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## Why There Should Be No Constitutional Right to Contact Counsel from a Police Car

Terry Skolnik

*University of Toronto, Faculty of Law, [terry.skolnik@mail.utoronto.ca](mailto:terry.skolnik@mail.utoronto.ca)*

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# Why There Should Be No Constitutional Right to Contact Counsel from a Police Car

## Abstract

The Supreme Court of Canada has yet to consider whether there is a constitutional right to use a cell phone to contact legal counsel while detained in a police car. This article argues that it should not be recognized as a constitutional right for three principal reasons. First, recent judicial interpretations of the constitutional right to counsel have foreclosed the possibility of detained and arrested persons using their own cell phones to call a lawyer from a police car. Second, allowing detainees to use their cell phones to contact counsel can create unreasonable risks to public safety and undermine the privacy interests of the accused. Third, pre-existing mechanisms adequately protect the accused against self-incrimination while generating fewer risks than permitting a detainee to use her cell phone to call a lawyer. Traditional and emerging constitutional requirements related to section 10(b) of the Canadian Charter of Rights and Freedoms are satisfied by the process of the immediate transport of detained or arrested persons to a police station to contact a lawyer.

This article is helpful for readers seeking to learn more about:

- detention and arrest procedures, the application of the Charter to criminal proceedings, section 10(b) of the Charter, the impact of technology, the collection of evidence, public safety concerns, privacy of arrested and detained individuals

Topics in this article include:

- arrests, detentions, right to counsel, police protocol for arrests, cell phone access, cell phones as weapons, evolution of technology, exclusion of evidence, Charter rights, Charter violations

Authorities cited in this article include:

- Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11
- R v Taylor, 2014 SCC 50
- R v Suberu, 2009 SCC 33
- R v Black, [1989] 2 SCR 138
- R v Manninen, [1987] 1 SCR 1233
- R v Burlingham, [1995] 2 SCR 206
- R v Feeney, [1997] 2 SCR 13
- R v Lewis, 2007 NSCA 2
- R v Smith, 2011 BCSC 1695

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- R v Sinclair, 2010 SCC 35

**Keywords**

detention and arrest procedures, the application of the Charter to criminal proceedings, section 10(b) of the Charter, the impact of technology, the collection of evidence, public safety concerns, privacy of arrested and detained individuals, arrests, detentions, right to counsel, police protocol for arrests, cell phone access, cell phones as weapons, evolution of technology, exclusion of evidence, Charter rights, Charter violations

## WHY THERE SHOULD BE NO CONSTITUTIONAL RIGHT TO CONTACT COUNSEL FROM A POLICE CAR

TERRY SKOLNIK\*

### INTRODUCTION

Are police officers obligated to facilitate an accused's right to counsel via a cell phone? In *R v Taylor*, the Supreme Court of Canada (SCC) clarified police officers' positive obligations regarding the constitutional right to counsel outside a police detachment.<sup>1</sup> Police officers are not required to provide their own cell phones to detained or arrested persons to facilitate communication with counsel under s. 10(b) of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup>

However, *Taylor* did not address whether a detained or arrested person can use *his own* cell phone to contact counsel from a police car. Because of increased cell phone use in Canada, it is likely that more detainees will request to use their own cell phones to contact lawyers.<sup>3</sup> The courts' position on whether the *Charter* allows an accused to use her cell phone to contact counsel from a police car will therefore become important.<sup>4</sup>

This article argues that police officers should not be constitutionally obligated to allow detained or arrested persons to use their own cell phones to contact counsel from a police car for three reasons. First, recent judicial interpretations of the right to counsel appear to negate the right to use cell phones to call counsel. Second, practical concerns related to public safety and privacy also weigh against the right to contact counsel from a police car. Third, pre-existing safeguards adequately protect arrested and detained persons against self-incrimination.

This paper first considers the facts of *R v Taylor* and discusses the decisions of the trial court, the Alberta Court of Appeal, and the SCC. Second, the paper examines the impact of *Taylor* on Canadian law. Third, the paper examines recent judicial

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\*Terry Skolnik holds an L.L.L. (Ottawa) and L.L.M. (Cambridge). He is currently an S.J.D. Candidate at the University of Toronto. Terry would like to thank Fonds de Recherche du Québec - Société et Culture (FRQSC) for their generous support. He would also like to thank the editorial team at the Windsor Review of Legal and Social Issues and their anonymous reviewer for their feedback on a prior version of this article. Terry would like to thank the editorial board and anonymous reviewers of the Western Journal of Legal Studies for their outstanding feedback and support throughout the entire review process.

