *Taylor*, which reiterated that the duty to facilitate access to counsel arises immediately after the detainee has asked to speak with counsel, which means at the first reasonably available opportunity. In other words, the police officers did not fulfil their duty—one that is well known—not by complying with a directive, but by refusing to do so because of the absence of a directive. This situation cannot be tolerated.

1. Those words apply, with circumstantial adjustments as to the years, except that here we are not talking about the absence of a directive, but rather, according to the officer, about a directive to the effect that the phone call must be made at the police station. This shows that there is systemic conduct that consists in failing to take the overall circumstances into account, contrary to the officers’ obligations and contrary to *R. v.* *Taylor*, *supra*, paras. 31 to 33. Significant or exceptional circumstances are required to delay access to counsel: *R. c.* *Archambault*, *supra*, para. 36, and *R. v. La*, 2018 ONCA 830, para. 39. Moreover, it is the prosecution, and not the accused, that has the burden of demonstrating that the delay was reasonable. Reasonableness is a question of fact: *Taylor*, para. 24.
2. The prosecution’s burden requires a demonstration of fact—on a case-by-case basis—as the respondent concedes, not hypotheses or an unwavering rule in the nature of a directive.
3. The Court of Québec judge concluded that, in the circumstances, the first reasonable opportunity occurred at the scene of the accused’s interception, after the arrest resulting from the ASD test result. We know it took another hour and 17 minutes until the appellant was finally allowed to access a lawyer at the police station. That was therefore not the first reasonable opportunity, since the judge set aside the officers’ explanations as to why they waited until they got to the station.
4. It bears repeating that I acknowledge that the presence of a cell phone is not in and of itself a circumstance that obliges police officers to permit its use. This technology does not always provide the answer to when the “first reasonable opportunity” arises. Nevertheless, it is a circumstance to be considered when answering that question.
5. With regard to the ruling in *R. c. Piazza*, *supra*, which the Superior Court judge referred to and the respondent relies on, the following excerpt from my reasons in *Tremblay* explains why it can be of no use in these circumstances:

[translation]

[57] The appellant refers to *R. c. Piazza*, 2018 QCCA 948, in support of its argument that it is difficult, if not impossible, to allow the use of a cell phone [translation] “at the side of the road”. This calls for two comments.

[58] First, that case deals with the period preceding the use of the ASD, such that the right to counsel is suspended because of a rule of law (s. 254(2) *Cr.C.* at the time) which states that the breath sample must be provided “forthwith”. Thus, s. 10(*b*) of the *Charter* did not apply. As my colleague, Vauclair, J.A. wrote, at para. 112 of *Piazza*, regarding access to counsel: [translation] “I think it is a spurious problem, because the right is suspended...” in these circumstances. It cannot therefore be argued that this ruling can be of use to us here, when my colleague referred to the difficulties of using a cell phone at the time of an arrest.

[59] Second, while, at paras. 113 and 114, my colleague set out a series of difficulties that are likely to make the possibility of consulting counsel at the scene using a cell phone illusory, he did so in the context of the waiting period prior to the use of the ASD and in response to the suggestion that such consultation becomes necessary in order to authorize the use of the ASD. He did not rule on the period that follows the taking of a breath sample using the ASD, since this was not the situation being considered in that judgment.

