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

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| R. c. Blackburn-Laroche | 2021 QCCA 59 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | QUEBEC |
| No.: | 200-10-003711-194 |
| (150-01-059340-191) |
|  |
| DATE: | January 15, 2021 |
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| CORAM: | THE HONOURABLE | SUZANNE GAGNÉ, J.A.GENEVIÈVE COTNAM, J.A.MICHEL BEAUPRÉ, J.A. |
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| HER MAJESTY THE QUEEN |
| APPELLANT – Prosecutor |
| v. |
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| JONATHAN BLACKBURN-LAROCHE |
| RESPONDENT – Accused |
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| JUDGMENT |
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1. The appellant appeals against a judgment of the Court of Québec, Criminal and Penal Division, District of Chicoutimi (the Honourable Sonia Rouleau), rendered on October 1, 2019, acquitting the respondent of the charge of driving with a blood alcohol concentration exceeding the legal limit.[[1]](#footnote-1)
2. For the reasons of Gagné, J.A., with which Cotnam, J.A., concurs, **THE COURT**:
3. **DISMISSES** the appeal**;**
4. Beaupre, J.A., dissenting, would have allowed the appeal on the following questions of law:
* the judge erred in law in finding a violation of the respondent’s s. 10(b) *Charter* right;
* the judge erred in law in her application of the criteria in *Grant* and in accordingly excluding the results of the blood alcohol test from the evidence.
1. Furthermore, for the reasons set out more specifically in paragraph [140] of his opinion, Beaupré, J.A. would have found the respondent guilty of the charge against him and referred the case back to the Court of Québec for sentencing.

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|  | SUZANNE GAGNÉ, J.A. |
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|  | GENEVIÈVE COTNAM, J.A. |
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|  | MICHEL BEAUPRÉ, J.A. |
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| Mtre Sébastien Vallée |
| Director of Criminal and Penal Prosecutions |
| For the appellant |
|  |
| Mtre Julien Boulianne |
| Cantin, Boulianne |
| For the respondent |
|  |
| Date of hearing: | August 5, 2020 |

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| REASONS OF BEAUPRÉ, J.A. |
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1. The appellant appeals against a judgment of the Court of Québec, Criminal and Penal Division, District of Chicoutimi (the Honourable Sonia Rouleau), rendered from the bench on October 1, 2019.[[2]](#footnote-2)
2. The judge began by finding that, when the respondent was arrested for impaired driving, obstruction, and breach of conditions, the police officers violated his right to retain and instruct counsel of his choice under s. 10(b) of the *Canadian Charter of Rights and Freedoms*[[3]](#footnote-3)(the “*Charter*”).
3. The judge then proceeded to consider the criteria in *Grant*, allowed the respondent’s application under s. 24(2) of the *Charter*, and excluded from the evidence the results of the breath sample test taken with a breathalyzer.[[4]](#footnote-4)
4. Then, in the absence of any other supporting evidence, she acquitted the respondent of the charge of operating a motor vehicle with a blood alcohol level exceeding 80 mg of alcohol in 100 ml of blood.[[5]](#footnote-5)
5. The appellant raises two grounds of appeal. It submits that the judge erred in law in finding (i) that the police officers infringed the respondent’s s. 10(b) *Charter* right, and (ii) that the application of the criteria in *Grant* justified the exclusion of the blood alcohol test results from the evidence.
6. Unlike my colleagues, I am of the view that these grounds are well founded and the appeal should be allowed.
7. A review of the evidence adduced at the *voir dire* will be useful to an understanding of the conclusions I propose. In matters where police officers are faulted for infringing a s. 10(b) *Charter* right and where the person arrested or detained had an obligation of diligence, an examination of all of the circumstances is essential to assessing the conduct of everyone involved[[6]](#footnote-6) and to analyzing their rights and obligations.
8. Incidentally, it is important to note at the outset that only the police officers testified at the *voir dire*. Despite some grey areas, the testimony of each police officer was corroborated by the other and was uncontradicted. The respondent, who bore the burden of proof,[[7]](#footnote-7) did not testify in support of his application, call any witnesses to testify either orally or by affidavit, or adduce any documentary evidence concerning certain disputed yet crucial facts. I will come back to this in detail below.
9. **The evidence**
10. On June 12, 2019, at about 10:30 p.m., while they were on patrol in Saguenay, police officers Naess and Larouche noticed a vehicle moving at high speed in the opposite direction. The Doppler radar confirmed that it was moving at 89 km/hr, although the speed limit in that area was 50 km/h.
11. They turned on their flashing lights and made a U-turn to stop him. It is not disputed that the respondent was driving the vehicle.
12. The respondent did not stop. He turned left onto a street and then into the parking lot of a daycare centre, where he stopped his vehicle. The police officers saw him get out then run into an adjacent wooded area. The police officers went to the edge of the area. They were unable to establish visual contact and repeatedly asked the respondent to come out of the wooded area, but to no avail. Using a flashlight, one of them located him lying on the ground. The respondent, exposed in the flashlight beam, finally complied.
13. When asked why he had attempted to flee, the respondent answered with a confused look and slurred words that he had panicked because he did not have a driver’s licence. He stated that he had not consumed alcohol that evening.
14. In these circumstances, at 10:35 p.m., the police officers decided to use the approved alcohol screening device (“ASD”).[[8]](#footnote-8) Before blowing into the device, the accused spontaneously corrected his first statement and stated that he had drunk one glass of wine that evening, about an hour earlier. He then blew into the ASD and the second result indicated “fail”.
15. At 10:41 p.m., Officer Larouche arrested the respondent for impaired driving. She also ordered him to accompany them to the police station for an analysis of his breath samples with an approved breathalyzer[[9]](#footnote-9) and informed him of his rights. He answered that he understood and that he did not wish to speak to a lawyer. A cursory search of his vehicle before they left yielded the cork from a wine bottle.
16. The parties left the scene at about 11:03 p.m. and arrived at the station at 11:16 p.m.
17. At about 11:30 p.m., after the usual procedures upon arrival, the officers once again asked the respondent if he still did not wish to contact a lawyer. This time, he answered that he did, adding that he wanted to speak to Mtre Boulianne or Mtre Cantin, who practise in the same firm.
18. At about the same time, the station’s dispatcher informed his colleagues that the respondent was subject to a condition to abstain from consuming alcohol in relation to a previous offence. The respondent was arrested for breach of conditions, and Officer Larouche therefore read him his rights again, including his right to retain and instruct counsel. The respondent stated that he understood and repeated that he wanted to speak to Mtre Boulianne or Mtre Cantin.
19. The officers led him to a room where he could have a private telephone conversation and immediately took steps to try to contact one of the lawyers identified.
20. To that end, Officer Naess used a portable device to search the internet and found the website for Mtre Boulianne and Mtre Cantin’s law firm.
21. At 11:37 p.m., he tried to reach Mtre Boulianne first, using the personal cellphone number indicated on the website, to no avail. There was no answer and he hung up. At 11:39 p.m., he dialled the number for the firm’s 24-hour telephone line, once again unsuccessfully. At the *voir dire*, he testified about what happened next as follows:

[translation]

Q. What did you do when you realized that there was no answer at either of the two (2) numbers?

A. Exactly what I did, I can’t remember exactly what I did in that, in that situation.

Q. Was there a usual procedure...

A. Yes.

Q. In general?

A. Yes, the procedure, when we can’t, when I can’t reach the lawyer, the accused’s lawyer or if the accused doesn’t know whom to contact, we give him, we give him, we give him the telephone directory open to the page with the lawyers on it and we tell him that he’s free to call any lawyer he wants, and in the telephone room, there is also a legal aid poster on the wall with a photo of each, of each of the lawyers and that’s when, when Jonathan pointed to the one he wanted, that he wanted to speak to Maître Gagnon.

1. Then, when cross-examined on his attempt to reach Mtre Boulianne, he added:

[translation]

Q. So at eleven thirty-seven (11:37 p.m.), you dialled my telephone number, what did you do when there was no answer?

A. I hung up.

Q. You hung up?

A. Yes.

Q. Okay. So I understand that you didn’t leave a message.

A. No.

Q. Why?

A. I can’t remember if, if there was voicemail or not.

Q. What if I suggest to you that there was voicemail?

A. I can’t, I can’t tell you, I don’t, I don’t remember for sure.

[…]

Q. You write down what number you dial, you write down that there’s no answer, if there had been no voicemail or the voicemail was full, you certainly would have written that down?

A. Again, I can’t, I can’t tell you for sure, Maître.

Q. Do you sometimes leave messages?

A. It hasn’t happened, it hasn’t happened often, that I call and there’s no answer.

Q. But if there’s no answer, do you leave a message?

A. Usually, yes.

[…]

Q. So why didn’t you leave one that evening, Mr. Naess?

A. That evening, I can’t remember for sure if there was no, if there was voicemail or not.

[…]

Q. So then, what did you say to him, what happened between eleven thirty-seven (11:37 p.m.) and eleven thirty-nine (11:39 p.m.), what did you say to Mr. Blackburn-Laroche?

A. Just what it says in the report here, we, I informed him that there was no answer, so I went onto Cantin and Boulianne’s website and I tried to call the twenty-four-hour line (24h)...

Q. Okay

A. Again, again there was no answer.

Q. […], My cellphone number, […] where did you find it?

A. On your website.

Q. […],you called the office phone line, what did it say then when you called the office phone line?

A. I don’t remember, what I remember, is that it, it rang, there was no answer and then I hung up.

Q. Okay. What if I suggest to you that there is a voicemail that indicates the emergency telephone numbers on the office’s voicemail?

A. I can’t remember, I don’t remember.

[…]

Q. So you’re the one who told him that his lawyers, that there was no answer, is that right?

A. Yes.

[…]

Q. […], When did you call Mtre Cantin’s cellphone number?

R. His cellphone, I, I didn’t call it.

Q. You didn’t call it, so you have an individual who says to you, I want to speak to Mtre Boulianne or Mtre Cantin, you call Mtre Boulianne, you call the office, you don’t leave a message, all of that takes less than two (2) minutes, you don’t call Mtre Cantin, then you give him the telephone directory and point to the posters, pick another one, that’s what happened in those two (2) minutes?

A. Usually, if a line, it doesn’t ring for more than thirty (30) seconds, then for sure, in that time period I had time to call both, to call the lawyers two (2) times, I didn’t get any answer on either of the two (2) lines...

Q. Oh, oh, oh!

[…]

Q. Constitutional law, when you give rights, you surely had some training at the station, they told you, oh, what the right to a lawyer includes, what, what your obligation as a police officer is?

A. That we must make an attempt to reach the, the suspect’s counsel of choice, and once that’s done, the suspect has the right to have a private telephone conversation with his lawyer and must be satisfied with his conversation.

Q. Okay, so for you, the right to counsel is an attempt to reach his counsel of choice?

A. As I said, there was no answer when I called.

[…]

Q. Do you find it reasonable that when someone says I want to speak to Mtre Boulianne, to Mtre Cantin, to make two (2) attempts in two (2) minutes, zero attempts concerning Mtre Cantin, not to leave a message, how do you expect a lawyer to call you back if you don’t leave a message?

A. Again, as I told you before, I don’t, I can’t remember exactly if there was voicemail or not.

Q. Shall we try?

A. But that, that was in July, so...

Q. But shall we ...

A. We can if you like.

Q. Your Honour, would you like us to dial my telephone number?

Mtre MARIE-PHILIPPE CHARRON, CROWN PROSECUTOR:

Objection Your Honour, that doesn’t mean, just because there is voicemail now doesn’t mean that ...

THE COURT:

Exactly.

[…]

 [Emphasis added]

1. The cross-examination of Officer Naess continued with another question from counsel for the respondent, who suggested an unproven disputed fact, and with an intervention by the judge to correct his rewording of the police officer’s testimony and to inform him of what she accepted from the evidence adduced up until that point:

[translation]

Q. Okay. So, on my cellphone that night and on the office telephone line, which have had voicemail since day one of my practice of twelve (12) years, that evening, there was no longer voicemail, otherwise you would have written it down?

A. As I said, I don’t remember.

Q. Right, you don’t remember, I asked you four (4) times just now, you answered four (4) times that you don’t remember, and now finally you remember, be careful, just now, I asked you, was there voicemail, I don’t remember if there was voicemail, now you’re changing your answer to say if there was voicemail, I would have written it down, one minute, is it ...

THE COURT:

That’s not what I understood, however.

Mtre JULIEN BOULIANNE, COUNSEL FOR THE RESPONDENT:

Sorry?

THE COURT:

What I understood is I don’t remember and the rest is hypothetical, you understand, […] I can’t conclude anything from a hypothesis, […] it’s hypothetical, I mean, he doesn’t remember, so it’s very difficult to draw a conclusion from that ...

[…]

 [Emphasis added]

1. Therefore, no evidence whatsoever established that Mtre Boulianne’s cellphone or the firm’s 24-hour line had operating voicemail that evening in June 2019 at around 11:37 p.m. to 11:39 p.m., and those possibilities were merely suggested by counsel for the respondent and remained hypothetical.
2. As for Officer Larouche, during cross-examination, she provided the following answers to counsel for the respondent’s questions concerning the attempts to reach Mtre Cantin. Again, two of these questions included a statement of a significant unproven fact.