<sup>1</sup> *R v Taylor*, 2014 SCC 50 [*Taylor*].

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, s 10(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

<sup>3</sup> See Statistics Canada, *Residential Telephone Service Survey*, 2013, (Ottawa: Statistics Canada, 23 June 2013) at 1.

<sup>4</sup> *R v Taylor*, 2013 ABCA 342 at para 83 [*Taylor ABCA*].

interpretations of the right to retain and instruct counsel in order to demonstrate that police officers must immediately *facilitate* contact with counsel. Fourth, the paper discusses the security and privacy concerns that arise from using a cell phone to contact counsel from a police car. Fifth, the paper considers the traditional safeguards associated with the right to counsel. The paper concludes that courts should not recognize the right of detained and arrested persons to contact counsel from the back of a police car.

#### I. *R V TAYLOR*: FACTS, TRIAL DECISION, AND COURT OF APPEAL DECISION

Jamie Kenneth Taylor, the accused, was driving home in the early hours of the morning with three passengers. Taylor was driving at a high speed when he lost control of the vehicle and collided with a lamppost, injuring himself and the vehicle's occupants.<sup>5</sup> RCMP Constable MacGillivray responded to the scene of the crash. He observed signs of alcohol impairment in Taylor, who was arrested and charged with impaired driving causing bodily harm.<sup>6</sup> Several minutes after his arrest, Taylor was placed in the back of a police car and was informed of his *Charter* rights. Taylor expressed his wish to speak with both a lawyer and his father.<sup>7</sup> Paramedics assessed Taylor and brought him to a hospital nearly an hour after his request to speak with a lawyer.<sup>8</sup> Upon Taylor's arrival at the hospital, a nurse took five vials of blood from him. Following a conversation with the nurse, the officers were informed that the accused might not be able to leave the hospital to give a breath sample at the police station.<sup>9</sup> In response, Constable MacGillivray demanded an additional blood sample, which was taken approximately one and a half hours after Taylor was informed of his *Charter* rights.<sup>10</sup> In the four hours that passed between Taylor's arrest and Constable MacGillivray's departure from the hospital, the police did not provide Taylor with an opportunity to speak with counsel or even determine whether contact was feasible.<sup>11</sup> Taylor's first blood samples were seized pursuant to a warrant. The Court excluded the second set after the Crown conceded that the samples were unconstitutionally obtained at Constable MacGillivray's order.<sup>12</sup> However, the first set of samples demonstrated that the accused surpassed the *Criminal Code* blood alcohol concentration limit at the time of the crash.<sup>13</sup>

At trial, the arresting constable's partner testified that it was not her normal practice to allow detainees to contact counsel from the back of a police car.<sup>14</sup> Instead,

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<sup>5</sup> *Taylor*, *supra* note 1 at para 3.

<sup>6</sup> *Ibid* at para 4.

<sup>7</sup> *Ibid* at para 5.

<sup>8</sup> *Ibid* at paras 6-7.

<sup>9</sup> *Ibid* at para 12.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* at para 13.

<sup>12</sup> *Ibid* at paras 15-16.

<sup>13</sup> *Ibid*.

<sup>14</sup> *R v Taylor*, 2011 ABQB 543 at para 18 [*Taylor* ABQB].

detainees were brought to the police detachment to contact a lawyer.<sup>15</sup> Constable MacGillivray testified that only after the events had transpired did he realize the accused was not given the opportunity to contact counsel.<sup>16</sup> Despite Constable MacGillivray's evidence, the trial judge concluded that because Taylor was awaiting emergency medical treatment, there was no reasonable opportunity to contact counsel at the hospital.<sup>17</sup> Nevertheless, the first blood samples seized by warrant were admitted into evidence and the accused was convicted.<sup>18</sup>

The Alberta Court of Appeal determined that the accused's right to counsel was infringed upon because the police failed to facilitate contact with counsel.<sup>19</sup> Taylor was deprived of the ability to choose whether he should allow blood samples to be taken as evidence.<sup>20</sup> The Court excluded the first samples, overturned the conviction, and substituted an acquittal.

