

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Mian, 2014 SCC 54, [2014] 2 S.C.R. 689 | **Date:** 20140912  **Docket:** 35132 |

Between:

**Mohammad Hassan Mian**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Alberta**

Intervener

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 90) | Rothstein J. (McLachlin C.J. and LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring) |

r. *v.* mian, 2014 SCC 54, [2014] 2 S.C.R. 689

Mohammad Hassan Mian Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Alberta Intervener

**Indexed as: R. *v.* Mian**

2014 SCC 54

File No.: 35132.

2014: April 15; 2014: September 12.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for alberta

*Criminal law — Appeals — Powers of Court of Appeal — Accused charged with possession of cocaine and possession of currency obtained by crime — Court of Appeal raising new issues on appeal — Whether appeal court erred in ordering new trial on basis of improper cross-examination — Whether appeal court erred in raising new issue on appeal.*

*Constitutional law — Charter of Rights — Right to be informed of reasons for arrest — Right to counsel — Accused charged with possession of cocaine and possession of currency obtained by crime — Police delaying in advising accused of reasons for arrest and of his rights to retain and instruct counsel — Whether trial judge erred in law in concluding that police infringed accused’s right to be informed of reasons for arrest and his right to counsel — Whether trial judge erred in law in excluding evidence — Canadian Charter of Rights and Freedoms, ss. 10, 24(2).*

The accused was charged with possession of cocaine for the purpose of trafficking and possession of currency obtained by the commission of an offence. The trial judge determined that the accused’s rights under s. 10(*a*) and (*b*) of the *Charter* were breached because the constables waited 22 minutes to inform him of the reasons for his arrest and an extra 2 to 5 minutes to inform him of his right to retain and instruct counsel. The trial judge noted that defence counsel cross-examined the detective who instructed constables to arrest and search the accused. During this cross-examination, defence counsel confronted the detective about the testimony of another Crown witness, which differed from the detective’s concerning the grounds to arrest and search the accused. Ultimately, all evidence was excluded and the accused was acquitted. The Crown appealed. After the Crown and defence counsel filed their written submissions, the Court of Appeal provided the parties with a list of cases and called their attention to two issues for comment during oral argument: (1) what is a question of law on an appeal from an acquittal; and (2) the limits of cross-examination and consequences of exceeding the limits. During the oral hearing, both counsel made submissions on whether the defence had conducted an improper examination of the detective by asking him to comment on the veracity of another officer’s testimony. The Court of Appeal allowed the appeal on the basis that the trial judge erred in law by relying on the impermissible cross-examination of the police detective. The acquittals were set aside and a new trial ordered.

*Held*: The appeal should be allowed and the acquittals restored.

An appellate court has the jurisdiction to raise new issues and invite submissions on an issue neither party has raised. An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Issues that are rooted in or are components of an existing issue are not new issues nor are issues that form the backdrop of appellate litigation. Furthermore, not all questions asked by an appeal court will constitute a new issue. Questions raised during the oral hearing may properly touch on a broad range of issues, which may be components of the grounds of appeal put forward by the parties, or may go outside of those grounds in an aim to understand the context, statutory background or larger implications. Absent any concerns about bias, questions raised during the oral hearing, whether linked directly or by extension to the grounds of appeal or not, are not improper.

While appellate courts have the discretion to raise a new issue, this discretion should be exercised only in rare circumstances. An appellate court should only raise a new issue when failing to do so would risk an injustice. At all times the discretion is limited by the requirement that raising the new issue cannot suggest bias or partiality on the part of the court. Courts cannot be seen to go in search of a wrong to right. Where there is good reason to believe that the result would realistically have differed had the error not been made, this risk of injustice warrants the court of appeal’s intervention. The standard of “good reason to believe” that a failure to raise a new issue “would risk an injustice” is a significant threshold which is necessary in this context in order to strike an appropriate balance between the role of appellate courts as independent and impartial arbiters with the need to ensure that justice is done. In order to raise a new issue, the court should also consider whether it has the jurisdiction to consider the issue, whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party.

When an appellate court raises a new issue, there must be notification and opportunity to respond. The court of appeal must make the parties aware that it has discerned a potential issue and ensure that they are sufficiently informed so they may prepare and respond. Requiring that strict procedural standards be followed would fail to recognize that the issue may arise in different circumstances in different cases. The court should raise the issue as soon as is practically possible after the issue crystallizes so as to avoid any undue delay in the proceedings. However, notification of the new issue may occur before the oral hearing, or the issue may be raised during the oral hearing. The notification should not contain too much detail, or indicate that the court of appeal has already formed an opinion, however it must contain enough information to allow the parties to respond to the new issue. The requirements for the response will depend on the particular issue raised by the court. Counsel may wish to simply address the issue orally, file further written argument, or both. The underlying concern should be ensuring that the court receives full submissions on the issue. If a party asks to file written submissions before or after the oral hearing, there should be a presumption in favour of granting the request. Recusal of a judge or panel should be rare and should be governed by the overriding consideration of whether the new issue or the way in which it was raised could lead to a reasonable apprehension of bias.

In this case, the Court of Appeal erred in raising the new issue of improper cross-examination. The impugned question on cross-examination did not impact the trial judge’s decision. The error was not material and the result would not have been different had the trial judge not allowed the impugned cross-examination. Even if the trial judge had relied on the impugned question, it had no material bearing on the outcome so as to raise a realistic risk of an injustice. It is also significant that the improper question was put to a Crown witness, rather than the accused. Furthermore, the Crown neither objected to the impermissible question nor raised it as an issue on appeal which suggests that the question did not have a serious effect on the outcome of the *voir dire*. As not raising the issue of the impugned cross-examination would not have risked an injustice, it follows that the Court of Appeal erred in raising the issue.

There is also no basis to overturn the trial judge’s conclusion that the accused’s s. 10 *Charter* rights were breached. The trial judge found as a fact that there was insufficient evidence to support the assertion that immediate compliance with s. 10 of the *Charter* would have compromised the ongoing investigation. As Crown appeals from acquittals are restricted to questions of law, findings of fact can only be undermined in limited situations, not applicable in this case. There were no exceptional circumstances to justify the delay by the police in complying with their s. 10 informational duties and therefore no reason to disturb the trial judge’s conclusion that s. 10(*a*) and (*b*) of the *Charter* were infringed. Furthermore, in view of the deferential standard of review on appeal and because the Crown’s arguments with respect to the trial judge’s s. 24(2) findings amount to an attack on the trial judge’s findings of fact, the trial judge’s order to exclude the evidence under s. 24(2) of the *Charter* should also not be interfered with.