[translation]

Q. How many times did you attempt to call Mtre Cantin?

A. We tried once on the twenty-four-hour line (24h).

Q. Yes but Mtre Cantin on his cellphone number, which is on the same website, which is on voicemail of the twenty-four hour line (24h), how many times did you call him?

A. We didn’t try that one.

Q. You didn’t attempt to call the lawyer that Mr. Blackburn-Laroche told you he wanted to call?

A. Listen, it wasn’t, it wasn’t because we didn’t want to, we looked on the website, those were the telephone numbers we found, and we used the telephone numbers that we found as best we could.

[…]

Q. Because if I suggest to you that if they have my number on the website, they have Mtre Cantin’s number?

A. It’s possible, I’m not saying otherwise.

 [Emphasis added]

1. After her colleague’s fruitless efforts, and in accordance with what she described as the usual procedure, Officer Larouche informed the respondent that Mtre Boulianne and Mtre Cantin could not be reached [translation] “for the time being”, and that he could also consult the telephone directory to find another lawyer or use legal aid services, which had a poster on one of the walls in the room he was in. The poster also featured a 24-hour telephone number and the photographs of five lawyers. The appellant answered yes. Moreover, as both police officers confirmed, he pointed specifically to Mtre Gagnon on the poster.
2. At 11:40 p.m., Officer Larouche dialled the number on the poster and reached Mtre Gagnon. The call was immediately transferred to the respondent, and his conversation with Mtre Gagnon lasted about eight minutes.
3. The respondent then knocked on the door to indicate to the police officers that he had finished his conversation with the lawyer. He did not express any dissatisfaction about their exchange or the quality of the advice he had received from Mtre Gagnon, nor did he ask the police officers to try to reach Mtre Boulianne or Mtre Cantin again or object to providing a breath sample.
4. At 11:56 p.m., about one hour and fifteen minutes after the respondent’s arrest, a first breath sample was taken. The result indicated a blood alcohol level of 110 mg of alcohol in 100 mL of blood.
5. As of around 11:57 p.m., during the waiting period required before a second sample could be taken, the police officers and the respondent reviewed his consumption scenario that evening using the form provided to that end, which in principle he had to sign once completed.
6. The respondent, however, was uncooperative in completing the form. He did not answer all of the questions on it, including the time of his last drink and the exact quantity he had drunk, and he refused to sign it.
7. Then, at 12:15 a.m., a second breath sample was taken. The result indicated the same level of 110 mg of alcohol in 100 mL of blood.
8. A copy of the analyst and certified technician’s certificate was given to the respondent and, at around 12:47 a.m., he was taken to the cells at the station to await his appearance in court.
9. On October 1, 2019, at the beginning of his trial for impaired driving, obstruction, and operating a motor vehicle with a blood alcohol level exceeding the legal limit, the respondent presented the application at issue here to have the results of the breathalyzer tests excluded from the evidence. His lawyer confirmed that these results were not contested.
10. Other than the foregoing concerning the evidence adduced at the *voir dire*, a reading of the transcript of the hearing reveals that, after he cross-examined the police officers, counsel for the respondent told the judge that the respondent would testify in support of his application, [translation] “[…] on the part […] regarding the crunch”, in the words of the lawyer. The respondent did not testify, however, and the “hypotheses” raised by the judge remained hypotheses, and the police officers’ version remained uncontradicted.
11. **The judgment under appeal**
12. After reviewing the evidence, the judge asked the following question:

[translation]

Now, was Mr. Blackburn-Laroche actually afforded the right to counsel of his choice in accordance with s. 10(b) of the *Charter*?[[10]](#footnote-10)

1. The essence of her conclusions on this question and on the exclusion of evidence under s. 24(2) are found in the following excerpts of her judgment, which are worth reproducing in full. I will present them under my own headings, however, to better distinguish them for the purposes of the analysis that will follow:
2. **Violation of the s. 10(b) *Charter* right**

[translation]

So, here is the situation […], can we say today, with the evidence we have, that the lawyers chosen by Mr. Blackburn-Laroche were not available? This is the crux of the matter, because all of the evidence boils down to saying that we do not know if those lawyers were available because either no message was left for them, or no attempt was made to, to reach Mtre Cantin, or no additional attempts were made to try to reach those lawyers, even though there were thirty-four (34) minutes until the maximum time limit and the right to counsel of choice is important, and there’s a reason it’s in the *Charter*, and if we discuss the accused’s diligence, the accused is detained, so his diligence, where does it end, where does it start? He is subject to what the police officers do.

[…]

[…] and I’m not saying that the police officers were in bad faith, what I’m saying is that the police officers acted much more out of habit, they told themselves that he has the right to counsel of choice, he is saying he wants Mtre Cantin, Mtre Boulianne, we call Mtre Boulianne, can’t reach him, we don’t call Mtre Cantin because we called the general emergency number, so that’s enough, it’s been two (2) minutes, we made no further attempts, we didn’t look into it more and we immediately offered him a different lawyer and because he accepted a different lawyer in a situation where, where he was in a precarious situation, I repeat, he was arrested for impaired driving, he was arrested for obstruction, and he was arrested for breach of an undertaking, he was detained, and because of that, because he agreed to call a legal aid lawyer, his right to counsel was supposedly respected? I, I cannot, in this situation, I cannot accept the prosecution’s theory. I find that indeed, once the lawyers, we can’t conclude that they weren’t available, and that is what I cannot do today, I cannot conclude that because the search was not exhaustive enough, not significant enough, the required efforts were not made, and from that moment on, I find that indeed the accused was not given the right to counsel of his choice and that the police officers’ efforts, although probably in good faith, were clearly insufficient to meet the criteria of section ten b (10(b)), and as a result, I consider that, in effect, section ten b (10(b)) was infringed.

 [Emphasis added]

1. **Section 24(2): the significance of the *Charter*-infringing state conduct**

[translation]

I repeat, the accused was detained, he was subject to the authority of the police officers, he could not have done the search himself. Should he have raised his hand and said, no wait, you haven’t searched enough, I don’t believe that this is the accused’s obligation even if he has the burden of proof, on the contrary, I think that the police officers must respect the *Charter* and their obligation is to ensure that the accused had access to his counsel of choice and only when that isn’t possible will he be allowed to contact another one, another lawyer, and as I was saying, I cannot get past the first step, and accordingly I find that in this case especially, that the seriousness of the police officers’ *Charter*-infringing state conduct is indeed **significant**.

 [Underlining added; boldface added]

1. **Impact of the police officers’ conduct on the respondent’s rights**

[translation]

The impact of the infringement of the accused’s rights, clearly, we can’t read the accused’s mind, he didn’t testify, but the fact remains that visibly, he asked for those two lawyers because he knew them, so if he knew them, there was a certain relationship of trust. From the moment when, even if you tell me the infringing conduct is minimal because we know they have an obligation to, to, to provide the breath samples, the fact nevertheless remains that we never know what advice a lawyer might give a client in the case of an arrest for such matters, be it for impaired driving, in this case there is obstruction and also breach of an undertaking […] but that was not explained to the accused, his choices were not explained to him, it was taken for granted that the lawyers were not available. That was not the case, however, so I find that the impact of the infringement on the accused’s rights was **significant**.

 [Underlining added; boldface added]

1. **Public interest in an adjudication on the merits**

[translation]

Regarding the interest in an adjudication on the merits, […] impaired driving is a social evil, […] society finds this type of offence repugnant, and it is clear that we want the perpetrators of this kind of offence to be punished, and I think that there is clearly an interest in an adjudication on the merits, that is for sure.

1. **The balancing exercise: exclusion of the evidence**

[translation]

Now all of this evidence must be weighed, and we must ask ourselves if indeed what prevails, and although I am convinced that the matter ought to, should be, decided on the merits, the fact remains that the manner, the manner the police officers acted this time appears to me wholly unacceptable, notwithstanding, notwithstanding good faith or anything else, the fact remains that they made no reasonable effort to respect the accused’s rights. I therefore find that it is indeed appropriate to set aside the evidence obtained after the right to counsel [sic].

 [Emphasis added]

1. **Analysis**

**3.1 Did the judge err in law in finding that the police officers infringed the respondent’s s. 10(b) *Charter* right?**

 **3.1.1 The standard of review**

1. In its brief, the appellant suggests that the judge’s finding that the police officers infringed the respondent’s *Charter* right to retain and instruct counsel of his choice is subject to a standard of correctness. In his brief, the respondent argues that the judge’s factual findings are owed deference.
2. These statements are not entirely incompatible.
3. Determining whether the *Charter* right of an arrested or detained person to retain and instruct counsel of choice has been infringed is a question of law that is reviewable according to a standard of correctness.[[11]](#footnote-11) The analysis is nevertheless inextricably linked to the circumstances of the case,[[12]](#footnote-12) subject to the limits imposed by the Crown’s right of appeal on the re-examination of the trial judge’s factual findings. I will come back to this later.

**3.1.2 The right to retain and instruct counsel of choice: some principles**

1. Section 10(b) of the *Charter* expressly provides that, upon arrest or detention, everyone has the right “to retain and instruct counsel without delay and to be informed of that right”. Furthermore, the person may express the choice to communicate with a specific lawyer; that is one facet of the guaranteed right.[[13]](#footnote-13)
2. As McLachlin, C.J. and Charron, J. noted in *McCrimmon* and *Willier*, that right is intended to “provide detainees with immediate legal advice on his or her rights under the law, mainly regarding the right to remain silent”.[[14]](#footnote-14) In *McCrimmon*, they added:

[17] As explained in *Willier*, the right to choose counsel is one facet of the guarantee under s. 10(b) of the *Charter*. Where the detainee opts to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles him or her to a reasonable opportunity to contact chosen counsel. If the chosen lawyer is not **immediately** available, the detainee has the right to refuse to contact another counsel and wait a reasonable amount of time for counsel of choice to become available. […]

[18] […] It is also because of this **immediate** need to consult counsel that information about the existence and availability of duty counsel and Legal Aid plans **must** be part of the standard s. 10(b) caution upon arrest or detention [references omitted]. […][[15]](#footnote-15)

 [Underlining added; boldface added]

1. As the Supreme Court also noted in *Sinclair*, 25 years of case law have established that s. 10(b) of the *Charter* essentially provides “the right to consult counsel to obtain information and advice immediately upon detention”.[[16]](#footnote-16)
2. That said, the police obligations flowing from s. 10(b) include not only this “informational component”[[17]](#footnote-17) but also, if the person indicates a desire to exercise his or her right, the “implementational component”.[[18]](#footnote-18) Failure to comply with either of these components results in the infringement of the guaranteed right.[[19]](#footnote-19)
3. This “implementational” component requires police officers to give the arrested or detained person a reasonable opportunity to exercise the right, except in cases of urgency or danger, and to refrain from trying to elicit evidence until the person has had that opportunity, except, again, in cases of urgency or danger.[[20]](#footnote-20)
4. Section 10(b), however, does not recognize an absolute and unlimited right to retain and instruct counsel, including the right to counsel of choice, and furthermore, diligence must also accompany the arrested or detained person’s exercise of his or her right.[[21]](#footnote-21) As a corollary, the obligations of the police are not absolute,[[22]](#footnote-22) and the guaranteed rights must be exercised in a way that is reconcilable with the needs of society.[[23]](#footnote-23)
5. In *Keror*,[[24]](#footnote-24) the Court of Appeal of Alberta applied these principles:

[42] The police do not violate a detainee’s right to counsel of choice when his preferred counsel is unavailable and the detainee **voluntarily** chooses to call a different lawyer. […], the appellant was “properly presented with another route by which to obtain legal advice,” and he **freely** chose to speak with a different lawyer […].

[43] Having **freely** pursued the option of speaking with a different lawyer, “**unless** a detainee indicates, diligently and reasonably, that the advice he or she received is inadequate, the police may assume that the detainee is satisfied with the exercised right to counsel and are entitled to commence an investigative interview” […].

 [Underlining added; boldface added]

1. In *Traité général de preuve et de procédure pénales*, Justice Vauclair and author Tristan Desjardins concur:

 [translation]

Furthermore, police officers must not pressure the detainee to end the waiting period and force an alternate consultation. If the detainee communicates with a different lawyer, such as duty counsel, who is not his or her counsel of choice, the police officer may assume that the assistance was useful unless the detainee indicates, diligently and reasonably, that the advice received was inadequate.[[25]](#footnote-25)

 [Emphasis added; references omitted.]

1. In short, as the Court of Appeal of Alberta also noted in *Keror*,[[26]](#footnote-26) a case similar to the one at bar, where it echoed the remarks of McLachlin, C.J. and Charron, J. to the same effect in *McCrimmon*[[27]](#footnote-27)and *Willier*: [[28]](#footnote-28)

[45] […] A police officer’s duties under s 10(b) depend upon what the detainee says and does, and what the officer should reasonably infer from the surrounding circumstances: [references omitted]. The appellant said and did nothing to suggest he was dissatisfied after speaking with duty counsel. […]

[…]

[47] […] In the absence of any evidence that duty counsel provided inadequate advice, we presume that duty counsel properly advised the appellant about his legal rights and obligations and in particular, adequately advised him about how he should exercise his right to remain silent. The appellant expressed his satisfaction with that opportunity to speak with counsel. As a result, the police were free to interview the appellant […] without waiting for Mr. Chow to become available to speak with the appellant.