## II. JUDGMENT OF THE SUPREME COURT OF CANADA

The SCC unanimously upheld Taylor's acquittal.<sup>21</sup> The Court noted the two components of the right to counsel were information and implementation.<sup>22</sup> The information component requires police officers to immediately inform a person of his right to counsel upon detention or arrest.<sup>23</sup> The implementation duty arises once the detainee manifests his wish to contact a lawyer, at which point the officers are constitutionally obligated to facilitate contact with counsel at the first reasonable opportunity.<sup>24</sup> Furthermore, the officers are required to abstain from eliciting evidence from the accused until he has either spoken with counsel or unequivocally waived his right.<sup>25</sup> The burden falls on the Crown to undertake a factual inquiry and demonstrate that a particular delay was reasonable given the circumstances.<sup>26</sup> It is crucial to allow detainees to speak with counsel at the first reasonable opportunity to minimize accidental self-incrimination.<sup>27</sup>

In *Taylor*, the information component of the right to retain and instruct counsel was fulfilled because the accused was informed of his right to counsel when he was

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Taylor*, *supra* note 1 at para 14.

<sup>17</sup> *Ibid.*, at para 18.

<sup>18</sup> *Taylor* ABQB, *supra* note 14 at paras 27-9.

<sup>19</sup> *Taylor* ABCA, *supra* note 4 at paras 11-13.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Taylor*, *supra* note 1 at para 43. The decision was unanimously rendered by Abella, Rothstein, Moldaver, Karakatsanis, and Wagner JJ.

<sup>22</sup> *Ibid* at paras 24-35.

<sup>23</sup> *R v Suberu*, 2009 SCC 33 at paras 41-42 [*Suberu*].

<sup>24</sup> *Taylor*, *supra* note 1 at para 24.

<sup>25</sup> *R v Black*, [1989] 2 SCR 138 at 154-55 [*Black*]; *R v Sinclair*, 2010 SCC 35 [*Sinclair*].

<sup>26</sup> *Taylor*, *supra* note 1 at para 24.

<sup>27</sup> *Ibid* at para 28.

arrested.<sup>28</sup> In contrast, the implementation component of this right was not fulfilled. The police did not attempt to find a location for the accused to privately telephone counsel.<sup>29</sup> There was no evidence of any logistical or medical barriers that would justify delaying the implementation of the right to counsel.<sup>30</sup> As hospitals are not “*Charter*-free zones,” the failure of the police to facilitate contact with counsel left the implementation component of section 10(b) unfulfilled, thereby violating Taylor's right to counsel.<sup>31</sup> The SCC concluded that admission of the blood samples would bring the administration of justice into disrepute and upheld Taylor's acquittal.<sup>32</sup>

The SCC also discussed the extent to which police officers must immediately facilitate the right to retain and instruct counsel upon detention or arrest. For safety and privacy concerns, police officers are not obligated to provide their own cell phones to detainees.<sup>33</sup> The Court explained that the police must allow detainees access to a telephone as soon as reasonably possible. Unfortunately, the Court did not rule on whether a detainee is allowed to use her own cell phone to contact a lawyer upon detention or arrest.<sup>34</sup>

### III. ANALYSIS

*Taylor* is likely to have far reaching implications, particularly with respect to police officers' positive obligations to facilitate communication with counsel in hospital settings. *Taylor* is consistent with earlier jurisprudence that found eliciting evidence prior to any attempt to facilitate contact with counsel violates the *Charter* right to counsel.<sup>35</sup> Unfortunately, the decision does not distinguish land lines from cell phones. Further, the decision does not address how the use of cell phone technology affects security and other policy concerns.

*Taylor* upholds that the burden of proof falls on the Crown to demonstrate that a delay was reasonable and the accused had no reasonable opportunity to privately communicate with counsel. Following *Taylor*, the circumstances that justify police delaying an accused's contact with counsel are relatively clear. Medical, logistical, or security concerns can justify delays provided the accused consults counsel within a reasonable time frame. Examples of justifiable delays include (i) sufficiently grave medical emergencies that render communication unfeasible; (ii) insufficient privacy; (iii) availability of a telephone (and officers are not obligated to provide theirs for safety and

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<sup>28</sup> *Ibid* at para 5.

<sup>29</sup> *Ibid* at para 35.

<sup>30</sup> *Ibid* at paras 29-30.

<sup>31</sup> *Ibid* at paras 34-35.