**Cases Cited**

**Referred to:** *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *R. v. W. (G.)*, [1999] 3 S.C.R. 597; *Greenlaw v. United States*, 554 U.S. 237 (2008); *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *Jones v. National Coal Board*, [1957] 2 All E.R. 155; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Phillips*, 2003 ABCA 4, 320 A.R. 172, aff’d 2003 SCC 57, [2003] 2 S.C.R. 623; *R. v. Taubler* (1987), 20 O.A.C. 64; *R. v. E.M.W.*, 2011 SCC 31, [2011] 2 S.C.R. 542; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *R. v. Kociuk*, 2011 MBCA 85, 270 Man. R. (2d) 170; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3; *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Strachan*, [1988] 2 S.C.R. 980; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 8, 9, 10(*a*), (*b*), 24(2).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 676(1)(*a*), 686(4).

**Authors Cited**

*Black’s Law Dictionary*, 9th ed. St. Paul, Minn.: West, 2009, “adversary system”.

APPEAL from a judgment of the Alberta Court of Appeal (Côté and O’Brien JJ.A. and Belzil J. (*ad hoc*)), 2012 ABCA 302, 536 A.R. 308, 559 W.A.C. 308, 78 Alta. L.R. (5th) 249, 292 C.C.C. (3d) 346, 98 C.R. (6th) 311, [2012] A.J. No. 1044 (QL), 2012 CarswellAlta 1744, setting aside the accused’s acquittals and ordering a new trial. Appeal allowed.

*Daniel J. Song*, *Darin D. Sprake* and *Anna M. Konye*, for the appellant.

*David Schermbrucker* and *Ronald C. Reimer*, for the respondent.

*Jolaine Antonio*, for the intervener.