 [Emphasis added]

**3.1.3 Application**

1. The respondent has admitted that the police officers fulfilled the informational component of their obligations. The appeal, therefore, concerns only the judge’s finding that the police officers breached the implementational component of their obligations and thereby infringed the respondent’s s. 10(b) right.
2. With the greatest respect, in my view the judge’s essential findings on these issues are tainted by errors of law. One of these errors stems from a determinative finding of fact in her decision that was not based on any evidence at all, or that was based on an incomplete assessment of all of the evidence, even on conjecture. Other errors, which are interrelated, concern her findings on the extent of the police officers’ obligations in the circumstances on the one hand, and on the parameters of the respondent’s obligation of diligence on the other.[[29]](#footnote-29)
3. **Error of law stemming from shortfalls in the assessment of all of the evidence on a determinative element**
4. In *Mian*,[[30]](#footnote-30) Rothstein, J., speaking for a unanimous court, noted that “the trial judge’s alleged shortcomings in assessing the evidence” can give rise to an error of law.[[31]](#footnote-31)
5. For example, it is well established that a finding of fact that is not supported by the evidence constitutes such an error,[[32]](#footnote-32) especially when it is “at the root of the trial judge’s decision.”[[33]](#footnote-33) The incorrect legal effect that the judge confers on one of his or her findings of fact also constitutes an error of law,[[34]](#footnote-34) as does the failure to consider all of the evidence in relation to the ultimate issue to be decided.[[35]](#footnote-35) As Cromwell, J. noted in *R. v. J.M.H.*, such situations, as well as the fourth that he also identifies in that decision, but that is not relevant to this case, may not constitute an exhaustive list.[[36]](#footnote-36)
6. That said, as the following excerpts from her reasons illustrate, in this case the judge accepted – or inferred – from the evidence, that lawyers Boulianne and Cantin were definitely available to provide legal assistance to the respondent, or that the police officers unduly [translation] “took for granted that the lawyers were not available”:

[translation]

* So, here is the situation [...], can we say today, with the evidence we have, that the lawyers chosen by Mr. Blackburn-Laroche were not available? This is the crux of the matter, […];
* […] I find that indeed, once the lawyers, we can’t conclude that they weren’t available, and that is what I cannot do today, […];
* […] it was taken for granted that the lawyers were not available. That was not the case, however. […].[[37]](#footnote-37)

[Emphasis added]

1. The appellant is correct to suggest that these findings or inferences are not supported by the evidence. Furthermore, these errors of law are determinative because, according to the judge, for the purposes of her analysis of whether the police officers violated the respondent’s s. 10(b) *Charter* right, “this is the crux of the matter”.
2. First, however, other than the mere suggestions in the questions put to the police officers during their cross-examination, no evidence whatsoever allowed the judge to conclude that lawyers Boulianne and Cantin were available on the evening of June 2019 as of 11:37 p.m. to provide assistance to the respondent. Incidentally, if that had been the case, the respondent, who bore the burden of proof, could have adduced evidence to establish it.
3. In my view, the judge committed a second reviewable error in finding from the evidence that [translation] “it was taken for granted” by the police officers that lawyers Boulianne and Cantin were not available.
4. Indeed, the only uncontradicted, actual evidence on this matter instead established that, after her colleague’s unsuccessful attempts, Officer Larouche informed the respondent that the lawyers he had identified were not available [translation] “for the time being”. Again, it would not have been complicated for the respondent to adduce evidence to contradict the officer’s version had it been false or inaccurate.
5. In short, the uncontradicted testimony of the police officers, whose good faith and credibility the judge did not question, established that, after finding the website for the lawyers’ firm, Officer Naess dialled the personal cellphone number of Mtre Boulianne that appeared there and then the 24-hour number that also appeared there, but was unsuccessful in both cases. According to Officer Larouche, those are the numbers she and her colleague were able to find on the website for the lawyers’ firm. These were the circumstances in which she informed the respondent that the lawyers were not available [translation] “for the time being” and that he could also seek the assistance of a legal aid lawyer if he wished.
6. It is important to reiterate here that it was in response to the suggestions of the respondent’s lawyer during Officer Naess’s cross-examination, and after having sustained an objection by counsel for the appellant in that regard, that the judge clearly informed counsel for the respondent that, given the inconclusive results of his line of questioning up to that point, the existence of operational voicemail on his cellphone line or on the firm’s 24-hour line that evening was [translation] “speculation”.
7. The respondent, who bore the burden of proof on his application to exclude evidence, decided not to subsequently adduce evidence to confirm this hypothesis, for example through oral or written testimony from Mtre Boulianne or a staff member of his firm. These persons could also have been called to testify to contradict the police officers’ testimony and, if possible, establish that, at the time of the events, a personal telephone number to reach Mtre Cantin directly also appeared on the firm’s website. In these matters, the applicant may present his or her evidence by any means, including testimony or affidavits, in which case the witnesses or affiants can nevertheless be cross‑examined.[[38]](#footnote-38)
8. The existence on that June evening around 11:37 p.m. of operational and functional voicemail on Mtre Boulianne’s cellphone and on the firm’s 24-hour line, or the fact that Mtre Cantin’s personal cellphone number was also listed on the website, are important considerations in this type of dispute, where the steps taken by police officers to enable the exercise of the right to counsel are examined.[[39]](#footnote-39)
9. Admittedly, the form of more than one of the questions put to the police officers by counsel for the respondent on cross-examination and the type of exchanges that followed may have complicated the judge’s task with respect to the findings of fact she could draw from them.
10. Indeed, these questions, the transcript of which are reproduced above, incorrectly implied and suggested that evidence of certain facts in dispute should be taken as proved, namely, the existence of operational and functional voicemail on Mtre Boulianne’s cellphone and a reference to a personal cellphone number for Mtre Cantin on the law firm’s website or in the voicemail message in operation on the 24-hour phone line that evening.[[40]](#footnote-40) The evidence, however, was silent on these matters, and it remained so thereafter.
11. Lawyers cannot use wording in the questions they ask on cross-examination to offer their own testimony on a disputed fact not otherwise established by the evidence. Nor can they slip in such a fact by making a mere suggestion to a witness, thereby in reality leaving a void where that key evidence should be, and yet later during submissions, present that fact as established. Admittedly, this type of omission and course of action can be purely unintentional, done in good faith, and explained by the fast-paced reality of the courtroom.
12. The remarks of Hurtubise, J. in *MIUF-27*[[41]](#footnote-41)adequately reflect the limits that the law of evidence imposes in these matters and are applicable to the case at bar:

[translation]

[1] [Counsel]:

 [2] In this context I am perfectly entitled to say to him: “I suggest to you that in reality the EPA stipulates that we use the linear threshold etc.” Either he knows or he does not. If he does not, Your Honour, I think it will give you a clear indication of the weight to give to his testimony. And if he knows it, so much the better, there is no problem. That’s all.

[3] The Court:

[4] You see, the difficulty there is that there are other ways of verifying what you have just submitted to me without, I think, any legal difficulties. In reality, even if, hypothetically, the witness did not know, I don’t want to prejudge his answer, nor can I take your statement as a proven fact because you are not a witness in this case and because you did not deem it appropriate to have a lay witness adduce it into evidence beforehand. It’s as simple as that.

 [Emphasis added]

1. This issue of substantive evidence, which is relevant both in civil and criminal law, was not modified by the rule established a few years later by the Supreme Court in *Lyttle*[[42]](#footnote-42) concerning the admissibility of questions by counsel for the accused during cross‑examination about unproven facts.
2. In that case, the Supreme Court found that the trial judge had erred in law in preventing the lawyer from asking a question on cross-examination without first proving the facts it included by another means. The Court found that the judge must give counsel full latitude and allow the question, as long as counsel is acting in good faith. That, however, is the extent of the guidance *Lyttle* can provide. That it is permissible to ask such a question, as is the case here, does not mean that the facts it contains are proved, unless they are admitted by the cross-examined witness or otherwise established. The distinction is elementary, but crucial.
3. For example, in *R. v. Dixon*,[[43]](#footnote-43) the Court of Appeal for British Columbia allowed an appeal and ordered a new trial because the judge had not warned the jury that it could not take as proven facts that, although suggested in questions that were otherwise admissible, were simply suggested in the questions asked by the lawyer on cross-examination, but were not admitted by the witness, and were not otherwise supported by the evidence.[[44]](#footnote-44)
4. Lastly, it is equally important to note that in the absence of any evidence on these matters the judge could not take judicial notice that (**i**) Mtre Boulianne’s cellular device had voicemail that had been activated and was operational that evening, (**ii**) the firm’s 24‑hour line had voicemail, and (**iii**) a personal cellphone number to reach Mtre Cantin directly appeared on the law firm’s website, because they did not constitute generally known facts. The threshold for judicial notice is strict,[[45]](#footnote-45) and accordingly, a judge cannot take notice on his or her own of a fact concerning a specific event or of a disputed fact that generates the right claimed by a party or that is close to the centre of it.[[46]](#footnote-46) The judge may take judicial notice only of a fact that is so certain that any contrary evidence would be futile and considered inadmissible.[[47]](#footnote-47)
5. The above-mentioned facts, however, which were at the heart of the dispute before the judge, do not meet this onerous burden.
6. **Error of law concerning the extent of the police officers’ obligation in the circumstances on the one hand, and the parameters of the respondent’s obligation of diligence on the other**
7. With all due respect, once the judge’s above-mentioned findings of fact are removed because of their lack of an evidentiary underpinning, and once the duly proven facts are considered, the judge’s finding that the police officers infringed the respondent’s right to retain and instruct his counsel of choice appears to me incorrect in law.
8. First, in a sense that finding has the effect of imposing on the police officers an obligation of result by effectively ruling that only if it had been [translation] “impossible”[[48]](#footnote-48) for them to reach one of the lawyers identified by the respondent would he have been [translation] “entitled to contact another lawyer”.[[49]](#footnote-49)
9. This principle as stated also appears incorrect in law, as it implies that it is only in the case of such an impossibility that the choice of the detained or arrested person to seek the assistance of a legal aid lawyer can meet the requirements of s. 10(b) of the *Charter*. This is in fact what the judge concluded when she stated:

[translation]

[…] it’s been two (2) minutes, we made no further attempts, we didn’t look into it more and we immediately offered him a different lawyer […] and because of that, because he agreed to call a legal aid lawyer, his right to counsel was supposedly respected? His right to counsel of his choice was respected? I, I cannot, in this situation, I cannot accept the prosecution’s theory, […].

[Emphasis added]

1. While s. 10(b) includes the detained or arrested person’s right to retain and instruct his or her counsel of choice “without delay”, the Supreme Court has confirmed that police officers also have the obligation to inform the person, also “without delay”, of the availability of legal aid services.[[50]](#footnote-50) In *Suberu*,[[51]](#footnote-51)the Court added that the expression “without delay” in s. 10(b) means “immediately”.[[52]](#footnote-52) The Court provided the following explanation:

[42] To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill‑defined and unworkable test of the application of the s. 10(b) right.  The right to counsel requires a stable and predictable definition.  What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. […]

 [Emphasis added]

1. Thus, inasmuch as the applicable law requires that police officers who arrest or detain a person be aware of the duties incumbent upon them, the judge could not fault Officer Larouche for infringing the respondent’s s. 10(b) *Charter* right by informing him “without delay” of the availability of legal aid services, in accordance with the teachings of the Supreme Court, after it turned out that the lawyers he initially identified were not “immediately” available. Indeed, *Willier* and *McCrimmon* unambiguously teach that police officers have an obligation to inform an arrested person of his or her right to retain and instruct counsel “without delay” and of the existence of legal aid and duty counsel.[[53]](#footnote-53) According to Justice Vauclair and author Tristan Desjardins, the detainee must [translation] “be informed without delay of all of the available services”.[[54]](#footnote-54)
2. I am also of the view that the judge erred in unduly diluting the respondent’s obligation of diligence by failing to consider that it was freely and without direct or indirect coercion, and in the absence of any evidence of misleading information from the police officers, that he exercised his right to a legal aid lawyer, whom he in fact specifically identified.
3. As the Supreme Court emphasized in *Sinclair*:[[55]](#footnote-55)

[26] The purpose of the right to counsel is “to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights” [references omitted]. The emphasis, therefore, is on assuring that the detainee’s decision to cooperate with the investigation or decline to do so is free and informed. Section 10(b) does not guarantee that the detainee’s decision is wise; nor does it guard against subjective factors that may influence the decision. Its purpose is simply to give detainees the opportunity to access legal advice relevant to that choice.[[56]](#footnote-56)

 [Emphasis added]