<sup>32</sup> *Ibid* at paras 37- 42.

<sup>33</sup> *Ibid* at para 27.

<sup>34</sup> *Ibid* at para 28.

<sup>35</sup> See especially *R v Manninen*, [1987] 1 SCR 1233 at para 23 [*Manninen*]; *R v Burlingham*, [1995] 2 SCR 206 [*Burlingham*]; *R v Feeney*, [1997] 2 SCR 13 [*Feeney*]; *R v Evans*, [1991] 1 SCR 869 [*Evans*].

privacy reasons); (iv) dangerous circumstances that prevent immediate contact with counsel; and (v) public safety concerns.<sup>36</sup>

Yet *Taylor* does not address whether the police must allow an accused to use *her own* cell phone to contact counsel in a police car. Cell phone access in a police car is particularly relevant as many Canadians are cell phone subscribers.<sup>37</sup> Many arrested individuals possess cell phones at the time of their apprehension.<sup>38</sup> Following a search, cell phones and other possessions can be confiscated from arrested persons, which prevents the use of cell phones to contact counsel from police cars. Individuals subject to investigative detention in public settings may be precluded from using their cell phones to contact counsel due to police directives and practices, or because of concerns that cell phones may be used for illicit purposes. These individuals may be brought to a police detachment to contact a lawyer.

*R v Manninen* and *Taylor* established that the accused is entitled to use a telephone to call a lawyer in locations other than a police detachment provided there is a reasonable opportunity to contact counsel. *R v Suberu* established that police officers are required to immediately *facilitate* the right to counsel upon arrest or detention, “subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the *Charter*.”<sup>39</sup> Unfortunately, the law remains uncertain in contexts where an accused wishes to immediately contact counsel from a police car using his own cell phone.

#### IV. WHY THERE SHOULD BE NO CONSTITUTIONAL OBLIGATION TO PERMIT CONTACT WITH COUNSEL FROM A POLICE CAR

##### A. Immediately Facilitating Contact with Counsel

The *Charter* right “to retain and instruct counsel without delay” does not obligate police officers to allow *immediate contact* with counsel via cell phones. Rather, when an accused expresses her desire to contact a lawyer, police officers must *immediately facilitate* contact at the first reasonable opportunity and refrain from eliciting evidence from the accused until she contacts a lawyer.<sup>40</sup> Officers can fulfill this requirement by immediately bringing detained or arrested persons to a police detachment to contact counsel.

<sup>36</sup> *Taylor*, *supra* note 1 at paras 29-33; *R v Lewis*, 2007 NSCA 2 at paras 27, 29, 32; *R v Bartle*, [1994] 3 SCR 173 at 192 [*Bartle*]; *Suberu*, *supra* note 23 at para 42.

<sup>37</sup> Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report September 2013* (Ottawa: Government of Canada, 2013) at iv, 23 (28 million Canadians were wireless telephone subscribers in 2012).

<sup>38</sup> Statistics Canada, *supra* note 3.

<sup>39</sup> *Suberu*, *supra* note 23 at para 42. This decision broadened the traditional interpretation of section 10(b)) of the *Canadian Charter* from “without delay” to “immediately.”

<sup>40</sup> *Ibid*; *Manninen*, *supra* note 35 at para 23; *R v Ross*, [1989] 1 SCR 3 at 12.



Canadian courts have generally rejected the notion of an immediate implementation of the right to counsel. Section 10(b) of the *Charter* reads as follows: “Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right.”<sup>41</sup> Courts have recognized that the right to counsel “without delay” does not generally equate to the right to immediately contact counsel.<sup>42</sup> Instead, police officers are required to immediately facilitate contact with counsel at the first reasonable opportunity.<sup>43</sup> Courts have upheld both *Suberu* and *Taylor*’s interpretation of section 10(b).<sup>44</sup> However, some courts have also recognized that an accused person may be required to wait a reasonable period of time before either being informed of the right to counsel or contacting counsel.<sup>45</sup> The courts’ recognition is logical since constitutionally protected rights “are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society.”<sup>46</sup> Furthermore, the prosecution bears the burden of demonstrating that a delay in contacting counsel was reasonable under the circumstances of the case.<sup>47</sup> Imposing reasonableness as a constraint would not be necessary if police officers were obligated to allow the accused to immediately contact counsel.