The judgment of the Court was delivered by

Rothstein J. —

1. Overview
2. The primary question on this appeal centres on the issue of an appellate court’s ability to raise new grounds of appeal and the considerations which should guide the court in doing so. At the heart of this appeal are two potentially competing tensions: (1) the adversarial system, which relies on the parties to frame the issues on appeal, and reserves the role of neutral arbiter for the courts; and (2) the need for an appellate court to intervene in order to prevent an injustice. The question on this appeal is at what point can an appellate court disrupt the adversarial system and raise a ground of appeal of its own?
3. This appeal arose in the context of a *voir dire* to exclude evidence. The secondary issue therefore concerns the trial judge’s findings with respect to infringements under s. 10(*a*) and (*b*) of the *Canadian* *Charter of Rights and Freedoms* and the exclusion of evidence under s. 24(2).
4. Facts
   1. The Chelmick Investigation
5. This case began with an investigation by the Edmonton Police Service into a number of homicides and attempted homicides in the city of Edmonton. Under the leadership of Detective Werth (then Constable Werth), the investigation team obtained a wiretap authorization allowing them to intercept the private communications of one of their principal targets, Robin Flynn Chelmick.
6. Between the night of January 5, 2009 and the afternoon of January 6, 2009, the police intercepted calls from Chelmick’s line related to a drug transaction for the purchase of a half a kilogram of cocaine. Chelmick was acting as the middle man for an unidentified supplier for a transaction scheduled to occur at 4:30 p.m. at Duke’s Bar and Grill.
7. Visual surveillance of Chelmick on January 6, 2009 revealed interactions between Chelmick and the driver of a rented grey Chevrolet Malibu in the parking lot of Duke’s Bar. The driver of the Malibu was believed by Detective Werth to be the supplier of the cocaine. The driver was later identified as the appellant, Mohammad Mian.
8. Three separate meetings took place between Chelmick and the driver of the Malibu. Intercepted communications revealed that the buyer of the cocaine was dissatisfied with the quality of the first delivery of cocaine. After the third meeting which took place in the parking lot of Duke’s Bar, the Malibu drove away and headed south.
   1. The Arrest and Search
9. While the surveillance of Chelmick was ongoing, Detective Werth contacted two officers not connected with the homicide investigation, Constables McGill and Dalziel. At a meeting at police headquarters, Detective Werth advised Constables McGill and Dalziel that surveillance was in place with respect to an individual involved in a drug transaction who was believed to have drugs in his vehicle. Constables McGill and Dalziel were provided with a surveillance radio so that they could listen to surveillance reports and Detective Werth advised that at some point he would instruct them to stop the target vehicle, the grey Chevrolet Malibu.
10. Constables McGill and Dalziel were instructed by Detective Werth to make a routine traffic stop of the Malibu. Detective Werth instructed Constables McGill and Dalziel that, once they were instructed to stop the vehicle, they were to use every effort to find appropriate grounds to search the Malibu without having to rely on the information provided by Detective Werth so that the ongoing homicide investigation would not be compromised. Nonetheless, the constables were told that there were already grounds to arrest the driver which could be relied upon if other grounds could not be found.
11. After the meeting with Detective Werth, Constables McGill and Dalziel went to the area of Duke’s Bar. As the Malibu left Duke’s, it was followed by a surveillance vehicle, with Constables McGill and Dalziel following behind in a police vehicle. At Detective Werth’s instructions, at approximately 7:40 p.m. the overhead lights of the police vehicle were activated and the Malibu was pulled over to the side of the road with the police vehicle stopped about 40 feet behind. When the constables approached the Malibu, Constable McGill recognized the driver as Mohammad Mian from prior dealings with the police.
12. As the pretence of the routine traffic stop was underway, Detective Werth listened to reports from Constable Drynan, a member of the surveillance team, who reported his observations that the driver of the Malibu was reaching over the front passenger seat area and doing something with his hands. At the *voir dire*, Constable McGill testified that he also noticed Mr. Mian reaching in this way and that he had officer safety concerns when he saw this. After hearing the reports from Constable Drynan, Detective Werth then telephoned Constable Dalziel and informed Constable Dalziel that Mr. Mian was reaching under the seats of the vehicle and that the officers should go to the vehicle, remove Mr. Mian and arrest him.
13. Constables McGill and Dalziel removed Mr. Mian from the vehicle. Mr. Mian had a cell phone in his hand, which Constable McGill removed. A pat-down search of Mr. Mian revealed $2,710 in cash on his person. After Mr. Mian was placed in the back of the police vehicle, searches of the Malibu led to the discovery of a large amount of cocaine and a smaller baggie of cocaine, an additional $1,340 in cash, another cell phone and Mr. Mian’s wallet. Following the searches, a call was made for a tow truck to attend and seize the Malibu.
14. Twenty-two minutes passed between the time when the officers pulled over the Malibu and when Mr. Mian was advised that he was being arrested for the possession of cocaine for the purposes of trafficking. A further two to five minutes passed before Mr. Mian was advised of his *Charter* rights to retain and instruct counsel.
15. Mr. Mian was charged with possession of cocaine for the purpose of trafficking and possession of currency obtained by the commission of an offence. He applied to exclude all evidence on the basis that he was arbitrarily detained and arrested by the police contrary to s. 9 of the *Charter*, that the police performed an unreasonable search and seizure contrary to s. 8, and that the police failed to advise Mr. Mian of the reason for his detention and his right to counsel contrary to s. 10(*a*) and (*b*). Mr. Mian asserted that the admission of the evidence seized would bring the administration of justice into disrepute and should therefore be excluded pursuant to s. 24(2) of the *Charter*.
16. Judicial History
    1. Alberta Court of Queen’s Bench, 2011 ABQB 290, 516 A.R. 368
17. In his decision on the *Charter voir dire* to exclude the evidence, Macklin J. found Constable Drynan to be a credible witness and accepted his evidence that he did not indicate a concern about officer safety, but simply reported his observations to the investigative team.
18. Macklin J. did not accept the evidence of either Detective Werth or Constable McGill that there was a concern for officer safety in the context of the search, detention or arrest caused by Mr. Mian reaching under the seat of the Malibu. He found that Detective Werth gave his evidence in a “very cavalier fashion and in a manner intended to justify a direction he gave for the purpose of providing McGill and Dalziel with grounds to search the Malibu while disguising the true purpose for stopping and searching the vehicle in the first place” (para. 68). Macklin J. held that Detective Werth was “intentionally misleading the Court with a view to justifying his instructions to Dalziel” (para. 68). Macklin J. noted that when defence counsel confronted Detective Werth about Constable Drynan’s testimony with respect to Mr. Mian’s movements in the vehicle, Detective Werth responded that he did not care what Constable Drynan said and that Constable Drynan was mistaken.
19. However, although Macklin J. did not accept that officer safety concerns could be relied on as grounds for Mr. Mian’s search and arrest, he did find that there were other valid grounds based on Detective Werth’s belief that the Malibu contained a significant quantity of cocaine.
20. After determining that Mr. Mian’s ss. 8 and 9 *Charter* rights had not been breached in the course of the search and arrest, Macklin J. turned to whether Mr. Mian’s s. 10(*a*) *Charter* right on detention to be informed promptly of the reasons therefor and s. 10(*b*) right on arrest or detention to be informed of his right to retain and instruct counsel without delay had been breached. Macklin J. noted that there must be exceptional circumstances to justify suspending the rights protected under s. 10(*a*) and (*b*). There was no satisfactory reason for not advising Mr. Mian of these rights immediately upon arrest. Macklin J. held that, in waiting 22 minutes to inform Mr. Mian of the reason for his arrest and his right to retain and instruct counsel, Constables Dalziel and McGill breached Mr. Mian’s rights under s. 10(*a*) and (*b*).
21. Macklin J. then went on to consider whether the evidence should be excluded under s. 24(2) of the *Charter* pursuant to the analysis as set out by this Court in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. Under the first *Grant* factor, Macklin J. found that the breaches were serious and deliberate, and thereby egregious. This factor weighed in favour of excluding the evidence. Under the second factor, Macklin J. held that there was a lack of causal connection between the *Charter* breaches and the obtaining of the evidence. As such, the breaches did not have a significant impact on Mr. Mian’s privacy interests, which weighed in favour of inclusion of the evidence. Finally, under the third *Grant* factor, Macklin J. determined that, while the offence was serious and the evidence highly reliable and probative, the *Charter* breaches were also serious. In addition, Detective Werth’s and Constable McGill’s continued reliance on alleged officer safety concerns was an attempt to undermine the truth-seeking function of the criminal trial process. Constable McGill’s questioning of Mr. Mian in the back of the police vehicle prior to Mr. Mian being advised of the reason for his detention and arrest was a further aggravating factor. Macklin J. concluded that this factor favoured excluding the evidence.
22. Ultimately, Macklin J. held that, on balance, the *Grant* factors favoured exclusion of the evidence.
23. Mr. Mian was acquitted.
    1. Alberta Court of Appeal, 2012 ABCA 302, 536 A.R. 308
24. The Crown appealed Mr. Mian’s acquittal, advancing two grounds of appeal: (1) that “[t]he trial judge erred in law by failing to find [that] exceptional circumstances justified the suspension of [Mr. Mian’s] s. 10 *Charter* rights”; and (2) that “[t]he trial judge erred in law by excluding ‘essential and reliable evidence on account of *Charter* violations that had no causal connection with the discovery of the evidence, were not otherwise egregious, and had no significant impact on Mr. Mian’s *Charter*-protected interests’” (C.A. reasons, para. 27).
25. After the Crown and defence counsel filed their written submissions, the Court of Appeal provided the parties with a list of cases and called their attention to two issues for comment during oral argument: (1) what is a question of law on an appeal from an acquittal; and (2) the limits of cross-examination and consequences of exceeding the limits.
26. During the oral hearing, both counsel made submissions on whether the defence had conducted an improper cross-examination of Detective Werth by asking him to comment on the veracity of Constable Drynan’s testimony. Following the hearing, defence counsel asked to file further written submissions on the improper cross-examination issue. The Court of Appeal allowed this request, and both parties submitted supplemental written submissions in accordance with the timelines set out by the court. Defence counsel was required to file written submissions before the Crown.
27. The Court of Appeal held that a review of a trial judge’s decision under s. 24(2) of the *Charter* requires deference and is generally subject to a standard of palpable and overriding error. However, the Court of Appeal was satisfied that the appeal should be allowed “on the basis that the trial judge erred in law by relying on the impermissible cross-examination of Detective Werth” (para. 32).
28. The impugned cross-examination occurred when Detective Werth was questioned about the veracity of evidence given by Constable Drynan:

Q. All right. Now, I know you set out - - I’m going to use your words, I don’t care what Drynan said about - - about the vehicle. I’m going to tell you now what Drynan said. Okay? Under oath in these proceedings. Is that he never - - never communication to anyone, anyone, to go and arrest the subject of the roadside stop as a result of those observations that - - that is, the reaching under the seat. I’m going to tell you he took it further, and he said under oath that he never told or communicated to anyone to go and extract the person from the motor vehicle at the roadside. He never told anyone to do anything as a result of his observations.