1. In the case at bar, there is even less reason to find that there was an infringement of s. 10(b), given that the police officers duly facilitated the respondent’s freely expressed choice by communicating without delay with the legal aid lawyer he had identified, who, it turned out, was immediately available.
2. In *R. v. Richfield*,[[57]](#footnote-57) the Court of Appeal for Ontario recalled that the availability of legal aid services is a crucial factor that must be considered in analyzing whether the detained person has been given a reasonable opportunity to exercise the right to retain and instruct counsel of choice, and whether he or she has exercised that right with reasonable diligence.[[58]](#footnote-58)
3. I am also of the view that the judge erred in law when, using metaphorical language, she stated that the respondent’s obligation of diligence did not require him to [translation] “raise his hand” to signal to police officers that he wanted them to do more research to try and get in touch with Mtre Boulianne or Mtre Cantin before he opted for legal aid assistance. This finding appears to me incompatible with the teachings in *McCrimmon*, which recognized that the arrested or detained person has the right to refuse the option of communicating with another lawyer and to wait a reasonable time until his or her counsel of choice is available.[[59]](#footnote-59) In the case at bar, the respondent preferred not to exercise that right and instead chose to rely on the free assistance of legal aid.
4. In short, it seems to me that the general principles that emerge from *Willie*r and *McCrimmon*[[60]](#footnote-60) clearly indicate—no doubt more clearly than my explanations do here—how the judge erred in law in finding that the police officers infringed the respondent’s s. 10(b) *Charter* right.
5. In *Willier*, which deals specifically with the nature and limits of the right to counsel of one’s choice, the police arrested the accused for murder, advised him of his right to retain and instruct counsel, and then helped him get in touch with a legal aid lawyer, with whom he spoke briefly. The next day, after the police had given him another opportunity to speak to a lawyer, Willier tried unsuccessfully to contact a specific lawyer but was able to leave a message. After the police asked him if he wanted to speak to another lawyer, Willier told them that he wanted to wait for the first lawyer he had chosen to call. However, when the police officers said that the lawyer was unlikely to call back before his office opened the next day, and after the accused was reminded that legal aid was available to him immediately, he chose to speak to a legal aid lawyer again. He then expressed satisfaction with the advice he received and did not attempt to contact his or any other lawyer again before giving a statement to police.
6. The trial judge determined that the police officers were required to inform Willier of his right to a reasonable opportunity to contact counsel of his choice and to refrain from questioning him until he was afforded that opportunity. The majority of the Court of Appeal overturned that ruling, finding no infringement of s. 10(b). In that Court’s view, the right to counsel of one’s choice does not impose an additional informational duty on the police when the detained person is unable to contact a specific lawyer and chooses to speak to a different lawyer.
7. The Supreme Court affirmed the Court of Appeal judgment. The essential findings of McLachlin, C.J. and Charron, J. were the following:

[43] Considering the circumstances of this case as a whole, the majority of the Court of Appeal correctly found that Mr. Willier did not suffer a violation of his s. 10(b) right to counsel. In no way did the police interfere with Mr. Willier’s right to a reasonable opportunity to consult with counsel of choice by simply reminding him of the **immediate** availability of free Legal Aid after his unsuccessful attempt to call Mr. Royal. […] **Mr. Willier was not told that he could not wait to hear back from Mr. Royal, or that Legal Aid was his only recourse. There is no indication that his choice to call duty counsel was the product of coercion. The police had an informational duty to ensure that Mr. Willier was aware of the availability of Legal Aid, and compliance with that duty did not interfere with his right to a reasonable opportunity to contact counsel of choice. Mr. Willier was properly presented with another route by which to obtain legal advice, an option he voluntarily chose to exercise.**

[44] Further, the brief interval between Mr. Willier’s attempt to contact Mr. Royal and the start of the investigative interview did not deprive him of a reasonable opportunity to contact counsel of choice. **The brevity of the interval must be viewed in light of all the circumstances prior to the commencement of the interview**. After speaking with Legal Aid, Mr. Willier expressed satisfaction with that advice prior to being questioned. He did not pursue any further opportunity to contact Mr. Royal, though he was offered an open‑ended invitation to contact counsel prior to and throughout the interview. If Mr. Willier maintained any continuing desire to speak with Mr. Royal, or wait for him to call back, he was not diligent in exercising that right. […]

 [Underlining added; boldface added]

1. While the above judgment confirms the negative obligation on the police to refrain from falsely informing the arrested or detained person that he or she does not have the right to wait until the lawyer of his or her choice can be contacted, neither that judgment—nor any other—confirms that police have the positive obligation to inform the arrested or detained person that he or she may wait a reasonable period of time before electing to retain and instruct legal aid counsel.
2. In light of the principles that arise from *Willier*, the judge made a determinative error of law in analyzing the duration of the police officers’ attempts to reach Mtre Boulianne or Mtre Cantin, an analysis she carried out in a vacuum, without considering all of the evidence relevant to the issue she had to decide, especially the aspect that supports the conclusion that the respondent freely and without pressure or coercion decided to retain and instruct Mtre Gagnon, that their conversation lasted eight minutes, and that nothing afterwards gave the police any reason to believe that he was dissatisfied with the advice he received or the quality of that advice. This is especially so, since the s. 10(b) *Charter* right does not oblige the police to oversee the quality of the advice received or ensure that the legal advice received by the arrested or detained person meets a certain quality standard before proceeding further.[[61]](#footnote-61)
3. In *McCrimmon*, the respondent had been arrested for assaulting five women. When informed of his right to retain and instruct counsel, he told police officers that he wished to speak to a specific lawyer. After the police officers’ unsuccessful attempts to reach that lawyer, McCrimmon agreed to communicate with a legal aid lawyer, with whom he spoke for five minutes. During the interrogation that followed, McCrimmon repeatedly stated that he wanted to speak to a lawyer again and that he wanted to have a lawyer physically present. The police refused these requests, and ultimately, McCrimmon made some incriminating statements.
4. The trial judge and the Court of Appeal judge rejected McCrimmon’s submissions that his right to retain and instruct counsel of choice had been infringed by the police officers’ refusal to suspend the interrogation until he had access to the lawyer of his choice and by their repeated refusal to grant his request for additional legal advice during the interrogation.
5. The Supreme Court dismissed the appeal. McLachlin, C.J. and Charron, J., writing for the majority, concluded:

[18] What amounts to a reasonable period of time depends on the circumstances as a whole, including factors such as the seriousness of the charge and the urgency of the investigation. It is also informed by the purpose of the guarantee. The right to counsel upon arrest or detention is intended to provide detainees with **immediate** legal advice on his or her rights and obligations under the law, mainly regarding the right to remain silent. […]

[19] In this case, we agree with the courts below in rejecting Mr. McCrimmon’s contention that he was denied the right to counsel of choice in a manner that contravened his rights under s.10(*b*). While Mr. McCrimmon expressed a preference for speaking with Mr. Cheevers, **the police rightly inquired whether he wanted to contact Legal Aid instead when Mr. Cheevers was not immediately available.  Mr. McCrimmon agreed,  exercised his right to counsel before the interview began, and expressed satisfaction with the consultation**. He also indicated an awareness of his rights at the commencement of the interview. In these circumstances, there was no further obligation on the police to hold off the interrogation until such time as Mr. Cheevers became available.

 [Underlining added; boldface added]

1. In *R. v. Littleford*,[[62]](#footnote-62)which is also analogous to the present case in several respects, the Court of Appeal for Ontario reached the same conclusion:

[2] […] Although the appellant testified in his defence, he did not testify during the s. 10(b) *Charter* *voir dire* nor did he give any evidence addressing that issue.

[…]

[7] The appellant argues that his s. 10(b) rights were violated because he expressed the wish to speak to his own lawyer, and was not given a reasonable opportunity to do so. The basis for this submission is his assertion that after a perfunctory attempt was made by the officer to reach that lawyer, the officer immediately contacted and put the appellant in touch with duty counsel, contrary to his wishes and therefore contrary to his rights.

[8] On a *Charter* motion, the onus is on the accused person to prove a breach of his or her *Charter* rights on a balance of probabilities. **The difficulty with the appellant’s position in this case is that he did speak to duty counsel before taking the breathalyzer test. He neither raised any concern at the time, nor did he testify on the *voir dire* to suggest that he misunderstood his rights at the time or that the conduct of the police officer affected his ability to assert those rights. The trial judge made a finding that speaking to duty counsel “seemed to satisfy him at the time.” There is no basis on the record to disturb that finding.**

 [Underlining added; boldface added]

1. Recently, in *Dupont-Dorais c. R*.,[[63]](#footnote-63) the Quebec Superior Court applied the principles arising from those judgments:

[translation]

[30] The trial judge did not err in applying the teachings of the Supreme Court as he did.

[31] In this case, Officer Louis, after reaching Mtre Laurent Brisebois’ voicemail, asked the appellant if he wished to speak to a legal aid lawyer, and the appellant accepted immediately.

[32] It must also be pointed out that the message on the voicemail did not provide a contact number in case of emergency. Officer Louis stated that, had that been the case, she would have taken the appropriate steps.

[33] **In addition, the appellant never stated that he was dissatisfied with the exercise of his right with the legal aid lawyer. If the appellant wanted to speak to Mtre Laurent Brisebois, he had to show more reasonable diligence by not spontaneously accepting the first offer to contact legal aid after the unsuccessful attempt to contact Mtre Brisebois.**

[…]

[35] It must be noted that once the trial judge found that the appellant understood the warning about his right to counsel, there was no basis for complaint about the application of the informational component of the right to counsel. **Also, it is clear that the appellant made the decision to contact the legal aid lawyer.**

[36] The Court finds that this ground of appeal must be rejected and that the trial judge did not err in fact or in law when he ruled that the appellant’s s. 10(b) *Charter* right was not infringed.

 [Underlining added; boldface added; references omitted]

1. That said, at the hearing, the respondent argued that the police officers’ obligation to provide him with a reasonable opportunity to exercise his right to retain and instruct the lawyers he had first identified required them, after their unsuccessful attempts, to expressly inform him that he was entitled to an additional period of time to make a second attempt to contact them before deciding to retain and instruct Mtre Gagnon
2. Unlike my colleagues, and with respect, I do not believe that is so.
3. First, the respondent has submitted no case law that confirms such a duty, and there does not appear to be any. Second, it emerges from the case law that, on the contrary, s. 10(b) of the *Charter* imposes no such additional obligation on police officers.
4. For example, in *R. v. Keror*,[[64]](#footnote-64) discussed above, the Court of Appeal of Alberta, relying on the Supreme Court’s judgment in *Willier*, rejected a similar submission:

[48] […] The appellant argues that unless the police tell a detainee about the possibility of waiting to speak with his preferred counsel, the detainee cannot make an informed decision about whether to “make do” with another lawyer who happens to be available, such as duty counsel.

[49] The appellant attempts to revive an argument that the Supreme Court rejected in *Willier*. Mr. Willier argued that the police should have told him about his right to speak with his counsel of choice, in a manner similar to a *Prosper* warning. As McLachlin CJC and Charron J explained, the analogy to *Prosper* is inapt (at para 39):

…**The concerns animating the provision of a *Prosper* warning do not arise when a detainee is unsuccessful in contacting a specific lawyer and simply opts to speak with another**. In no way did Mr. Willier attempt to relinquish his right to counsel and thus any opportunity to mitigate his legal disadvantage. He made no attempt to waive his s 10(b) right. Instead, unsuccessful in contacting Mr. Royal, he exercised his right to counsel by opting to speak with Legal Aid. **As such, the police were under no obligation to provide him with a *Prosper* warning, and its absence fails to establish a *Charter* breach.**

[50] There is no need to place an additional obligation on the police in these circumstances, because *duty counsel* can explain a detainee’s right to speak with his preferred counsel. […]

[51] In conclusion, Det. Burrow did not violate the appellant’s right to consult with counsel of his choice, nor did the trial judge err when she concluded Det. Burrow had complied with s 10(b).