In alleged violations of the right to counsel, courts have not generally been concerned with whether counsel was immediately contacted. Instead, courts have

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<sup>41</sup> *Charter*, *supra* note 2 s 10(b).

<sup>42</sup> See, e.g., *R v Nelson*, 2010 ABCA 349 at para 17 (“[i]mmediacy does not mean instantaneous; practical considerations still play a role, particularly with respect to the police’s obligation to implement an arrested person’s contact with counsel”) [*Nelson*]. See also *R v Smith*, 2011 BCSC 1695 at para 186, Ker J [*Smith* BCSC]. With respect to the interpretational component of section 10(b) of the *Charter*, see *R v Fan*, 2013 BCSC 1406 at paras 178-180 [*Fan*]. In that case, “immediately” was interpreted as “the first order of business” and is fulfilled by bringing an accused immediately to a police station to contact counsel.

<sup>43</sup> *Suberu*, *supra* note 23 (“Subject to concerns for officer or public safety, and such limitations as prescribed by law and justified under s. 1 of the Charter, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention” at para 42). See also *Taylor*, *supra* note 1 at para 25 (“to give effect to the right to counsel, the police must inform detainees of their s. 10(b) rights and facilitate access to those rights where requested, both without delay”).

<sup>44</sup> See e.g. *R v McDonald*, 2013 BCSC 2344 (“[o]nce the search of Mr. McDonald’s person was over, the obligation of the police was to immediately facilitate Mr. McDonald’s request to consult with counsel” at para 329). See also *R v McDonald*, *ibid* at para 330 (“[i]t cannot be said in these circumstances that the police discharged their obligation to facilitate contact with counsel ‘without delay’ as that phrase has been interpreted in *Suberu*”). See also *R v Liew*, 2012 ONSC 1826 at para 64 (“[t]o ensure that the purpose of s. 10(b) is served, and subject to concerns for officer or public safety, the police must immediately inform detainees of the right to counsel as soon as the detention arises and they must immediately facilitate that right”) [*Liew*].

<sup>45</sup> See, e.g., *R v Debot*, [1989] 2 SCR 1140 (it was determined that the right to counsel could lawfully be suspended until after a search incidental to arrest was undertaken). See also *Fan*, *supra* note 42. See also *R v Montgomery*, 2009 BCCA 41, Tysoe JA (the British Columbia Court of Appeal found it was reasonable, due to safety concerns, to deny the accused the possibility to contact counsel with a cell phone from the scene of arrest, although several hours had passed between the arrest and his first opportunity to speak with counsel).

<sup>46</sup> *R v Smith*, [1989] 2 SCR 368 at 385, Lamer J [*Smith*].

<sup>47</sup> *Taylor*, *supra* note 1 at para 24. See also *R v Luong*, 2000 ABCA 301 at para 12.

assessed whether the police breached the accused's right to counsel before any attempts were made to facilitate contact with counsel. In the past, police have not met the implementation component when (i) delays were used against the accused to elicit evidence; (ii) delays were deliberate; (iii) the accused was questioned before receiving an opportunity to contact counsel; or (iv) officers did not attempt to facilitate contact with counsel.<sup>48</sup> Reasonable delays in reaching counsel are constitutional when the police immediately transport the detainee to a police detachment to call a lawyer.

The SCC has expressed that the right to counsel is not absolute and does not require facilitating access to a "specific" telephone.<sup>49</sup> It appears that police officers are not obligated to permit the accused to use his own cell phone (a specific telephone) to contact counsel. Instead, officers must discharge their obligation to immediately facilitate contact with counsel by any appropriate means (e.g., immediately bringing the accused to a police detachment).

The objectives of the right to counsel without delay are to minimize the possibility of self-incrimination, obtain relevant legal advice, and make an informed choice of whether to cooperate with a police investigation.<sup>50</sup> Requiring immediate contact with counsel undermines these objectives. For example, a detainee who immediately contacts counsel via a cell phone has not had a "reasonable opportunity" to contact a lawyer if the detaining officers can overhear the conversation. The reasons for a constitutionalized right to counsel cannot be realized when there is limited privacy.

## **B. Privacy and Public Safety Concerns**

Providing detained or arrested persons with the opportunity to use their cell phones to contact counsel may reduce the risk of accidental self-incrimination.<sup>51</sup> However, minimizing involuntary self-incrimination and accidental elicitation of evidence is effective only if the detainee receives privacy and time to consult counsel while public safety is maintained. Contacting counsel from a police detachment protects these interests better than a cell phone call to counsel in a police car.