1. The respondent concedes that it is necessary to [translation] “assess—on a case-by-case basis—a multitude of issues or difficulties that may arise in connection with the implementation of the right to counsel by the roadside […]”. It writes that the conclusion may be different [translation] “from one detained person to another, depending on whether they have a functioning cell phone, their conduct, their criminal record, the weather conditions, the road conditions, the existence of a partition in the patrol car, whether they can access a lawyer rapidly, etc.”. I agree.
2. Yet, the main thrust of its argument shows that it refuses to take into consideration all those circumstances. In paragraph 23 of its brief, the respondent rejects the idea of taking the appellant’s conduct into account; in paragraph 63 it contests the possibility of taking the weather conditions into account; in paragraph 25 it argues that officers may never step away from their police cruisers. Thus, the respondent refuses to take all of the circumstances into account, contrary to the rule.
3. With regard to the waiver of the right to a confidential conversation with a lawyer in exchange for the right to use a cell phone at the site of the arrest, the respondent does not believe it would be lawful in view of [translation] “the fundamental importance of confidentiality to the call to counsel”, taking into account the condition of a person arrested for impaired driving. I do not accept that argument. Detained persons can legally waive their right to counsel. Why could they not do so partially? A lack of privacy does not necessarily justify a refusal: *R. v. Fan*, 2017 BCCA 99, para. 55. In any event, the Court of Québec judge’s findings of fact led her to dismiss the officers’ claim that the call could not be confidential.
4. The respondent also believes that the Court of Québec judge erred in affirming that the words “without delay” in s. 10(*b*) mean “immediately.” That is not the case, as we saw above. The trial judge assessed all of the circumstances, trying to determine whether the prosecution’s evidence showed that access to counsel was granted at the first reasonable opportunity, meaning as soon as it was practically possible. In truth, the respondent is criticizing her for rejecting the officer’s testimony on the reasons for the delay. These are questions of fact, however, which fall to the trial judge, and regarding which the respondent has not demonstrated any error.
5. In the circumstances, the Court is of the opinion that the Superior Court judge erred in law by intervening as she did.
6. It should be noted that the Court of Québec judge stated the law perfectly, especially when she pointed out that it is up to the prosecution to demonstrate that [translation] “the time between when a detained person states his or her intention to exercise the right to counsel and the time when that right takes effect” is reasonable. The same applies to her statement that the officers must [translation] “give the detained person access to a telephone as soon as it is practically possible”. She also stated, rightly so, that s. 10(*b*) [translation] “does not create the right to use a specific telephone”. In short, it is a question of circumstances and that is what the trial judge did: she assessed all of the circumstances to determine whether the prosecution had demonstrated that the delay was reasonable.
7. The Superior Court judge faulted her for creating the obligation of having to inquire whether a detained person is in possession of a cell phone. That is not the case. The trial judge did not create such an obligation. All she did was note that no such inquiry was made. That is one more circumstance to consider, especially since the possession of a cell phone is so common these days that we wonder less and less whether someone has one. That is in fact what the Court of Québec judge said, in her own words, in paragraph 75 of her judgment.
8. The Superior Court judge’s ruling shows that she is the one who committed the error for which she faulted the Court of Québec judge, i.e., not taking all the circumstances into account. When she wrote, for example, that [translation] “[a] roadside call to a lawyer would no doubt raise a number of issues […]” or [translation] “[i]t is unlikely that an officer would be able to assume or guess how a detained person will behave under the effect of alcohol”, she was straying from the evidence and relying on hypotheses: what conduct is to be expected from a police office. But that is not what matters. The Court of Québec judge drew factual inferences that deserved deference in the absence of any reviewable error, and the decision as to whether the right had been infringed had to be based on those inferences.
9. The Superior Court judge also reversed the burden, writing: [translation] “There is no evidence that there would not have been an incident or problem had the respondent been left alone in the patrol car.” I will say it again: it is up to the prosecution to prove that the delay was reasonable—it is not up to the accused to make sure the evidence demonstrates that it was not.
10. The message in the Superior Court judgment is clear: a roadside telephone call will never be a reasonable option, because it cannot be confidential and will always endanger the safety of the police officer and the others. Yet, that is not the state of the law.
11. I return to *Tremblay*:

 [translation]

[41] The appellant writes in its memorandum [translation] “that the advent and proliferation of cell phones do not bring about a new constitutional era in which an individual could consult the lawyer of his or her choice at the side of the road while waiting for the tow truck to arrive”. If this means that it cannot be decreed, in all cases, that the person must be authorized to do so, I agree. On the other hand, if it means that it can never be done, I disagree entirely. It all depends on the circumstances and I disagree with the appellant when it adds: [translation] “This is the essence of the debate”. The essence of the debate is not whether the advent of the cell phone changes the law and allows its use. Rather, in my view, the essence of the debate is to determine what police officers should take into account in deciding whether or not to authorize its use for the purpose of consulting a lawyer.

[…]

[53] In short, hypotheses and assumptions, such as those raised by the appellant (as the Court of Québec judge concluded), are not sufficient for it to discharge its burden, which requires proof of real obstacles, such as an emergency, a danger or a rule of law: *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *R. v. Strachan*, [1988] 2 S.C.R. 980. Recently, in *R. v. La*, 2018 ONCA 830, the Ontario Court of Appeal emphasized that factual evidence of particular circumstances is required to justify a delay, and mere suppositions are not sufficient […]

1. In short, given the Court of Québec judge’s findings of fact, the Superior Court judge could not quash her decision as she did.