 [Underlining added; boldface added]

1. Certainly, in some cases the Supreme Court has recognized the need to add to the duties of police officers to ensure a reasonable opportunity for the accused or detained person to retain and instruct counsel.
2. This was the case in *Prosper*,[[65]](#footnote-65) where the Supreme Court set out the additional informational obligation of police officers when the arrested or detained person is not successful in contacting a specific lawyer and then refuses the opportunity to consult another. The *Prosper* warning, as it has come to be known, ensures that the individual is aware that his or her right to counsel is not exhausted by unsuccessful attempts to contact a specific lawyer. As the Court pointed out in *Willier*, this additional obligation to inform on the part of the police arises only when the arrested or detained person “indicates an intent to forego s. 10(*b*)’s protections in their entirety, ensuring that any choice to do so is fully informed”.[[66]](#footnote-66)
3. In *Sinclair*,[[67]](#footnote-67) the Supreme Court of Canada also recognized that police officers cannot be satisfied that their obligation has been met where they have informed the accused or detained person of his or her right to retain and instruct counsel at the outset and the person has exercised that right, if the circumstances of the arrest or detention subsequently change. This may occur, for example, when the interview with the arrested person leads to the suspicion or knowledge of an additional offence with which the police officers may have to charge the person, or when they decide to give the person a polygraph test. These are just some examples. In such cases, the s. 10(b) *Charter* right imposes an additional obligation on the police to read the person their rights again, including the right to retain and instruct counsel, and to allow the person to consult counsel a second time if necessary.
4. Unlike my colleagues, I am of the opinion that the s. 10(b) *Charter* right does not include an additional obligation on police officers like the one suggested by the respondent in this case, and I do not see the need to intensify the *Prosper* warning requirement, as the respondent would like.
5. A final word is in order on the “relationship of trust” that allegedly existed between the respondent and the two lawyers, Mtre Boulianne and Mtre Cantin. As we understand from the judge’s reasons, this relationship existed solely because the respondent had named them, and the legal effect was to intensify the police officers’ obligation to facilitate the respondent’s opportunity to retain one of them.
6. First, the respondent did not testify during the *voir dire* to establish that he had told the police officers in any way about the relationship of trust he had with either of these lawyers. Although one of the allegations in the affidavit of counsel for the respondent attached to his application to exclude evidence states that he had represented him in several cases in the past, this information was not available to the police officers at the time of the events. What is important in cases such as these is all of the circumstances and all of the information available to the police at the time of the arrest, not information that is tailored and adduced after the fact, once the case is before a court.
7. The situation therefore is very different from that in *R. v. Lefebvre*,[[68]](#footnote-68)in which Cournoyer, J.S.C., now of the Court of Appeal, rightly insisted on the importance of the relationship of trust between Lefebvre and the lawyer he had identified when assessing the police officers’ conduct. In that case, the accused Lefebvre had testified at the *voir dire* to establish that he had told the police officer that he wished to contact a lawyer he knew and [translation] “really trusted”.[[69]](#footnote-69)
8. Second, after correctly observing that she could not assume that there was a relationship between the respondent and the lawyers he identified because [translation] “clearly, we can’t read the accused’s mind, he didn’t testify”, the judge nevertheless assumed that [translation] “a certain relationship” of trust existed [translation] “because he knew them, so if he knew them, there was a certain relationship of trust”.
9. In the absence of any specific *voir dire* evidence, however, the possibility that an arrested or detained person might have identified a lawyer simply because he or she has heard of but never consulted that lawyer before cannot be ruled out.
10. Moreover, if merely asking to speak to a specific lawyer indicates a certain relationship of trust, the judge should not have overlooked the fact that the respondent also picked Mtre Gagnon out of all the lawyers whose photographs appeared on the legal aid poster, yet she did not mention it in her judgment.
11. Finally, if there was a [translation] “certain relationship” of trust between the respondent and Mtre Boulianne or Mtre Cantin that was important to him, would this not have been all the more relevant to his obligation of diligence to at least inform the police of this fact and/or to turn down the opportunity the police gave him to use legal aid while waiting until another attempt was made to reach them? The answer, it seems to me, lies in the very question.
12. In my view, therefore, it is important that the notion of “relationship of trust” not be given inordinate weight to such an extent that it raises the requirements of the implementational aspect of police officers’ obligations indiscriminately in all cases and in the abstract, that it transforms the right of an arrested person to counsel of his or her choice into an absolute right, or that it dilutes the arrested person’s obligation of diligence in a way that is irreconcilable with s. 10(b) and the needs of society.
13. For all of these reasons, I would reverse the judge’s finding that the respondent’s s. 10(b) *Charter* right to retain and instruct counsel of his choice was violated.
14. This disposition of the first ground raised by the appellant would be sufficient to decide the appeal, without the need to analyze the second ground concerning the judge’s decision to exclude the results of the blood alcohol tests from the evidence under s. 24(2).
15. Nonetheless, in view of the conclusions of my colleagues on this point, it is appropriate that I address this argument, which I also find to be well founded.

**3.2 Did the judge err in law in finding that the application of the criteria in *Grant* justify the exclusion of the blood alcohol test results from the evidence?**

 **3.2.1 The applicable standard of review**

1. When faced with an application for exclusion under s. 24(2) of the *Charter*, a judge must assess and balance the effect of admitting the evidence on public confidence in the justice system having regard to the seriousness of the infringing state conduct, the impact of the infringement on the *Charter*-protected interests of the accused, and society’s interest in the adjudication of the case on its merits.[[70]](#footnote-70)
2. A judge’s decision to exclude evidence after weighing these criteria calls for great deference. An appellate court must not intervene unless there has been an apparent error as to the applicable principles or rules of law, or an unreasonable finding.[[71]](#footnote-71)
3. In *R. v. Lefebvre*[[72]](#footnote-72), Cournoyer, J.S.C., now of the Court of Appeal, provided further clarification:

[translation]

[275] When the decision concerning the exclusion of evidence under s. 24(2) is tainted by an error in principle or a misunderstanding of the evidence, when it is the product of an unreasonable assessment of the evidence, or when it fails to take into account or ignore the relevant considerations, the decision no longer merits the considerable deference generally afforded this type of decision, and the analysis under s. 24(2) can be repeated by an appellate court.

 [Emphasis added]

* + 1. **Application**
1. **Seriousness of the infringing conduct**
2. Acts and omissions that infringe *Charter* rights vary in seriousness. Therefore, they do not all carry the same consequences for the public’s confidence in the administration of justice.
3. The more serious the actions alleged against police officers, the more deliberate the disregard of their obligations, or the more abusive the situation, the more the courts must dissociate themselves from them. The less serious those actions are, the less likely it is that public confidence will be undermined by the judge’s decision to admit the evidence obtained for the purposes of the trial. Thus, at one end of the spectrum is the admission of evidence obtained through minor, understandable, or inadvertent violations,[[73]](#footnote-73) and at the other, that obtained through a wilful disregard of *Charter* rights,[[74]](#footnote-74) including, within that spectrum, negligent conduct: “What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct.”[[75]](#footnote-75) This is all the more so when the infringement is the result of genuine good faith behaviour by the police, which will also reduce the need for the Court to disassociate itself from the police conduct.[[76]](#footnote-76) Although not determinative, good faith constitutes a mitigating factor.[[77]](#footnote-77)
4. For example, in *Taylor*,the accused had been arrested for impaired driving causing bodily harm. At the hospital, a nurse had taken blood samples, which established that his blood alcohol level exceeded the legal limit. The Supreme Court found that the criteria with respect to the analysis of the infringing conduct weighed in favour of excluding that evidence[[78]](#footnote-78) because the police officers’ decision not to give Mr. Taylor access to a telephone so that he could speak to his lawyer, as he had requested, and to then take him to the hospital for the blood samples, again without providing him the opportunity to speak to his lawyer or even verifying whether that would have been possible, constituted (as the judge incidentally also found in the present case) a “significant” departure from the standard of conduct expected of police officers that cannot be condoned. Contrary to the situation of the respondent in the present case, however, the police officers did not “do anything” to facilitate Mr. Taylor’s access to a lawyer.[[79]](#footnote-79)
5. It appears that the trial judge made an unreasonable error by inappropriately positioning the infringing conduct of police officers Naess and Larouche, as revealed by the evidence, on the spectrum of infringing conduct. Their actions certainly do not constitute a significant departure from their obligations and can in no way be described as a “complete denial”[[80]](#footnote-80) of the right to retain counsel.
6. I note, moreover, that the judge found that they acted in good faith. She also did not question the credibility of their testimony on the information they gave to the respondent and the reasons for their actions. Although not determinative on its own, the evidence also establishes that, in accordance with their obligations, police officers Naess and Larouche informed the respondent of his right to retain and instruct counsel at the time of his initial arrest for impaired driving, again upon arrival at the police station to see if he still refused, and again when circumstances changed due to the information they received that he was also in breach of a condition to abstain from alcohol. Finally, after their admittedly brief attempts to do so, and after informing him that the lawyers he had initially identified were not available [translation] “for the time being”, the police officers informed him without further delay of the possibility of retaining and instructing a legal aid lawyer.
7. This was the situation, which involved no coercion or misrepresentation by the police officers, in which the respondent voluntarily decided to seek the free assistance of a legal aid lawyer. Moreover, he specifically identified this lawyer and spoke with him in a private conversation lasting eight minutes, regarding which he expressed no dissatisfaction, before agreeing to blow into the breathalyzer.
8. In light of all of the circumstances, the situation is quite removed from one where police officers, through means that were concerted and deliberate,[[81]](#footnote-81) that were overt or negligent, that involved misrepresentation,[[82]](#footnote-82) or that were taken in order to gain a strategic advantage,[[83]](#footnote-83) infringed, in a “clearly serious”[[84]](#footnote-84) manner, a s. 10(b) *Charter* right or otherwise committed an abuse of office.
9. Although I am well aware of the applicable standard of review, for these reasons, I do not see how the judge could reasonably conclude that the seriousness of the police officers’ conduct was [translation] “significant” or [translation] “entirely unacceptable” and therefore situate it in the higher range of seriousness of infringing conduct. Furthermore, the judge’s analysis of this issue and her characterization of the police officers’ conduct were also inevitably affected by the above-mentioned errors of law in the assessment of the evidence.
10. Thus, had I found that the police officers infringed the respondent’s s. 10(b) *Charter* right, it would have been a minor infringement committed in good faith.
11. **Impact of the infringing conduct on the respondent’s right guaranteed in s. 10(b)**
12. The appellant is also correct to argue that the judge erred in an unreasonable manner in finding that the impact of the police officers’ infringing conduct on the respondent’s guaranteed right was also [translation] “significant”.
13. In *Grant*,[[85]](#footnote-85)the Supreme Court summarized the type of analysis this test requires:

[76] This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused.  It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter*breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused’s protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests.  […]  The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

 [Emphasis added]

1. In *Oakes,*[[86]](#footnote-86) the Supreme Court established for the first time that the meaning and purpose of a *Charter* right must be analyzed in light of the interests it was meant to protect.[[87]](#footnote-87) It must therefore be borne in mind that the right that s. 10(b) seeks to protect is that of the arrested or detained person to retain and instruct counsel without delay, from the outset of detention, in order to ultimately allow that person “[…] not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights”.[[88]](#footnote-88)
2. That said, in the case at bar, the police officers’ conduct did not significantly affect the right that s. 10(b) is essentially intended to protect. Indeed, the respondent had the benefit of legal advice from a legal aid lawyer, one whom he had specifically identified, and he did not complain about that advice in any way. In fact, it is reasonable to believe that his limited cooperation in reviewing his consumption scenario on the evening of June 12 and his refusal to sign the form provided for this purpose, which essentially reflect a desire to avoid self-incrimination, stem from the content of his eight-minute conversation with Mtre Gagnon. It was following this conversation that he blew into the breathalyzer with no objection, in accordance with the obligation imposed on him by s. 320.15 *Cr.C.*
3. For these reasons, I find that the judge could not have reasonably found that the police officers’ infringing conduct, if indeed I had characterized their conduct as such, had a [translation] “significant” impact on his s. 10(b) *Charter* right.
4. **Society’s interest in the adjudication of the case on its merits**
5. It is undisputable that the public has an interest in the adjudication of a case on its merits when, as here, the evidence that the accused is seeking to have excluded is reliable and key to the outcome of the trial.[[89]](#footnote-89) This was specifically confirmed by Parliament in its enactment of s. 320.12 *Cr. C.*, which came into force shortly before the hearing of the respondent’s application to exclude evidence:[[90]](#footnote-90)

**320.12** It is recognized and declared that

**(a)** operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety;

**(b)** the protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;

**(c)** the analysis of a sample of a person’s breath by means of an approved instrument produces **reliable and accurate** readings of blood alcohol concentration; and

**(d)** an evaluation conducted by an evaluating officer is a reliable method of determining whether a person’s ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug.

[Underlining added; boldface added]

1. In *Grant*, the Supreme Court wrote the following, providing comments on obtaining evidence through the collection of breath samples that are particularly relevant to this case:

[83] The importance of the evidence to the prosecution’s case is another factor that may be considered in this line of inquiry. […] the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

[…]

[111] While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused’s privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability.  On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused’s body may be admitted. **For example, this will often be the case with breath sample evidence, whose method of collection is relatively non‑intrusive.**

 [Underlining added; boldface added]

1. Based on this excerpt, I am of the view that the judge erred in principle in failing to consider the high reliability and decisive importance for the prosecution of the respondent’s blood alcohol level test results. Not only does she not discuss this at all in her judgment, but – although this is not decisive in itself – it is clear from the transcript of the recording of the hearing that it was only after she had rendered judgment and excluded these results from the evidence that she asked the appellant whether it had any other evidence to support the charge, which it did not.
2. **Balancing of the three criteria**
3. After analyzing the three criteria individually to determine whether the use of the contested evidence would be likely to bring the administration of justice into disrepute, the judge must use a [translation] “*holistic* and *prospective* approach”, without assigning more weight to one criterion over another.[[91]](#footnote-91)
4. In 2019, in *R. v. Le*, the Supreme Court also stated:[[92]](#footnote-92)

[142] The third line of inquiry, society’s interest in an adjudication of the case on its merits, typically pulls in the opposite direction — that is, towards a finding that admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown’s case [reference omitted], we emphasize that the third line of inquiry cannot turn into a rubber stamp where *all* evidence is deemed reliable and critical to the Crown’s case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility [reference omitted]. Conversely, if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence.