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<sup>48</sup> See *Burlingham*, *supra* note 35 at para 18 (denigrating counsel prior to facilitating contact with them); *R v Arthur*, 2013 BCSC 770 at para 55 (deliberately delaying the right to counsel) [*Arthur*]; *Taylor*, *supra* note 1 (omitting to give the opportunity to consult counsel prior to giving a blood sample); *Manninen*, *supra* note 35 (questioning the accused prior to facilitating contact with counsel); *Evans*, *supra* note 35 (questioning the accused and conscripting the accused against himself prior to facilitating contact with counsel); *Feeney*, *supra* note 35 (questioning the accused prior to any attempt to facilitate contact with counsel).

<sup>49</sup> *Smith*, *supra* note 46 at 385; *Taylor*, *supra* note 1 at para 28.

<sup>50</sup> *Sinclair*, *supra* note 25 at paras 24-25.

<sup>51</sup> *Taylor*, *supra* note 1 at para 28.

In consulting counsel, detained or arrested persons “must be able to speak to and listen to a lawyer without the conversation being overheard.”<sup>52</sup> While contacting counsel does not require “absolute privacy,” a cell phone call from a police car can undermine the reasons for granting privacy to the accused when consulting counsel.<sup>53</sup> For example, events, noises, or onlookers may distract the accused when he speaks with counsel. The accused’s counsel could miss or misunderstand important information due to these distractions. The presence of onlookers could also pressure the detained or arrested person to quickly conclude the phone call, which may impact the quality or completeness of advice.

Alternatively, an accused could accept the risks of limited privacy in a police car and contact counsel immediately. Indeed, some courts have held that a sufficient level of privacy can be achieved when an accused contacts counsel from inside a police car.<sup>54</sup> Unfortunately, allowing counsel to be reached from a police car can generate unreasonable risks for officers. While a police officer is required to observe detainees held in a police car, events may distract the officer’s attention and undermine public safety. For example, citizen inquiries may prevent an officer from ensuring the accused’s cell phone is not being used for malicious purposes. A dangerous situation unfolding within the officer’s vicinity could expose both the officer and the detainee to potential harm. The officer may also be requested to assist another officer or provide basic medical attention to a citizen in need.

The safety of the officer and the detainee may be compromised when the officer must simultaneously handle two situations. Long telephone calls to counsel in the police car increase the possible occurrence of other events that would require an officer’s attention. Safety risks may be avoided by immediately transporting the accused to a police detachment. A police detachment not only provides privacy to detainees; it also allows officers to monitor the accused either by camera or through glass, without hearing the accused’s conversation with counsel. The accused can also have a confidential conversation of a reasonable length. A police detachment is devoid of distractions and is a setting where “the conversation cannot be overheard or there is no reasonable apprehension of [the accused] being overheard.”<sup>55</sup>

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<sup>52</sup> See *R v Ryle*, 2012 MBQB 14 at para 37 [Ryle]. See also *R v Rudolph* (1986), 32 CCC (3d) 179 (Alta QB); *R v O'Donnell*, 2004 NBCA 26, Robertson JA. See also *R v Playford* (1987), 40 CCC (3d) 142 (Ont CA) at 158.

<sup>53</sup> *R v Ryle*, 2012 MBQB 14 at para 39.

<sup>54</sup> See e.g. *R v Camacho*, 2011 BCSC 175 at para 44, aff'd 2013 BCCA 68.

<sup>55</sup> *R v Miller* (1990), 87 Nfld & PEIR 55 at para 15 (Nfld CA); *R v Kennedy* (1995), 103 CCC (3d) 161 at para 41 (Nfld CA). Both cases referred to in Steven Penney and James Stribopoulos, “‘Detention’ under the Charter after *R v Grant* and *R v Suberu*” (2010), 51 SCLR (2d) 439 at 466. See also *R v Burley* (2004), 181 CCC (3d) 463 (Ont CA) cited in *Ryle*, *supra* note 52 at para 38. See also *R v Cairns*, [2004] OJ No 210 at para 10 (ONCA) cited in *Burley*, *ibid*.