#### Section 24(2) of the *Charter*

1. Since she concluded that the right to counsel had not been infringed, the Superior Court judge decided not to rule on the exclusion of evidence and simply ordered a new trial. At the end of the hearing the respondent indicated to this Court that if the appeal were allowed, the case would have to be referred back to the Superior Court for a ruling on that issue. The appellant disagreed and asked the Court to make its own ruling on the exclusion of evidence.
2. In order to avoid any misunderstanding, the Court asked the parties to send it additional memoranda, which they did.
3. In its memorandum, the respondent argues that the Court is not validly seized of this issue, on the ground that the application for leave to appeal did not concern the exclusion of evidence nor did the judgment granting leave to appeal, which would explain its request to have the case referred back to the Superior Court. In any event, it adds, the Court of Québec judge’s analysis of s. 24(2) of the *Charter* is vitiated because there is no [translation] “close connection between the alleged violation and the evidence obtained”. It points out that the contested evidence was obtained subsequent to the consultation with a lawyer, such that the violation, if there was one, had no real effect.
4. The appellant contends that the Court should use its powers under s. 686(8) *Cr.C.* to [translation] “rule on the exclusion of evidence”. She points out that all the facts are in the record, that the Court has heard the parties’ arguments, which they were able to make before both the Court of Québec and the Superior Court, and that the delays are mounting; it has already been more than five years since the events happened. With regard to the exclusion of evidence, she argues that, absent a causal link, the temporal link in the present matter is amply sufficient.
5. When our colleague authorized this appeal, she evidently did so based on the issues of law set out in the application for leave. The appellant contested the order for a new trial and wanted to convince the Court to reinstate the acquittal; to do so, she naturally focused on the judgment rendered by the Superior Court, not the one rendered by the Court of Québec.
6. It goes without saying, it seems to me, that the application for leave to appeal encompassed the issue of the exclusion of evidence, whether explicitly or implicitly. Since the Superior Court did not overturn the exclusion, on the ground that the issue had become moot, the Superior Court judge could not have committed an error of law by not ruling on it. The appellant therefore could not have raised such an error in her application for leave to appeal. Nevertheless, in asking for the acquittal to be reinstated she was necessarily asking for the evidence to remain excluded. Similarly, in contesting the appeal at the Superior Court level, the appellant was invoking the absence of error by the Court of Québec. In short, it would be unjust to claim that the Court does not have jurisdiction over that aspect of the appeal simply because the appellant did not raise it in her application for leave to appeal, especially since all of the evidence is in the record and both parties have had the opportunity to present their positions.
7. In *R. v. Molnar*, 2018 MBCA 61, Hamilton, J.A. wrote:

[38] The trial judge did not make an alternate ruling under section 24(2). Rather than sending the matter back to the trial judge, the panel chose to rule on the motion, based on the record and findings of fact of the trial judge that are relevant to the required analysis and which are entitled to deference (see *R v Vu*, 2013 SCC 60 at para 67; and *R v Spencer*, 2014 SCC 43 at para 75). At the appeal hearing, the panel asked counsel to submit supplementary factums on this issue.

1. That is the procedure followed by this Court, which has jurisdiction over the exclusion of the evidence. The question becomes whether it should exercise that jurisdiction.
2. Since the Court is in possession of all the evidence and has the advantage of knowing the trial judge’s findings of fact, I am of the view that it should exercise its jurisdiction. As the findings of fact and the determinations required for an analysis under s. 24(2) are in the record, the issue should be decided: *R. v. McCorriston*, 2010 MBCA 3, para. 30; *R. v. Dudhi*, 2019 ONCA 665, para. 88; *R. v. Ritchie*, 2018 ONCA 918, para. 19; *R. v. Dolynchuk*, 2004 MBCA 45, p. 12; *R. v. Caputo*, [1997] O.J. No. 857 (Ont. C.A.), p. 16.
3. The delays in this case and the cost of a new trial—both to society and to the parties—have convinced me that this is the right course of action.
4. An appellate court owes deference to decisions made under s. 24(2) of the *Charter*. In *Tremblay*, I pointed out the following:

 [translation]

[62] Some might believe that the judge’s conclusion is harsh. After all, as soon as the exclusion of evidence results in an acquittal, the decision may seem harsh. Such a decision, however, is first and foremost one for the trial judge to make.