 [Emphasis added]

1. In this case, in light of my foregoing conclusions as to the unreasonableness of the judge’s findings on, first, the significance of the police officers’ allegedly infringing conduct and, second, the impact of that conduct on the respondent’s s. 10(b) *Charter* right, I am of the view that the test of society’s interest in having the case tried on the merits conclusively tips the balance in favour of the admissibility of the evidence. This is all the more so in light of the minimally invasive manner in which it was obtained, the respondent’s legal obligation to provide it, and the legislative statement recognizing the reliability and accuracy of this type of evidence to “simplify the law relating to the proof of blood alcohol concentration”.[[93]](#footnote-93)
2. For all of these reasons, had I not previously allowed the appellant’s first ground of appeal, I would have found its second ground of appeal well founded and quashed the judge’s decision to exclude the evidence of the blood alcohol level tests performed using the approved breathalyzer.
3. Lastly, in light of **(i)** my proposition to grant the appeal, **(ii)** the respondent’s admission at trial concerning the validity of the results of his blood alcohol level tests, and **(iii)** the legislative statement of the reliability and accuracy of the analysis of breath samples performed using an approved breathalyzer, I find that it is consistent with the proper administration of justice and judicial resources not to order a new trial and to find the respondent guilty of the following charge against him:

[translation]

On or about June 12, 2019, in Saguenay (Chicoutimi), district of Chicoutimi, did have a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood, within two hours after ceasing to operate a conveyance, namely a motor vehicle, thereby committing the indictable offence under s. 320.14(1)(b) – 320.19(1) of the *Criminal Code*.

1. Moreover, I would refer the case back to the Court of Québec for sentencing.

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| MICHEL BEAUPRÉ, J.A. |

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| REASONS OF GAGNÉ, J.A. |
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1. Overview
2. For over thirty years, the case law has recognized that s. 10(b) of the *Charter* guarantees a detained person a reasonable opportunity to consult counsel of choice. Only if the lawyer chosen is not available within a reasonable time is the detainee expected to exercise his or her right to retain and instruct counsel by calling another lawyer.
3. When police officers take responsibility for establishing contact with the chosen lawyer – by looking up the telephone number, dialing it, leaving a voicemail message or not – the obligation of reasonable diligence that is normally incumbent on the detainee falls to them because the detained person no longer has any means of discharging it.
4. It is on this point that my opinion differs from that of my colleague Beaupré, J.A. Despite some inaccuracies in the evidence, in my view the trial judge correctly found that the police officers had not made the necessary efforts to reach the lawyers chosen by the respondent and that he was thereby deprived of a reasonable opportunity to contact them. The fact that the respondent agreed to call a legal aid lawyer – without, however, being informed that he could wait a reasonable amount of time for his lawyers to answer – does not alter the fact that his right to retain and instruct his counsel of choice was infringed.
5. As for the trial judge’s decision to set aside the evidence pursuant to s. 24(2) of the *Charter*, the appellant has not convinced me that it is necessary to intervene. The judge examined the correct elements and did not reach an unreasonable conclusion. The Court must therefore show great deference to her decision.
6. The right to counsel of choice
7. I will begin with a brief overview of the case law on the right to retain and instruct counsel of choice and on the detainee’s obligation of diligence, and then examine whether the respondent benefitted in this case from a reasonable opportunity to communicate with one of his lawyers.
8. Brief overview of the case law
9. The first decisions on the right to retain and instruct counsel of choice date back to 1989. At the time, the Supreme Court recognized that “accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to retain and instruct counsel by calling another lawyer”: *R. v. Ross*, [1989] 1 S.C.R. 3, p. 11; see also: *R. v. Black*, [1989] 2 S.C.R. 138, p. 155.
10. Some twenty years later, a Supreme Court trilogy defined the nature and limits of the right to retain and instruct counsel guaranteed by s. 10(b) of the *Charter*: *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; *R. v. McCrimmon*, 2010 SCC 36, [2010] 2 S.C.R. 402; *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429. This last decision specifically addresses the aspect of the guarantee pertaining to the right to retain and instruct counsel of choice.
11. It is useful to reproduce the summary of the facts in *Willier*:

[2] The appellant, Stanley Willier, alleges that the police violated the *Charter* by depriving him of his right to counsel. His allegation arises out of the following circumstances: following Mr. Willier’s arrest for murder, the police informed him of his right to counsel and facilitated a brief telephone conversation with Legal Aid. Offered another opportunity to speak to counsel the next day, he made an unsuccessful attempt to call a specific lawyer and left a message on his answering machine. When asked if he wished to speak with another lawyer, Mr. Willier stated his preference to wait to hear back from his chosen counsel. However, when informed that his preferred lawyer was unlikely to call back before his office reopened the next day and reminded of the immediate availability of free Legal Aid, Mr. Willier opted to speak with duty counsel a second time. Shortly thereafter, the police commenced an investigative interview, prefacing the questioning with an open-ended invitation to contact counsel at any point during the exchange. Mr. Willier expressed satisfaction with the advice he had received from Legal Aid, and did not attempt to contact counsel again before providing a statement to the police.

1. After reiterating that *Charter* rights are not “absolute and unlimited rights” and that “[t]hey must be exercised in a way that is reconcilable with the needs of society” (*R. v. Smith*, [1989] 2 S.C.R. 368, p. 385), McLachlin, C.J. and Charron, J. described the right to retain and instruct counsel of choice as follows:

[35] Should detainees opt to exercise the right to counsel by speaking with a specific lawyer**, s. 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond.** What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation: *Black*. **If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended:**  *R. v. Ross*, [1989] 1 S.C.R. 3; and *Black*. As Lamer, J. emphasized in Ross, diligence must also accompany a detainee’s exercise of the right to counsel of choice:

Although an accused or detained person has the right to choose counsel, it must be noted that, as this Court said in *R. v. Tremblay*, , [1987] 2 S.C.R. 435, a detainee must be reasonably diligent in the exercise of these rights and if he is not, the correlative duties imposed on the police and set out in *Manninen* are suspended.  Reasonable diligence in the exercise of the right to choose one’s counsel depends upon the context facing the accused or detained person. On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise reasonable diligence accordingly. By contrast, when seeking the best lawyer to conduct a trial, the accused person faces no such immediacy. **Nevertheless, accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer.** [p. 11]

[Emphasis added]

1. In light of the circumstances, McLachlin, C.J. and Charron, J. found that Mr. Willier had not been deprived of the right guaranteed by s. 10(b) of the *Charter*:

[43] Considering the circumstances of this case as a whole, the majority of the Court of Appeal correctly found that Mr. Willier did not suffer a violation of his s. 10(b) right to counsel. In no way did the police interfere with Mr. Willier’s right to a reasonable opportunity to consult with counsel of choice by simply reminding him of the immediate availability of free Legal Aid after his unsuccessful attempt to call Mr. Royal. When Mr. Willier stated his preference to wait, Cst. Lahaie reasonably informed him that it was unlikely that Mr. Royal would be quick to return his call given that it was a Sunday, and reminded him of the immediate availability of duty counsel. Mr. Willier was not told that he could not wait to hear back from Mr. Royal, or that Legal Aid was his only recourse. There is no indication that his choice to call duty counsel was the product of coercion. The police had an informational duty to ensure that Mr. Willier was aware of the availability of Legal Aid, and compliance with that duty did not interfere with his right to a reasonable opportunity to contact counsel of choice. Mr. Willier was properly presented with another route by which to obtain legal advice, an option he voluntarily chose to exercise.

1. The facts in *McCrimmon* are different:

[7] At the outset, Cst. Laurel Mathew advised Mr. McCrimmon of the reasons for his arrest, his right to retain and instruct counsel, and his right to remain silent. She told him that he could call any lawyer he wanted, and that he had a right to contact a Legal Aid lawyer through a 24-hour telephone service. Mr. McCrimmon stated that he wished to speak to a lawyer. Cst. Mathew escorted him to the RCMP detachment in Chilliwack where Mr. McCrimmon provided the name of a Vancouver lawyer, John Cheevers, with whom he wished to speak. Cst. Mathew called Mr. Cheevers’ office, but was unable to reach him and left a message on the answering machine. She did not attempt to find Mr. Cheevers’ home telephone number, nor did Mr. McCrimmon ask her to do so. He said to Cst. Mathew: “I don’t know if I’ll hear back from him. . . . Like I said I only used him once . . . . He’s the only guy I know. I’ve never really dealt with a lawyer before.” Cst. Mathew asked Mr. McCrimmon if he would like to call a Legal Aid lawyer, to which he replied: “Well yes definitely but [I] prefer Mr. Cheevers.” Mr. McCrimmon then spoke privately with duty counsel for approximately five minutes. At the end of his conversation, Mr. McCrimmon confirmed that he was satisfied with the consultation and that he understood the advice provided by duty counsel.

1. In paragraph 17 of that judgment, McLachlin, C.J. and Charron, J. reaffirm that s. 10(b) of the *Charter* entitles a detained person to “a reasonable opportunity to contact chosen counsel” and that “[i]f the chosen lawyer is not immediately available, the detainee has the right to refuse to contact another counsel and wait a reasonable amount of time for counsel of choice to become available”. Nonetheless, they rejected Mr. McCrimmon’s argument:

[19]  In this case, we agree with the courts below in rejecting Mr. McCrimmon’s contention that he was denied the right to counsel of choice in a manner that contravened his rights under s. 10(b). While Mr. McCrimmon expressed a preference for speaking with Mr. Cheevers, the police rightly inquired whether he wanted to contact Legal Aid instead when Mr. Cheevers was not immediately available. Mr. McCrimmon agreed, exercised his right to counsel before the interview began, and expressed satisfaction with the consultation. He also indicated an awareness of his rights at the commencement of the interview. In these circumstances, there was no further obligation on the police to hold off the interrogation until such time as Mr. Cheevers became available.

1. It must be noted that the dissenting opinion of LeBel and Fish, JJ. in *McCrimmon*, as well as their concurring reasons and those of Binnie, J. in *Willier*, do not address these portions of the reasons of McLachlin, C.J. and Charron, J. writing for the majority.
2. In *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, the Supreme Court revisited the obligation of police officers to facilitate access to a lawyer upon request, stating “all this because the detainee is in the control of the police and cannot exercise his right to counsel unless the police give him a reasonable opportunity to do so” (para. 25). In this regard, Abella, J., on behalf of the Court, noted that “proactive steps are required to turn the *right* to counsel into *access* to counsel” (para. 33).
3. According to the Court of Appeal for Saskatchewan, that is also true for access to counsel of choice: *R. v. Ector*, 2018 SKCA 46, para. 46. Schwann, J., who delivered the judgment, stated the following:

[45]  *Taylor* reminds us that “proactive steps are required to turn the *right* to counsel into *access* to counsel” (at para 33, emphasis in original). Importantly, the Supreme Court went on to observe that, as a result of the officers’ failure to even turn their minds to how the accused’s right to access counsel could have been facilitated in the unique circumstances of that case, the trial judge was unable to even *assess the reasonableness* of the police action (para 35).

[46]  The obligation to facilitate a reasonable opportunity for the detainee to contact counsel includes facilitating a reasonable opportunity to contact counsel of choice and imposes a positive obligation on the police to facilitate that contact (*Willier* at paras 33–35).

1. Later, Schwann, J. noted that there is an additional layer of complexity to the analysis of s. 10(b) of the *Charter* where the police assume control over establishing contact with the chosen counsel (para. 50). She identified several lower court decisions that held that when the police interject themselves into the process, they “must do as much as the accused would have done to contact the accused’s lawyer of choice ”(para. 53, references omitted).
2. Ultimately, after *Willier* and *McCrimmon*, what can be concluded from the detained person’s decision to contact a different lawyer after being informed that counsel of choice is not available?
3. In *Picard c. R.*, 2020 QCCA 442, the Court clearly stated that if a reasonable opportunity to contact counsel of choice is denied, the detained person’s decision to speak to a legal aid lawyer cannot be used as a pretext to dismiss his or her request to have evidence excluded:

[translation]

[6]  In short, if the appellant is to be believed, the police officers did not afford him the reasonable opportunity to contact his counsel of choice, which is one of the obligations borne by the police: *R. v. Willier*, 2010 SCC 37, para. 35. **Accordingly, if that is the case, the appellant’s decision to speak to a legal aid lawyer cannot be used as a pretext for dismissing his application to exclude evidence, as the judge did.**

[7] The judge did not address the issue of which lawyer the appellant wished to speak to. Here is what she said: […]

[8] The judge noted the appellant’s consent to speak to duty counsel and the fact that he did not complain about his advice, and concluded therefrom that the statement was admissible, that the right to counsel had been respected, although she never decided whether he had first asked to speak to Mtre Séguin. **If the police officers ignored it, however, that request would have vitiated his consent, including the ensuing written waiver, and would have been an infringement of his right to counsel of choice.** For this reason, the Court is unable to adequately analyze the judgment until this question of fact has been decided. The judge’s criticism of the appellant’s lack of diligence in seeking Mtre Séguin’s contact information does not overcome this difficulty.