A. I don’t agree with that. You just suggested to me that he didn’t tell me. My evidence is that he did tell me, and I will not change that. I don’t care what he said. I know what happened.

Q. So Drynan is . . . is he wrong, or is he lying?

A. I think possibly he forgot.

Q. So you don’t care what he says. He called you.

A. I’ll go back to my evidence, because I remember it quite clearly. I said one of the members of surveillance - - and I still believe that it was Drynan. I still believe that. If he can’t remember it, that’s fair. But you can tell me what he said and what I said, but don’t tell me he didn’t say it because you weren’t there.

(C.A. reasons, at para. 33, quoting from trial transcript (emphasis added by Court of Appeal).)

1. On appeal, defence counsel conceded that this questioning was impermissible and offended the rule against cross-examining on the veracity of another witness. The Court of Appeal found that the trial judge erred in law by admitting and considering irrelevant and inadmissible evidence. In particular, the Court of Appeal held that, in rejecting Detective Werth’s testimony, the trial judge appeared to have relied upon the impugned cross-examination. This resulted in a failure by the trial judge to give due consideration to all the evidence relevant to the s. 24(2) issue. The Court of Appeal concluded that the trial judge’s mistake was material and that the verdict would not necessarily have been the same if the trial judge had not allowed the impugned cross-examination and admitted the evidence. The Court of Appeal ordered a new trial on this basis. The Court of Appeal did not analyze the grounds of appeal advanced by the Crown.
2. Issues
3. This appeal raises the following issues:
   * + 1. Did the Alberta Court of Appeal err in raising a new ground of appeal?
       2. Did the Alberta Court of Appeal err in ordering a new trial on the basis of the improper cross-examination issue?
       3. Did the trial judge err in law in concluding that the police infringed the rights of the accused under s. 10(*a*) and (*b*) of the *Charter*?
       4. Did the trial judge err in law in excluding the evidence under s. 24(2) of the *Charter*?
4. Analysis
   1. When Can an Appellate Court Raise a New Issue?
5. It is not disputed that an appellate court has the jurisdiction to invite submissions on an issue neither party has raised. This appeal raises the questions of how broad this jurisdiction is, when it should be exercised, and what procedures should be followed when it is invoked.
   * 1. What Is a “New Issue”?
6. This case turns on whether and how an appellate court can raise a new issue on appeal. It is therefore important to first define what a “new issue” is.
7. An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.
8. In defining what a new issue is, it is important to recognize what will not constitute a new issue raised on appeal. First, not all questions asked by an appeal court will constitute a new issue. The jurisdiction of appellate courts to ask questions during the oral hearing is well established. This jurisdiction is broad and is limited only by the requirement that questions not be “raised in a manner which suggests bias or partiality on the part of the appeal court” (*R. v. W. (G.)*, [1999] 3 S.C.R. 597, at para. 17, *per* Lamer C.J.). Nothing in these reasons should be construed as limiting the ability of appellate judges to ask any question in the course of the oral hearing.
9. Questions raised during the oral hearing may properly touch on a broad range of issues, which may be components of the grounds of appeal put forward by the parties, or may go outside of those grounds in an aim to understand the context, statutory background or larger implications. For example, an appellate court may pose questions as to the practical workings of a statutory regime. Absent any concerns about bias, questions raised during the oral hearing, whether linked directly or by extension to the grounds of appeal or not, are not improper (see *W. (G.)*, at para. 17). Such questions may be necessary for the court to gain a more complete understanding of the issues at hand.
10. Second, issues that are rooted in or are components of an existing issue are also not “new issues”. Appellate courts may draw counsel’s attention to issues that must be addressed in order to properly analyze the issues raised by the parties. For example, in a case involving a claim of self-defence, the parties may argue exclusively over whether the accused’s belief that his life was in danger was reasonable, but it may be necessary for the court to first analyze the issue of whether the accused subjectively believed that he was at risk of death. This is not a “new issue”, but a component of the overall analysis of the grounds as raised by the parties. However, where appropriate, the court may have to be prepared to grant even a brief adjournment to allow the parties to consider and canvass the issue.
11. Finally, issues that form the backdrop of appellate litigation, such as jurisdiction, whether a given error requires a remedy and what the appropriate remedy is, or as discussed below, the standard of review, are not new issues and parties should not require notice to address them.
12. In summary, an appellate court will be found to have raised a new issue when the issue was not raised by the parties, cannot reasonably be said to stem from the issues as framed by the parties, and therefore would require that the parties be given notice of the issue in order to make informed submissions. Issues that form the backdrop of appellate litigation will typically not be “new issues” under this definition. Exercising the jurisdiction to ask questions during the oral hearing will not constitute raising a new issue, unless, in doing so, the appellate court provides a new basis for reviewing the decision under appeal for error.
    * 1. What Considerations Should Guide an Appellate Court in Determining Whether to Raise a New Issue on Appeal?
13. The parties do not dispute that appellate courts have the jurisdiction to raise new issues. Indeed, this jurisdiction is an extension of the power of appellate courts to ask questions of the parties (see *W. (G.)*, at para. 17). The issue on this appeal is not whether appellate courts can raise new issues, but when and in what circumstances will it be appropriate for an appellate court to do so.
14. There are two potentially competing considerations at the heart of the issue in this case. First, the adversarial system, which is a fundamental tenet of our legal system. Second, the role of the courts to ensure that justice is done.
15. Our adversarial system of determining legal disputes is a procedural system “involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker” (*Black’s Law Dictionary* (9th ed. 2009), *sub verbo* “adversary system”). An important component of this system is the principle of party presentation, under which courts “rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present” (*Greenlaw v. United States*, 554 U.S. 237 (2008), at p. 243, *per* Ginsburg J.).
16. A fundamental reason for maintaining this system is to ensure that judicial decision-makers remain independent and impartial and are seen to remain independent and impartial. When a judge or appellate panel of judges intervenes in a case and departs from the principle of party presentation, the risk is that the intervention could create an apprehension of bias. This kind of departure from the usual conduct of an appeal could lead the court to be seen to be intervening on behalf of one of the parties, thus impugning the impartiality of the court. As this Court has said, “[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” (*Brouillard v. The Queen*, [1985] 1 S.C.R. 39, at p. 43, citing *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259). It is for this reason that an important tenet of our appellate system is for the court to respect the strategic choices made by parties in framing the issues (see *W. (G.)*, at paras. 17-18).