Additionally, it may be logistically difficult for a person handcuffed in a police car to meaningfully contact counsel. A possible solution could be to place the cell phone on a “speaker” setting. However, the sound quality may lead to misunderstandings or require the accused to raise his voice, which could undermine the privacy of the conversation. Furthermore, detainees risk pain or injury due to the uncomfortable physical position required to contact counsel when handcuffed in a police car.

### C. Minimizing the Risk of Cell Phone Use for Illicit Purposes

The risk of illicit, illegal, or dangerous use of a cell phone undercuts the position of some courts that certain circumstances permit the accused to use his own cell phone to contact counsel in a police car.<sup>56</sup> The risk is nearly eliminated when one contacts counsel from a police detachment.

Within a detachment, police can ensure that the accused contacts legal counsel rather than a third party.<sup>57</sup> Police provide the accused with a list of telephone numbers from which to select a lawyer, the officer who places the call to counsel then ascertains the lawyer’s identity, and the line is transferred to the accused in a private room. Further, there is often a remote switch to disconnect calls when the accused is speaking to someone other than counsel or when there is reason to suspect the call was made for illicit purposes.

Officers who access the detainee’s cell phone, locate counsel’s number, dial it for the detainee, and verify that the individual contacted is a lawyer can mitigate the risk that detainees will contact third parties rather than counsel.<sup>58</sup> However, there are two problems with adopting such an approach. First, the mere act of using the accused’s phone allows officers access to private information that they may not have the right to search.<sup>59</sup> For example, when a cell phone is unlocked, it may open to the latest application used by its owner. If the latest application used was a text messaging service, officers could access private information such as the accused’s associations and the content of messages. In addition, officers unfamiliar with the technology of certain phones may accidentally access private information.

Second, cell phones may be used to physically cause harm and allow the accused to escape or resist arrest. Cell phones have been transformed into dissimulated weapons (e.g. Tasers).<sup>60</sup> They can be used to conceal weapons, thereby increasing the likelihood

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<sup>56</sup> See e.g. *R v Arthur*, *supra* note 48 at para 114; *Smith* BCSC, *supra* note 42 at para 179; *R v Nguyen*, [2011] BCJ No 1663 (Prov Ct) at para 16; *R v Kembo*, 2009 BCSC 1879 at para 8 [*Kembo*].

<sup>57</sup> See e.g. *R v Edgar*, [2013] AJ No (Prov Ct) at paras 15-22 (discussion of specific concerns).

<sup>58</sup> See e.g. *Kembo*, *supra* note 56 at para 6. See also *R v Hughes*, 2013 BCSC 459 at para 70.

<sup>59</sup> See *R v Fearon*, 2014 SCC 77 (the decision recognized a police power to conduct warrantless searches of cell phones incidental to arrest in certain circumstances, but it is possible that the circumstances in question would not permit a search).

<sup>60</sup> See e.g. *R v Lucas*, [2009] OJ No 5329 (SC); *R v Krawcar*, [2011] OJ No 2056 (CJ) at para 9. See e.g. <<http://www.tbotech.com/cellphonestungun.htm>> (the description of the cell phone stun gun reads: “Cell

of escape or harm to officers.<sup>61</sup> Requiring the accused to use a telephone at the detachment minimizes risks of physical harm that may be unavoidable if the accused uses his cell phone to contact counsel.

When contacting counsel from a police car, the accused may be unaware that her right to privacy is compromised. A potential solution may be to inform the accused that she cannot expect absolute privacy when consulting her lawyer by cell phone from inside a police car. However, there is a risk that the accused may use the cell phone for malicious purposes. For example, a detainee may use her cell phone to intimidate complainants or witnesses via text messaging or voice calls. The detainee can, in a clandestine manner, contact accomplices in an attempt to escape, to resist arrest or to destroy evidence.<sup>62</sup> She may also destroy incriminating evidence accessible through her cell phone such as photos, text messages, contacts, or information available on social media accounts. Requiring the accused to call counsel from a police station minimizes the possibility of evidence being “lost, destroyed, or rendered impossible to obtain.”<sup>63</sup>

The increasing prevalence and sophistication of voice-activated features on smartphones presents additional risks.<sup>64</sup> Voice-activated features could allow detainees to undertake illicit actions using hands-free technology.<sup>65</sup> Even handcuffed detainees may be able to delete incriminating evidence or send intimidating text messages using voice-activated features.