[Emphasis added]

1. The law applied to the facts
2. I concur with Beaupré, J. that the evidence has some grey areas, including regarding whether it was possible for Officer Naess-Olivier to leave a voicemail message.
3. But let us return to the uncontested facts of the matter:
4. Police officers intercepted the vehicle driven by the respondent shortly after 10:30 p.m.;
5. At 10:35 p.m., Officer Larouche ordered the respondent to blow into the approved screening device;
6. At 10:39 p.m., she placed him under arrest and read him his rights;
7. When he arrived at the police station, the respondent asked to contact Mtre Boulianne or Mtre Cantin from the same firm;
8. Officer Naess-Olivier found Mtre Boulianne’s cellphone number on the website of the firm Cantin Boulianne;
9. He called Mtre Boulianne on his cellphone at **11:37 p.m.**, and there was no answer;
10. At **11:39 p.m.** he called [translation] “the 24-hour Cantin Boulianne line and there was still no answer”;
11. He did not leave a message, but he cannot remember if there was voicemail on either of the numbers he dialled;
12. He did not call Mtre Cantin on his cellphone;
13. Subsequently, the respondent [translation] “was hesitant about which lawyer he wanted to contact and did not know whom to call”;
14. Officer Larouche pointed out the legal aid poster on the wall to him;
15. The respondent pointed to the photograph of Mtre Gagnon on the poster;
16. At **11:40 p.m.**, Officer Larouche dialled the number for legal aid and Mtre Gagnon answered;
17. The respondent spoke to Mtre Gagnon from 11:41 p.m. to 11:49 p.m.;
18. The respondent made no comment (positive or negative) about his conversation with Mtre Gagnon and did not ask again to speak to Mtre Boulianne or Mtre Cantin;
19. The first breath sample was taken at 11:56 p.m. and the second at 12:15 a.m.;
20. In total, the calls to Mtre Boulianne’s cellphone and the offices of Cantin Boulianne lasted two minutes. One minute elapsed between the call to the offices of Cantin Boulianne and the call to legal aid. Officer Naess-Olivier did not attempt to reach Mtre Cantin on his cellphone.
21. A parenthetical remark is in order to state that there is no evidence that Mtre Cantin’s cellphone number could not be located as easily as Mtre Boulianne’s. The Court understands from Officer Naess-Olivier’s testimony that he felt that two attempts were sufficient:

[translation]

A [….] I made two (2) attempts to call the lawyers that he wanted to contact, so the first (1st) was at eleven thirty-seven (11:37 p.m.) to Mtre Boulianne and the second (2nd) at eleven thirty-nine (11:39 p.m.) to the twenty-four-hour (24-hour) line.

Q The offices?

A That’s right.

Q How many times did you attempt to call Mtre Cantin?

A One time, and I did not call Mtre Cantin on his cellphone.

1. Officer Naess-Olivier also admitted that the respondent had no cellphone or [translation] “access to anything” and was dependent on his efforts to contact his lawyer:

[translation]

Q Because you agree that when the police detain a person, he or she depends on your efforts to reach his or her lawyer?

A Yes.

Q He had no cellphone, he had access to nothing, so his own efforts to reach his lawyer are necessarily your efforts?

A Yes.

1. Officer Naess-Olivier’s efforts to contact Mtre Boulianne or Mtre Cantin lasted little more than two minutes in all, even though there was no urgency whatsoever.
2. According to the trial judge, this was the crux of the matter:

[translation]

This is the crux of the matter, because all of the evidence boils down to saying that we do not know if those lawyers were available because either no message was left for them, or no attempt was made to, to reach Mtre Cantin, or no additional attempts were made to try to reach those lawyers, even though there were thirty-four (34) minutes until the maximum time limit and the right to counsel of choice is important, and there’s a reason it’s in the *Charter*, and if we discuss the accused’s diligence, the accused is detained, so his diligence, where does his diligence end, where does it start? He is subject to what the police officers do.

1. Thus, contrary to my colleague’s reading of this passage, the judge did not find that the lawyers were available. Instead, she considered that [translation] “the evidence boils down to saying that we do not know” given the fact that no message was left on their voicemail, no attempt was made to reach Mtre Cantin, and no further attempt was undertaken. This assessment of the evidence does not suffer from a deficiency constituting an error of law and, consequently, cannot be the basis for an appeal from a verdict of acquittal: *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, para. 75; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, paras. 24-39.
2. In my view, the judge did not err in law in finding that the police officers failed to provide the respondent with a reasonable opportunity to contact counsel of choice. The fact that the respondent agreed to call a legal aid lawyer – without, however, being informed that he could wait a reasonable amount of time for his lawyers to answer – does not alter the fact that this facet of his s. 10(b) *Charter* right was infringed.
3. In his reasons, Beaupré, J. emphasized that Officer Larouche told the respondent that there was no answer from the lawyers [translation] “for the time being”. With the greatest respect for my colleague, I do not believe that so much significance can be attached to this part of Officer Larouche’s testimony. The transcript establishes that she did not repeat verbatim the words she uttered between 11:39 p.m. and 11:40 p.m. She instead described the [translation] “usual procedure”, that is, her [translation] “normal” way of proceeding.
4. In any event, the fact remains that the police officers did not inform the respondent that he could wait a reasonable amount of time for Mtre Boulianne and Mtre Cantin to answer. Yet, according to Officer Naess-Olivier’s testimony, the respondent hesitated and did not know whom to call. Unlike Mr. Willier, who “stated his preference to wait” (para.  43), it is likely that the respondent did not know that this option was available to him. To justify concluding that the respondent waived his right to contact his counsel of choice, the evidence must establish that he knew that he could wait a reasonable amount of time but that he preferred to call a legal aid lawyer.
5. Beaupré, J. repudiated this proposition, basing himself on *R. v. Keror*, 2017 ABCA 273, a case that he found has certain similarities to the one before us. I do not share this point of view. In *Keror*, the accused himself left messages for his counsel of choice (after the police officer helped him find the telephone number) and for legal aid. The police officer asked him if he wanted to wait to speak to a lawyer, to which the accused first answered no. After a *Prosper* warning, the accused changed his mind and stated that he wanted to wait for his lawyer to call back. A few moments later, the police officer called the lawyer chosen by the accused a second time and left him a message. The legal aid lawyer ended up returning the call and the accused agreed to speak to him. He stated that he was satisfied with the conversation. The next morning, the accused again tried to reach his lawyer and was told to call back in the afternoon. He repeated to the police officer that he had benefitted from the advice of duty counsel the previous evening. The police officer then determined that he could start questioning him. In the circumstances, which appear to me very different from those before us, the Court of Appeal of Alberta was of the view that it was not appropriate to impose an additional obligation on the police officer.
6. I also cannot subscribe to my colleague’s opinion with respect to the respondent’s obligation to inform the police officers of the significance of the relationship of trust that existed between him and Mtre Boulianne and Mtre Cantin and/or to refuse to speak to a legal aid lawyer while awaiting a new attempt to be made to reach them (para. 111 of the reasons Beaupré, J.). The obligation of police officers to provide a detained person with a reasonable opportunity to contact counsel of choice cannot depend on the intensity of the relationship of trust that exists between the person and the chosen lawyer. Police officers should not meddle in that choice, and their obligation does not vary according to whether the detained person informs them of the nature of the relationship with the lawyer so designated. And, at the risk of repeating myself, I do not see how the detained person can be blamed for not refusing to speak to a legal aid lawyer while waiting for his or her lawyer to call back (or to be reached) if the detained person did not know about the right to wait a reasonable amount of time.
7. In short, to the extent that Officer Naess-Olivier did not attempt to reach Mtre Cantin on his cellphone or call Mtre Boulianne again after a reasonable amount of time (if he was unable to leave a message), in my view the respondent was not afforded a reasonable opportunity to contact his counsel of choice, and the circumstances of the case do not lead to the conclusion that he waived that facet of the s. 10(b) *Charter* right.
8. Exclusion of the evidence under s. 24(2) of the *Charter*
9. It is well established that, “[w]here a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review”: *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, para. 44, citing: *R. c. Beaulieu*, 2010 SCC 7, [2010] 1 S.C.R. 248, para. 5; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, para. 86.
10. In my view, that is the case here. The judge examined the correct factors, and her conclusions are not unreasonable. Here again, the appellant did not establish an error of law.
11. In her assessment of the seriousness of the state’s infringing conduct, the judge correctly reiterated that the respondent [translation] “was detained, he was subject to the authority of the police officers, he could not have done the search himself”. This is a relevant consideration because s. 10(b) of the *Charter* is “principally concerned with addressing the imbalance of power between the state and the [detained person]”: *R. v. Grant*, para. 22; with mitigating his or her “legal vulnerability”: *R. v. Willier*, para. 38. When police officers do not take the necessary proactive steps to provide the detained person with access to his or her counsel of choice, they abuse their dominant position and thwart the realization of the very purpose of this protection.
12. The judge did not err with respect to the impact of the infringement on the respondent’s right in accepting that there had to be [translation] “a certain relationship of trust” between the respondent and his lawyers. The evidence establishes that, upon arrival at the police station, the respondent asked to contact Mtre Boulianne or Mtre Cantin. In addition, the application to exclude the evidence, supported by Mtre Boulianne’s affidavit, establishes that Mtre Boulianne had represented the respondent for several years.
13. That relationship of trust is the raison d’être of the right to retain and instruct counsel of choice, and the judge had to take it into account. As Cournoyer, J.A., then of the Superior Court, wrote in *R. c. Lefebvre*, 2018 QCCS 4468:

[translation]

[307] Canadian constitutional law therefore recognizes the right of a detained person to consult a lawyer whom he or she trusts, not just any lawyer.

[308]  Any analysis of the consequences of an infringement of this right and the impact of such a breach under s. 24(2) of the *Charter* must take into account the raison d’être of the right to retain and instruct counsel of one’s choice, namely, the relationship of trust that underlies consultation with counsel of one’s choice.

1. Lastly, the judge noted the [translation] “social evil” of impaired driving offences and recognized society’s interest in the case being tried on the merits. On balance, she found that the [translation] “unacceptable” conduct of the police officers must take precedence, in spite of their good faith.
2. In this regard, good faith must not be confused with negligence or ignorance of the law: *R. c. Lévesque-Mandanici*, 2014 QCCA 1517, para. 83. The good faith (or the absence of bad faith) of the police officers does not diminish the seriousness of their conduct where it results from their ignorance of the state of the law or “clear violations of well-established rules”:  *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, para. 44. I cite again Cournoyer, J.S.C., now of the Court of Appeal, in *R. c. Lefebvre*:

[translation]

[335]  The right to counsel of one’s choice is not a complex or controversial issue that justifies finding that the police officer acted in good faith, without flagrant disregard for or ignorance of *Charter* rights, or that mitigates the seriousness of the infringement.

[336]  In short, the fact that the police officer did not act in bad faith in no way mitigates the seriousness of the constitutional infringement of the appellant’s constitutional right to consult counsel of choice, because the police officer’s error cannot be characterized as a reasonable error.

[337]  Although “police are not expected to engage in judicial reflection on conflicting precedents, *they are rightly expected to know that the law is*”, especially when the rule of law has been stable for three decades.

[References omitted]

1. It was up to the judge to balance the various factors. This exercise, I repeat, is not governed by “an overarching rule”, and “[m]athematical precision is obviously not possible”: *R. v. Grant*, para. 86. In all cases, the long-term repute of the administration of justice must be assessed. *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 484, para. 36. With respect to impaired driving, where the police officers have failed to make a reasonable effort to reach the chosen lawyer in violation of a well-established rule, it may be appropriate to exclude the evidence: *Savard c. Ville de Québec*, 2020 QCCS 2004; *Savard c. R*., 2020 QCCS 843; *Lapierre c. R.*, 2020 QCCS 469; *Campion Létourneau c. R.*, 2019 QCCS 5636; *Costigan c. R.*, 2019 QCCS 2477; *R. c. Duval*, 2020 QCCQ 2594; *R. c. Lorrain*, 2020 QCCQ 1562; *R. c. Blouin*, 2019 QCCQ 7886; *R. c. Labrèche*, 2019 QCCQ 7342; *R. c. Chabot-Sasseville*, 2019 QCCQ 2874; *R. c. Lefebvre*, 2019 QCCQ 765.
2. The judge’s decision is part of a trend in case law that aims to preserve public confidence in the rule of law and to ensure that the state respects this facet of the s. 10(b) *Charter* right.
3. Conclusion
4. For these reasons, I would dismiss the appeal.