17. On the other hand, courts also have the role of ensuring that justice is done. As Lord Denning explained in the context of trial judges in the United Kingdom: “. . . a judge is not a mere umpire to answer the question ‘How’s that?’ His object above all is to find out the truth, and to do justice according to law . . .” (*Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.), at p. 159 (emphasis added)). This proposition is no less true of appellate judges. Meaningful appellate review assesses the correctness of a lower court decision, both on errors of law and palpable overriding errors of fact (see *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 25 and 28; and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 1 and 4). I accept the submission of the intervener the Attorney General of Alberta that “for ‘justice in fact to be done,’ judges must sometimes ‘intervene in the adversarial debate’” (I.F., at para. 16, citing *Brouillard*, at p. 44).
18. The question then is how to strike the appropriate balance between these competing principles. Appellate courts should have the discretion to raise a new issue, but this discretion should be exercised only in rare circumstances. An appellate court should only raise a new issue when failing to do so would risk an injustice. The court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party. This test is sufficiently flexible while also providing for an appropriate level of restraint to address the tensions inherent in the role of an appellate court.
19. At all times this discretion is limited by the requirement that raising the new issue cannot suggest bias or partiality on the part of the court. Of essence here is that courts cannot be seen to go in search of a wrong to right. This jurisdiction should be exercised with caution. Appellate courts have the discretion to raise a new issue where justice requires it, but this discretion is restrained in order to maintain the impartiality of the decision-maker as required by our adversarial system.
    * + 1. Whether Failing to Raise the Issue Would Risk an Injustice
20. The fundamental consideration for an appellate court in determining whether to raise a new issue is whether the failure to do so would risk an injustice.
21. There are some situations where the potential for injustice will be more self-evident. As Mr. Song, counsel for Mr. Mian submits, there are a number of situations where it will be appropriate for an appellate court to raise an issue in order to prevent or rectify an injustice. Indeed, the parties to this appeal agree that appellate courts can intervene to assist self-represented litigants to ensure that the proceedings are fair (see *W. (G.)*,at para. 18), although this assistance has neutrality-based limits and a judge “must exercise great care not to descend from the bench and become a spectre at the accused’s counsel table, placing himself ‘in the impossible position of being both advocate and impartial arbiter’” (*R. v. Phillips*, 2003 ABCA 4, 320 A.R. 172, at para. 24, *per* Fruman J.A., aff’d 2003 SCC 57, [2003] 2 S.C.R. 623, citing *R. v. Taubler* (1987), 20 O.A.C. 64, at para. 30). In the criminal context, other examples may include where a miscarriage of justice may have occurred (see *R. v. E.M.W.*, 2011 SCC 31, [2011] 2 S.C.R. 542, at paras. 4-5) or where a verdict or sentence appears to be clearly unreasonable (see *W. (G.)*, at para. 19). It should be noted, however, that while these examples generally apply, they are inapplicable to this case, which was a Crown appeal from an acquittal.
22. However, attempting to precisely define the situations which “would risk an injustice” would unduly limit the ability of appellate courts to intervene to ensure that justice is in fact done. Where there is good reason to believe that the result would realistically have differed had the error not been made, this risk of injustice warrants the court of appeal’s intervention.
23. The determination of whether there is good reason to believe that a failure to raise a new issue “*would risk* an injustice” requires performing a preliminary assessment of the issue. The standard of “good reason to believe” that a failure to raise a new issue “*would risk* an injustice” is a significant threshold which is necessary in this context in order to strike an appropriate balance between the role of appellate courts as independent and impartial arbiters with the need to ensure that justice is done.
24. At this stage, the merits of the issue will not yet have been argued or decided. As such, the assessment of the issue is not a “full-fledged review”, but rather is preliminary (*W. (G.)*, at para. 20). In all cases where an appellate court is considering whether to raise a new issue, it would be inappropriate for the court to engage in any in-depth assessment of the merits of an issue at a stage where the parties remain ignorant of the issue. However, a court’s failure to raise a new issue will not risk an injustice in the absence of a preliminary indication that there is good reason to believe that an identified potential error would have affected the result.
25. It is likely that issues identified by appellate courts will often fail to meet this “risk an injustice” factor. This will particularly be so where both parties are represented by counsel. It will only be in rare cases that counsel on both sides will have failed to identify an issue that would realistically have affected the result.
    * + 1. Other Considerations
26. Although consideration of whether the failure to raise a new issue in a given case would risk an injustice is left to the discretion of appellate courts, this discretion is not unlimited.
27. First, it should go without saying that an appellate court cannot raise a new issue unless the court has the jurisdiction to consider the issue. Courts of appeal are statutory bodies and there is no inherent jurisdiction in any appeal court (see *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, at p. 69, *per* La Forest J.; and *W. (G.)*, at para. 8). For example, an appellate court’s jurisdiction on Crown appeals from acquittals is restricted to consideration of questions of law (*Criminal Code*, R.S.C. 1985, c. C-46, ss. 676(1)(*a*) and 686(4)). If an appellate court would not have the jurisdiction to consider an issue raised by one of the parties, then the court cannot raise the issue as a new issue on appeal.
28. Second, in order to raise a new issue, an appellate court must be satisfied that there is a sufficient basis in the record on which to resolve the issue. “[T]here is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge’s view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited” (*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 32). The new issue must be “manageable on the evidentiary record” (para. 33).
29. Finally, an appellate court should consider whether there would be any procedural prejudice to either party. The procedures which should be followed when an appellate court exercises its discretion to raise a new issue are detailed further below. At this stage, it suffices to say that it will often be possible for appellate courts to ensure procedural fairness by adjusting the course of the appellate process, including granting an adjournment when an issue is identified at or in advance of a hearing or providing an opportunity for the parties to file written submissions. However, if the issue is raised in a way or at a stage that could result in procedural prejudice to either party, and such prejudice cannot be addressed through adjustments to the process, the appellate court cannot raise the issue.