#### **D. Pre-Existing Safeguards and Reasonable Diligence**

Finally, there are several pre-existing legal safeguards that adequately protect the accused against self-incrimination before she contacts a lawyer. These safeguards generate fewer risks than allowing the accused to use her cell phone to contact counsel. First, upon arrest or detention, the accused is informed of her right to remain silent. She is alerted to the consequences of making statements to the police because anything she

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phone stun guns are the latest in disguised self defense. No one will think that yours is actually a non lethal self defense weapon”).

<sup>61</sup> E.g., the TaskOne phone case contains knives and wire cutters within the case’s material. See Victoria Woollaston, “The iPhone case that turns your mobile into a 22-tool SWISS ARMY KNIFE - complete with a wood saw and bottle opener” *Mail Online* (3 March 2014), online: The Daily Mail, Mail on Sunday & Metro Media Group <<http://www.dailymail.co.uk>>. For examples of cell phone cases that act as concealed Tasers, see Yellow Jacket, online: <[www.yellowjacketcase.com](http://www.yellowjacketcase.com)>.

<sup>62</sup> See *United States v Santillan*, 571 F Supp 2d 1093 at 1097-98 (D Ariz 2008), cited in *Fearon*, *supra* note 59.

<sup>63</sup> See *Smith*, *supra* note 46 at 385 cited in *Sinclair*, *supra* note 25 at para 58.

<sup>64</sup> Such as Siri software available on iPhones and S-Voice features on the Samsung Galaxy.

<sup>65</sup> E.g., the Apple Support website indicates that with the assistance of voice activated Siri iPhone application, one can access their telephone, messaging, email, contacts, and also dictate. See “About Siri”, online: Apple Inc <<http://support.apple.com/en-us/ht4992>>. See also “iOS 8”, online: Apple Inc <<http://www.apple.com/ca/ios/siri/>>.

says can be used against her in trial.<sup>66</sup> Second, police officers are constitutionally required to refrain from attempting to elicit inculpatory statements from the accused once she requests to contact counsel.<sup>67</sup> Otherwise, officers risk the exclusion of the accused's confessions or self-incriminating evidence from the trial.<sup>68</sup> Third, evidence may also be excluded if the officers intentionally or negligently delay the accused's contact with counsel.<sup>69</sup>

Even if police officers have fulfilled their constitutional obligations, an accused may still make self-incriminating statements before reaching the police detachment. The statements can be attributed to the accused's lack of reasonable diligence and patience rather than the officers' failure to immediately facilitate contact with counsel.<sup>70</sup> To conclude otherwise would place the police in a constant race against time to prevent the accused from self-incrimination.

## CONCLUSION

For theoretical and practical reasons, the law should not recognize a constitutional right to contact counsel using one's cell phone from the back of a police car. Recent judicial interpretations of section 10(b) of the *Charter* suggest that police officers are not required to immediately allow contact with counsel. Instead, officers must immediately facilitate such communication by bringing the detainee to a police detachment to contact counsel without delay. Moreover, public safety and privacy concerns weigh against recognizing the right to contact counsel from a police car using a cell phone. An arrested or detained person is adequately protected against self-incrimination because officers cannot elicit inculpatory statements from her once she requests to contact counsel. The opportunity to privately consult counsel from a police station also generates substantially fewer risks of self-incrimination than contacting counsel from the back of police car. By immediately bringing an accused to a police detachment to contact a lawyer, officers respect the accused's constitutional right to counsel. The current procedure to facilitate contact with counsel minimizes the risk of self-incrimination, protects public safety, and respects the accused's privacy in consulting a lawyer.

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<sup>66</sup> See, e.g., *R v Named Person B*, 2013 SCC 9 (police caution "you have the right to remain silent. We must inform you that we are police officers. You are not required to say anything, and you must understand clearly that if you wish to speak, everything you say will be taken down . . . and can be used as evidence against you" at para 63).

<sup>67</sup> *Black*, *supra* note 25 at 154-155; *Bartle*, *supra* note 36 at 192; *Suberu*, *supra* note 23 at para 38.

<sup>68</sup> See, e.g., *Manninen*, *supra* note 35.

<sup>69</sup> See, e.g., *Taylor*, *supra* note 1; *Arthur*, *supra* note 48.

<sup>70</sup> *Black*, *supra* note 25 at 154-155; *R v McCrimmon*, 2010 SCC 36 at para 17.