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| SUZANNE GAGNÉ, J.A. |

1. Sections 320.14(1)(*a*) and 320.19(1) *Cr.C.* [↑](#footnote-ref-1)
2. The transcript of the judgment, which has not been published, is attached as Schedule 1 to the appellant’s brief at pp. 18−31 (the “judgment under appeal”). [↑](#footnote-ref-2)
3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [↑](#footnote-ref-3)
4. *R. v. Grant*, 2009 SCC 32. [↑](#footnote-ref-4)
5. Section 320.14(1)(*b*) *Cr.C.;* on the counts of impaired driving and obstruction, the judge found that the appellant had not established the first beyond a reasonable doubt and convicted the respondent on the second given his guilty plea. The consequences of the respondent’s arrest for breach of conditions were not established. [↑](#footnote-ref-5)
6. *R. v. Taylor*, 2014 SCC 50; *R. v. Sinclair*, 2010 SCC 35; *R. v. McCrimmon*, 2010 SCC 36, paras. 18, 19, 24, 29 and 31; *R. v. Willier*, 2010 SCC 37, particularly para. 16. [↑](#footnote-ref-6)
7. *R. v. Collins*, [1997] 1 S.C.R. 265, p. 277. [↑](#footnote-ref-7)
8. Sections 320.11 and 320.27(*b*)*Cr.C.* [↑](#footnote-ref-8)
9. Sections 320.11 and 320.28(1)(*a)*(i)*Cr.C.* [↑](#footnote-ref-9)
10. Judgment under appeal, p. 20, lines 7−9. [↑](#footnote-ref-10)
11. *Dussault c.* *R.*, 2020 QCCA 746, para. 28; *R. v. Keror*, 2017 ABCA 273, para. 7. [↑](#footnote-ref-11)
12. On the principle that the application of a legal standard to duly proven facts is a question of law, see also *R. v. Le*, 2019 SCC 34, para. 23; *R. v. Shepherd*, 2009 SCC 35, para. 20; *Catellier c. R*., 2020 QCCA 850, para. 17; *Vinet c. R.*, 2019 QCCA 437, para. 28. [↑](#footnote-ref-12)
13. *R. v. Willier, supra*, note 6, para. 24. [↑](#footnote-ref-13)
14. *R. v. McCrimmon*, *supra*, note 6, para. 18; see also *R. v. Willier*, *supra*, note 6, para. 29. [↑](#footnote-ref-14)
15. *R. v. McCrimmon*, *supra*, note 6, para. 17. [↑](#footnote-ref-15)
16. *R. v. Sinclair*, *supra*, note 6, para. 31 [Emphasis added]. [↑](#footnote-ref-16)
17. *Id.*, para. 27. [↑](#footnote-ref-17)
18. *Ibid*. [↑](#footnote-ref-18)
19. *Ibid*. [↑](#footnote-ref-19)
20. *R. v. Willier, supra*, note 6, para. 29. [↑](#footnote-ref-20)
21. *R. v. Willier*, *supra*, note 6, para. 35, citing Lamer, J. in *R. v. Ross*, [1989] 1 S.C.R. 3, p. 11; *R. v. McCrimmon*, *supra*, note 6, para. 18. [↑](#footnote-ref-21)
22. *R. v. Sinclair*, *supra*, note 6, para. 27. [↑](#footnote-ref-22)
23. *R. v. Smith*, [1989] 2 S.C.R. 368, p. 385; *R. v. Willier, supra*,note 6, para. 34; *R. v. Sinclair*, *supra*,note 6, para. 58; *Émond c. R*., 2012 QCCA 2090, para.8; *R. v. Richfield*, 178 C.C.C. (3d) 23, 2003 CanLII 52164, para. 7 (Ont. C.A.). [↑](#footnote-ref-23)
24. *R. v. Keror*, *supra*, note 11. [↑](#footnote-ref-24)
25. Martin Vauclair & Tristan Desjardins, *Traité général de preuve et de procédure pénales*, 27th ed., Montreal, Yvon Blais, 2020, p. 1309, para. 38.98. [↑](#footnote-ref-25)
26. *R. v. Keror*, *supra*,note 11. [↑](#footnote-ref-26)
27. *R. v. McCrimmon*, *supra*,note 6, para. 18. [↑](#footnote-ref-27)
28. *R. v. Willier*, *supra*,note 6, paras. 24, 33, 38, 39 and 43. [↑](#footnote-ref-28)
29. *Dussault v. R.*, *supra*,note 11, paras. 28 and 31, in which the Court characterized a similar issue as a question of law. [↑](#footnote-ref-29)
30. *R. v. Mian*, 2014 SCC 54. [↑](#footnote-ref-30)
31. *Id*., para. 75. [↑](#footnote-ref-31)
32. *R. v. J.M.H.*, 2011 SCC 45, heading (1); *R. v. Everard*, 2016 ABCA 300, para. 7. [↑](#footnote-ref-32)
33. *R. v. Everard*, *supra*,note 32, para. 8. [↑](#footnote-ref-33)
34. *R. v. J.M.H*., *supra*,note 32, heading (2). [↑](#footnote-ref-34)
35. *Id*. heading (4). [↑](#footnote-ref-35)
36. *Id.*, para. 24. [↑](#footnote-ref-36)
37. Judgment under appeal, p. 20, line 21, p. 21, line 2, p. 23, lines 3 to 6 and p. 26, lines 6 to 8. [↑](#footnote-ref-37)
38. *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, p. 1103. [↑](#footnote-ref-38)
39. *R. v. Doobay*, 2019 ONSC 7272, paras. 27−28. [↑](#footnote-ref-39)
40. *Supra*, paras. 26, 27 and 29. [↑](#footnote-ref-40)
41. *MIUF-27*, [1988] R.D.J. 501, 1987 CanLII 5237 (Sup. Ct.). [↑](#footnote-ref-41)
42. *R. v. Lyttle*, 2004 SCC 5. [↑](#footnote-ref-42)
43. *R. v. Dixon* (1984), 16 C.C.C. (3d) 431 (B.C.C.A.). [↑](#footnote-ref-43)
44. *Id*., pp. 451−452. [↑](#footnote-ref-44)
45. *R. v. Find*, 2001 SCC 32, para. 48, cited in *R. v. Spence*, 2005 SCC 71, para. 53. [↑](#footnote-ref-45)
46. *R. v. Spence*, *supra*,note 45, para. 60. [↑](#footnote-ref-46)
47. *Petro-Canada c. Mabaie Construction inc.*, 2003 CanLII 74725, para. 12 (C.A.); Léo Ducharme, *Précis de la preuve*, 6th ed., Montreal, Wilson & Lafleur, 2005, pp. 35−36, paras. 81−83. [↑](#footnote-ref-47)
48. Judgment under appeal, pp. 23−24. [↑](#footnote-ref-48)
49. *Ibid*. [↑](#footnote-ref-49)
50. *R. v. Willier*, *supra*,note 6, para. 29; *R. v. McCrimmon*, *supra*,note 6, para. 18. [↑](#footnote-ref-50)
51. *R. v. Suberu*, 2009 SCC 33. [↑](#footnote-ref-51)
52. *Id.*, paras. 41−42. [↑](#footnote-ref-52)
53. *R. v. Willier*, *supra* note 6, para. 29*; R. v. McCrimmon*, *supra* note 6, para. 18. [↑](#footnote-ref-53)
54. Martin Vauclair & Tristan Desjardins, *Traité général de preuve et de procédure pénales, supra*,note 25, p. 1312, para. 38.103. [↑](#footnote-ref-54)
55. *R. v. Sinclair*, *supra*,note 6. [↑](#footnote-ref-55)
56. *Id*., para. 26. [↑](#footnote-ref-56)
57. *R. v. Richfield*, *supra*,note 23. [↑](#footnote-ref-57)
58. *Id.*, paras. 8 and 10; in the same vein, see also: *R. v. Prosper*, [1994] 3 S.C.R. 236, p. 269. [↑](#footnote-ref-58)
59. *R. v. McCrimmon*, *supra*,note 6, para. 17. [↑](#footnote-ref-59)
60. *R. v. Willier*, *supra*,note 5; *R. v. McCrimmon*, *supra*,note 5. [↑](#footnote-ref-60)
61. *R. v. Willier*, *supra*,note 6, paras. 18 and 40. [↑](#footnote-ref-61)
62. *R. v. Littleford*, 86 C.R.R. (2d) 148, 2001 CanLII 8559 (Ont. C.A.). [↑](#footnote-ref-62)
63. *Dupont-Dorais c. R*., 2020 QCCS 251 (Downs, J.). [↑](#footnote-ref-63)
64. *R. v. Keror*, *supra*,note 11. [↑](#footnote-ref-64)
65. *R. v. Prosper*, *supra*,note 58. [↑](#footnote-ref-65)
66. *R. v. Willier*, *supra*,note 6, para. 38. [↑](#footnote-ref-66)
67. *R. v. Sinclair*, *supra*,note 6. [↑](#footnote-ref-67)
68. *R. v. Lefebvre*, 2018 QCCS 4468. [↑](#footnote-ref-68)
69. *Id*., para. 267. [↑](#footnote-ref-69)
70. *R. v. Taylor*, *supra*,note 6, para. 37; *R. v. Grant*, *supra*,note 4, para. 85. [↑](#footnote-ref-70)
71. *R. v. Côté*, 2011 SCC 46, para. 44; *R. v. Beaulieu*, 2010 SCC 7, para. 5; *R. v. Grant*, *supra*,note 4, paras. 86 and 129. [↑](#footnote-ref-71)
72. *R. c. Lefebvre*, *supra*,note 68. [↑](#footnote-ref-72)
73. *R. v. Grant*, *supra*,note 4, para. 133. [↑](#footnote-ref-73)
74. *Id.*, para. 74; see also Hugues Parent, *Traité de droit criminel:* *Tome IV*, *Les garanties juridiques (articles 7, 8, 9, 10, 11 et 24(2) de la Charte)*, Montreal, Wilson & Lafleur, 2018, p. 668. [↑](#footnote-ref-74)
75. *R. v. Harrison*, 2009 SCC 34, para. 23, citing with approval *R. v. Kitaitchik*, 166 C.C.C. (3d) 14, 2002 CanLII 45000 (Ont. C.A.). [↑](#footnote-ref-75)
76. *R. v. Grant*, *supra*,note 4, para. 75; *R. v. Kokesch*, [1990] 3 S.C.R. 3, pp. 27–28; Martin Vauclair & Tristan Desjardins, *Traité général de preuve et de procédure pénales*, *supra*,note 25, p. 963, para. 28.191; Hugues Parent, *Traité de droit criminel*: *Tome IV*, *Les garanties juridiques (articles 7, 8, 9, 10, 11 et 24(2) de la Charte)*, *supra*,note 74, pp. 670−671 and the case law cited in the footnote on page 1717. [↑](#footnote-ref-76)
77. Martin Vauclair & Tristan Desjardins, *Traité général de preuve et de procédure pénales*, *supra*, note 25, p. 969, para. 28.201; *Sylvain c. R.*, 2020 QCCA 400, para. 52; *L’Espérance c. R*., 2011 QCCA 237, para. 53. [↑](#footnote-ref-77)
78. *R. v. Taylor*, *supra*,note 6, para. 39. [↑](#footnote-ref-78)
79. *Id.*, paras. 35 and 39. [↑](#footnote-ref-79)
80. *Id*., para. 35. [↑](#footnote-ref-80)
81. *Dussault c. R.*, *supra*,note 11, para. 29. [↑](#footnote-ref-81)
82. *Id., para*. 24. [↑](#footnote-ref-82)
83. *Id.*, para. 35. [↑](#footnote-ref-83)
84. *Id.*, para. 40. [↑](#footnote-ref-84)
85. *R. v. Grant*, *supra*,note 4. [↑](#footnote-ref-85)
86. *R. v. Oakes*, [1986] 1 S.C.R. 103. [↑](#footnote-ref-86)
87. *Id.*, para. 28. [↑](#footnote-ref-87)
88. *R. v. Sinclair*, *supra*,note 6, para. 26, citing *R. v. Manninen*, [1987] 1 S.C.R. 1233, para. 23. [↑](#footnote-ref-88)
89. *R. v. Taylor*, *supra*,note 6, para. 38. [↑](#footnote-ref-89)
90. Indeed, this provision came into force in 2018 following the enactment of Bill C-46 (*An Act to amend the Criminal Code (offences relating to conveyances)* *and to make consequential amendments to other Acts*, S.C. 2018, c. 21, s. 15.), the preamble to which noted that impaired driving is “unacceptable at all times and in all circumstances” and that it is important “to simplify the law relating to the proof of blood alcohol concentration”. [↑](#footnote-ref-90)
91. Hugues Parent, *Traité de droit criminel:* *Tome IV*, *Les garanties juridiques (articles 7, 8, 9, 10, 11 et 24(2) de la Charte)*, *supra*,note 74, pp. 680−681. [↑](#footnote-ref-91)
92. *R. v. Le*, 2019 SCC 34; to the same effect, see also *Stevens c. R*., 2016 QCCA 1707, paras. 88−89 and *R. v. McGuffie*, 2016 ONCA 365, para. 63. [↑](#footnote-ref-92)
93. *An Act to amend the Criminal Code (offences relating to conveyances)* *and to make consequential amendments to other Acts*, *supra*,note 90, Preamble. [↑](#footnote-ref-93)