    * 1. What Procedures Should Be Followed When an Appellate Court Exercises Its Discretion to Raise a New Issue?
30. The risk of appellate courts appearing biased or partial will be reduced by the cautious exercise of the discretion to raise new issues, particularly when coupled with appropriate procedural safeguards. Requiring such safeguards ensures that there is no unfairness to the parties and no appearance of judicial partiality.
31. The Crown submits that when an appellate court raises a new issue, there must be notification and opportunity to respond. I agree. With respect to notification, the court of appeal must make the parties aware that it has discerned a potential issue and ensure that they are sufficiently informed so they may prepare and respond. It goes without saying that all parties should be provided with proper notice. With respect to the response, there is no single model. As the Crown submitted, “the nature of the judicial issue and its relationship to the issues raised by the parties will determine whether counsel wishes to file further written argument, address the issue orally, or both” (R.F., para. 60).
32. This approach is practical and recognizes that the appropriate procedure will vary depending on the context and the circumstances in a given case. For example, appellate courts may become aware of potential new issues at different points in time throughout the appeal process, including before, during or after the oral hearing. Requiring that strict procedural standards be followed would fail to recognize that the issue may arise in different circumstances in different cases.
33. In my view, the following guidelines should be used to assist an appellate court in determining what the appropriate procedure should be on a case-by-case basis.
34. First, notification of the new issue may occur before the oral hearing, or the issue may be raised during the oral hearing. If the issue is raised during the oral hearing, it may be necessary to grant an adjournment to ensure a full and fair hearing (*E.M.W.*,at para. 4). If the issue is raised prior to the oral hearing, the parties may request an adjournment of the hearing and an extension of the filing deadlines for further written argument. At all times, the court should raise the issue as soon as is practically possible after the issue crystallizes so as to avoid any undue delay in the proceedings.
35. Second, I agree with the submission of the Crown that the notification should not contain too much detail, or indicate that the court of appeal has already formed an opinion; however, it must contain enough information to allow the parties to respond to the new issue. Ultimately, the adequate content of notice will have to be determined on a case-by-case basis. It will be dependent on a number of factors, including the complexity of the issue and the obviousness of the issue on the face of the record.
36. Finally, I agree with the submission of the Crown that the requirements for the response will depend on the particular issue raised by the court. Counsel may wish to simply address the issue orally, file further written argument, or both. As the Crown in this case says, this determination is properly in the hands of both the court and the parties. In my view, the underlying concern should be ensuring that the court receives full submissions on the new issue. If a party asks to file written submissions before or after the oral hearing, in my view, there should be a presumption in favour of granting the request. The overriding consideration is that natural justice and the rule of *audi alteram partem* will have to be preserved. Both sides will have to have their responses considered.
37. The intervener the Attorney General of Alberta argues that, where a new issue is raised, the judge or panel that raised the new issue should recuse itself and the panel should be reconstituted as necessary. I cannot agree. Requiring recusal in all cases would be an onerous procedural requirement that would result in significant delay and would not be economical for the parties or the courts. Recusal is not necessary in every case and the need for a new judge or reconstituted panel should be determined on a case-by-case basis. Recusal should be rare and should be governed by the overriding consideration of whether the new issue or the way in which it was raised could lead to a reasonable apprehension of bias.
    * 1. Did the Court of Appeal Err in Raising a New Issue in This Case?
38. In this case, the Court of Appeal raised a new issue on the question of improper cross-examination. This was a new issue on appeal because it was not raised by the parties, required notice of the issue in order to make informed submissions and was a new basis for potentially finding error in the decision under appeal. The Court of Appeal also invited comment on whether the grounds of appeal exposed an error of law enabling the Crown to appeal the acquittal. As Mr. Mian concedes, the question of jurisdiction was not a new issue because it went to the issue of the appellate court’s jurisdiction and it was therefore properly raised. As discussed above, issues of jurisdiction form the backdrop of appellate litigation and will never constitute a new issue. The Court of Appeal did not comment on the “error of law” issue in its decision and dealt with the appeal entirely on the basis of the improper cross-examination issue.
39. I conclude that the Court of Appeal erred in raising the new issue of improper cross-examination. Although appellate courts have the jurisdiction to raise new issues, the Court of Appeal did not appropriately raise the issue of improper cross-examination in this case.
40. The raising of the new issue in this case fails at the second step: whether failing to raise the new issue would risk an injustice. I do not agree with the Court of Appeal that the impugned question on cross-examination impacted the trial judge’s decision. The error was not material and the result would not have been different had the trial judge not allowed the impugned cross-examination. The basis for the issue was one question asked in the course of the cross-examination of Detective Werth. The impugned exchange comprised two lines in the trial transcript. The question was not objected to at trial.
41. First, there is nothing to indicate that the improper cross-examination factored into the decision-making process at all. Detective Werth’s answer to the impugned question is not found in the trial judge’s reasons. The trial judge’s assessment of Detective Werth’s credibility was based on several factors, including his “very cavalier” demeanour and the trial judge’s impression that Detective Werth gave his evidence “in a manner intended to justify a direction he gave for the purpose of providing McGill and Dalziel with grounds to search the Malibu while disguising the true purpose for stopping and searching the vehicle in the first place” (para. 68).
42. Second, even if the trial judge had relied on the impugned question, I am not convinced that this had any material bearing on the outcome so as to raise a realistic risk of an injustice. It is significant that the improper question was put to a Crown witness, rather than Mr. Mian. As he argues, this was not a case where an accused was asked to testify before a jury as to the veracity of another witness’s evidence, thus undermining the presumption of innocence. It is difficult to see how this single question put to a Crown witness created a realistic risk of injustice.
43. Finally, the question was not objected to at the time. As the Manitoba Court of Appeal noted in *R. v. Kociuk*, 2011 MBCA 85, 270 Man. R. (2d) 170, *per* Chartier J.A. (as he then was):