[63] Deciding whether or not one or more factors favour the exclusion of evidence requires an overall assessment of all the circumstances and therefore mandates deference from an appellate court: *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, paras. 44 to 52. While the decision to exclude evidence must be reasonable, the reviewing court will not interfere with the trial judge’s findings in the absence of an “apparent error as to the applicable principles or rules of law” or an “unreasonable finding”: *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227, para. 32.

1. The respondent has not demonstrated such an error.
2. We must also bear in mind that, according to the trial judge, the officer had [translation] “made up” grounds after the fact to justify his refusal. There is therefore no good faith—on the contrary—and the seriousness of the state’s *Charter*-infringing conduct remains undiminished. Misleading testimony by a police officer undermines the integrity of the justice system: *R. v. Harrison*, 2009 SCC 34, [2009] 2 SCR 494, paras. 26 and 27.
3. The courts must distance themselves from police conduct based on immutable practices, like directives, rather than on the circumstances of the case. As Doherty, J.A. wrote in *R. v. Rover*, 2018 ONCA 745:

[32] […] There is no evidence that any of the officers turned their mind to the specific circumstances of this case before deciding that the appellant would be arrested and denied access to counsel for several hours while the police sought, obtained, and executed a search warrant. On the evidence of the police, there was no need to consider the specifics of this case. For them, the decision to arrest the appellant before seeking the search warrant dictated that the appellant would not be allowed to contact a lawyer until the warrant was executed.

[33] In my view, to fall within the exception to the requirement that an arrested person be allowed to speak to counsel without delay, the police must actually turn their mind to the specific circumstances of the case, and they must have reasonable grounds to justify the delay. The justification may be premised on the risk of the destruction of evidence, public safety, police safety, or some other urgent or dangerous circumstance. Furthermore, if the police determine that some delay in allowing an arrested person to speak to counsel is justified to permit execution of the warrant, then they must consider whether it is necessary to arrest the individual before they execute the warrant. […]

[34] The effective implementation of the right to counsel guaranteed by s. 10(b) depends entirely on the police. The police must understand that right and be willing to facilitate contact with counsel. The practice under which the officers involved in this case operated demonstrates a disregard of a fundamental constitutional right. The appellant’s right to speak with counsel was denied at the time of his arrest, when the police refused his request to speak with counsel.

1. The role of police officers is to analyze the circumstances as a whole so as to determine when the call can be made, which must be at the first reasonable opportunity. This requires that they assess each case individually: *R. c. Taylor*, *supra*, paras. 32 and 33; *R. v. La*, 2018 ONCA 830, para. 39; *R. v. Rover*, *supra*, paras. 32 and 33. A routine police practice or a directive that unduly restricts a right tends to aggravate the violation, which then becomes systemic.
2. Lastly, although it is true that no evidence was discovered before the appellant spoke to her lawyer—which the respondent associates with an absence of actual prejudice—it remains that a causal link between the violation of the *Charter* and the discovery of evidence is not always required. The temporal link is usually of particular importance and may even suffice: *R. v. Strachan*, [1988] 2 S.C.R. 980, p. 1000, and *R. v. Mian*, 2014 SCC 54, [2014] 2 SCR 689, para. 83. The appellant was also unnecessarily deprived of any contact with the outside world, and in particular with her lawyer, for over an hour after she had asked permission to call him, which was refused without even considering the mere possibility of her being able to do so. It is worth citing Justice Doherty’s remarks in *Rover*, *supra*, on how important it is for detained persons not to feel entirely at the mercy of the police:

[45] The right to counsel is a lifeline for detained persons. Through that lifeline, detained persons obtain, not only legal advice and guidance, […] but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

1. In short, the Court of Québec judge committed no error when she ordered the evidence excluded, and for those reasons, I would allow the appeal, quash the Superior Court judgment and restore the acquittal entered by the Court of Québec.

|  |
| --- |
|  |
|  |  |
| FRANÇOIS DOYON, J.A. |