. . . the fact that experienced counsel at trial, and on appeal, were of the view that it was not sufficiently important to warrant an objection at trial or to be a ground on appeal is not an irrelevant consideration. Not only does it speak to the overall satisfactoriness of the jury charge on this issue, it also says something about the gravity of any omissions in the eyes of defence counsel . . . . [para. 86]

In the present case, the fact that the Crown neither objected to the impermissible question nor raised it as an issue on appeal suggests that the question did not have a serious effect on the outcome of the *voir dire*.

1. As not raising the issue of the impugned cross-examination would not have risked an injustice, it follows that the Court of Appeal erred in raising the issue.
2. As the Court of Appeal erred in raising the new issue, it is not necessary to go on to determine whether the procedure it followed was unfair. However, as Mr. Mian argued the issue of procedural fairness before this Court, a few comments are warranted.
3. Mr. Mian bases his argument on the fact that the Court of Appeal required Mr. Mian, the respondent in the appeal, to file his supplementary factum on the new issues before the Crown, the appellant. Although in the usual course, the appellant will be required to file submissions first, I am of the view that the procedure adopted by the Court of Appeal was fair. The parties were notified of the issues in advance of the oral hearing and the notice called the parties’ attention to the issues and provided a list of authorities for comment. Both parties had the opportunity to address the issues and neither sought to adjourn the oral hearing. When counsel for Mr. Mian requested the opportunity to file written submissions on the issues raised by the Court of Appeal, the request was granted. Counsel for Mr. Mian did not complain about the filing requirements set out by the Court of Appeal.
4. Having the respondent file submissions first was unorthodox, particularly in view of the fact that the Crown had the burden to show a legal error that had a material bearing on the acquittal. I would not endorse this approach. However, it is difficult to say that prejudice resulted. The Court of Appeal received full submissions from both parties, both orally and in writing. The procedure adopted, while not perfect, was fair (see *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33, at para. 43; and *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at para. 46).
   1. The Exclusion of Evidence
5. As the Court of Appeal erred in allowing the appeal against acquittal and ordering a new trial on the basis of one of the new issues raised by the court, it must be determined whether there should be a new trial on the grounds of appeal advanced by the Crown before the Court of Appeal — namely, that the trial judge erred in finding violations of s. 10(*a*) and (*b*) of the *Charter* and that the trial judge erred in his s. 24(2) *Charter* analysis and ultimate decision to exclude the evidence.
   * 1. Were Mr. Mian’s Section 10 Rights Breached?
6. In my view, there is no basis to overturn the trial judge’s conclusion that Mr. Mian’s s. 10 *Charter* rights were breached.
7. The Crown argues that the police officers’ 22-minute delay in complying with the informational duties under s. 10 of the *Charter* was justified by exceptional circumstances. Specifically, the Crown submits that a more transparent drug arrest would have compromised the integrity of the separate ongoing wiretap investigation into gang violence.
8. The Crown concedes that to accept this argument would constitute an extension of the circumstances in which s. 10 rights may be suspended. As the Crown in this case recognizes, “[n]one of the jurisprudence has considered the precise situation presented here” (R.F., at para. 81). I accept that the jurisprudence does recognize that compliance with the s. 10(*b*) informational rights may be suspended in exceptional circumstances (see *R. v. Manninen*, [1987] 1 S.C.R. 1233, at p. 1244; and *R. v. Strachan*, [1988] 2 S.C.R. 980, at pp. 998-99). However, it is not necessary to decide in this case whether the need to protect the integrity of a separate, ongoing investigation is an exceptional circumstance which may justify the suspension of the s. 10(*b*) rights. Nor is it necessary to determine whether exceptional circumstances can delay the implementation of s. 10(*a*) rights. Even if they could, exceptional circumstances do not arise on the facts as found by the trial judge in this case.
9. The trial judge found as a fact that there was insufficient evidence to support the assertion that immediate compliance with s. 10 of the *Charter* would have compromised the broader investigation. The trial judge acknowledged that Detective Werth testified that the delay was due to concerns about compromising the ongoing investigation. However, the judge went on to find that there was no evidence about why simply advising Mr. Mian of the reason for his arrest or informing him of his right to counsel would have frustrated the ongoing investigation of Chelmick and other gang members. Ultimately, the trial judge found that there was no evidence of a “real and present danger that the operation would be frustrated or compromised” (para. 86). The Crown has not established a legal basis for assailing these factual findings. Crown appeals from acquittals are restricted to questions of law. Findings of fact can only be undermined in limited situations, not applicable in this case, where the trial judge’s alleged shortcomings in assessing the evidence give rise to an error of law (see *Criminal Code*, s. 676(1)(*a*); and *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 24-39, *per* Cromwell J.).
10. Accordingly, there were no exceptional circumstances to justify the delay by the police in complying with their s. 10 informational duties. There is no reason to disturb the trial judge’s conclusion that s. 10(*a*) and (*b*) of the *Charter* were infringed.
    * 1. Did the Trial Judge Err in Excluding the Evidence Under Section 24(2)?
11. It is well established that the determinations of trial judges as to what would bring the administration of justice into disrepute having regard to all of the circumstances will be reviewed deferentially: “Where 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, at para. 44, *per* Cromwell J.). Applying that standard in this case, there is no basis for overturning the trial judge’s decision to exclude the evidence under s. 24(2) of the *Charter*. Although the Crown argues that the trial judge committed serious legal errors in his s. 24(2) analysis, the Crown’s arguments amount to attacks on the trial judge’s findings of fact and his ultimate assessment under s. 24(2) of the *Charter*. It is significant that this case involved a Crown appeal from an acquittal, which limits the Crown’s challenge to the decision of the trial judge to questions of law.
    * + 1. The Grant Test for Exclusion of Evidence Under Section 24(2)
12. Under s. 24(2) of the *Charter*, evidence obtained in a manner that infringed or denied *Charter* rights will be excluded if it is established that, having regard to all of the circumstances, the admission of the evidence would bring the administration of justice into disrepute. In *Grant*, this Court held that a s. 24(2) analysis requires the court to assess and balance the following factors: (1) the seriousness of the *Charter* breach; (2) the impact of the breach on the protected interests of the accused; and (3) society’s interest in the adjudication of the case on its merits (para. 71). The trial judge applied this test and, as detailed below, did not make any unreasonable findings.
    * + - 1. The Seriousness of the *Charter* Breach
13. The Crown argues that the seriousness of the breach was lessened because of the extenuating circumstances of an ongoing investigation. The Crown argues that the police delayed informing Mr. Mian of the reason for his arrest and his right to counsel in order to avoid compromising an investigation, thus mitigating the seriousness of the *Charter* breach.
14. The Crown emphasizes the fact that the delay was “only 22 minutes” and describes this delay as “minor” (R.F., at para. 99). Although 22 minutes may be “minor” in some circumstances, in the context of this case it was significant. In this case, there was evidence that Mr. Mian was questioned while in the police vehicle at a point in time at which his s. 10 rights still had not been complied with (*voir dire* reasons, at para. 98). Although the Crown did not seek to introduce any statements that Mr. Mian may have made at that time, the questioning of Mr. Mian indicates the seriousness of the delay. The significance of the passage of time is heightened in the circumstances of this case, where the trial judge found that there was no valid reason for the delay and that there were numerous opportunities for the police officers to advise Mr. Mian of the reason for his detention and his right to retain and instruct counsel (*ibid*., at para. 94).
15. This does not mean that the seriousness of a delay will never be mitigated by extenuating circumstances. Indeed, in an appropriate case, where a *Charter* breach has been found, a delay of more than 22 minutes may well be justified. In this case, however, these arguments are impermissible attempts to undermine the factual findings of the trial judge.
16. First, in *Grant*, this Court recognized that “[e]xtenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach” (para. 75). However, in this case, the trial judge found that once Mr. Mian was out of his vehicle, there could not have been any concern for the destruction or loss of any evidence in the vehicle. Second, the trial judge found that Detective Werth had instructed Constables McGill and Dalziel that if they could not establish their own grounds to arrest the driver of the Malibu, there were already grounds to arrest the driver which they could rely upon. Finally, the trial judge found as a fact that “[t]here was no evidence of a real and present danger that the operation would be frustrated or compromised if Mian was immediately advised of the reason for his arrest” or of “his right to retain and instruct counsel” (para. 86). In view of these factual findings which were open to the trial judge, I am unable to accept the Crown’s argument that the extenuating circumstances of the ongoing investigation were sufficiently significant to lessen the seriousness of the breach.
17. The Crown further submits that the breach was not serious because there was a lack of a *causal* connection between the breach and the discovery of the evidence. However, a *causal* connection or lack thereof is not determinative. This Court has confirmed that a *causal* connection is not necessary in order to engage s. 24(2) of the *Charter* (*Strachan*, at pp. 1000-1002). Indeed, the Crown concedes that a *temporal* connection is in theory sufficient to engage s. 24(2). Moreover, the first line of inquiry in the *Grant* analysis is concerned with the police conduct, and is not focused on the connection or lack thereof between the police conduct and the evidence (*Grant*, at paras. 72-73; see also *Côté*, at para. 71).
18. At the stage of assessing the seriousness of the breach, deliberate and egregious state conduct favours the exclusion of the evidence: “In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*”(*Grant*, at para. 73 (emphasis added)). In this case, the trial judge found that the *Charter* breaches were “extremely serious and deliberate” (para. 96) due to the “number of opportunities” (para. 94) that Constables McGill and Dalziel had to advise Mr. Mian of the reason for his detention and because “[t]here was no evidence . . . as to how simply providing Mian with this information would have created a real and present danger of compromising the ongoing investigation” (para. 96). These were findings of fact, entitled to deference.
19. In my view, the trial judge did not consider improper factors, or ignore proper factors, at the first stage of the *Grant* analysis. There is no reason to disturb his findings that this first stage of the analysis weighs in favour of excluding the evidence.
    * + - 1. The Impact of the Breach on the Protected Rights of the Accused
20. The Crown argues that “the trial judge erred by overstating the impact of the breach on the *Charter*-protected interests of the accused” (R.F., at para. 100). The basis for this argument is that Mr. Mian “had to wait for constitutionally required advice for 22 minutes, not several hours. He was not subjected to any lengthy interrogation” (R.F., at para. 103).
21. However, as explained above, the trial judge’s assessment of the *Grant* factors in light of the facts of the case is to be afforded considerable deference by an appellate court. The Crown’s arguments are an attack on the judge’s assessment of the facts and do not point to an error of law. In addition, while the trial judge found that the impact on Mr. Mian’s rights with respect to the failure to advise him of the reason for his detention or of his right to counsel would have weighed in favour of excluding any statements that the Crown may have tried to introduce, the Crown did not seek to introduce such evidence. Moreover, with respect to non-bodily physical evidence, the trial judge found that the s. 10 *Charter* violations had little impact on Mr. Mian’s privacy interest in the contents of his car, in part because of the lack of causal connection between the breach and the evidence. It was appropriate to consider the causal connection at this stage (*Grant*, at para. 122). In this context, it is difficult to see how the trial judge could be said to have overstated the impact of the breach on Mr. Mian’s *Charter*-protected interests. I do not see any reason to disturb the trial judge’s findings with respect to the second *Grant* factor.
    * + - 1. Society’s Interest in the Adjudication of the Case on Its Merits
22. The Crown argues that the trial judge erred by concluding that the reliability and importance of the evidence were offset by Detective Werth’s attempt to mislead the court. I agree that misleading police testimony is properly considered under the first *Grant* factor. However, the *Grant* test is a flexible and imprecise balancing exercise (see *Grant*, at paras. 85-86). The question is whether the trial judge considered the proper factors. In this case, the trial judge did exactly that. The trial judge held that the lack of a causal connection between the breach and the evidence, the minimal impact of the breach on Mr. Mian’s privacy rights, the reliability of the evidence, and the seriousness of the offence favoured admission of the evidence. He also held that the egregious and deliberate state conduct, the lack of a valid reason for the *Charter* breach, and the misleading state conduct favoured exclusion of the evidence. On balance, the judge concluded that society’s interest in the adjudication of the case on its merits was outweighed by the wilful and flagrant state conduct and the attempts to mislead the court. This conclusion was not unreasonable.
    * + 1. Conclusion on the Admissibility of the Evidence
23. In view of the deferential standard of review on appeal and because the Crown’s arguments with respect to the trial judge’s s. 24(2) findings amount to an attack on the trial judge’s findings of fact, this Court cannot interfere with the trial judge’s s. 24(2) analysis.
24. Conclusion
25. The appeal is allowed and the trial judge’s verdict acquitting Mr. Mian is restored.

Appeal allowed.

Solicitors for the appellant: Sprake Song & Konye, Vancouver.

Solicitor for the respondent: Public Prosecution Service of Canada, Edmonton.

Solicitor for the intervener: Attorney General of Alberta, Calgary.