

# R. v. B

Passenger in vehicle with stolen licence plates found with loaded pistol. Acquitted after Court accepted argument that client's rights had been seriously violated in several ways.

[COMMENTS BY RICHARD NEARY]

R. v. B

Between  
Her Majesty the Queen, and  
Z B

[2004] O.J. No. 280

60 W.C.B. (2d) 220

Ontario Court of Justice  
Toronto, Ontario

Gage J.

January 29, 2004.

(47 paras.)

Civil rights — Security of the person — Unlawful search — Canadian Charter of Rights and Freedoms.

Application by the accused B to exclude evidence on the basis that it was obtained as a consequence of an unlawful search and seizure. B was a passenger in a car that came to the attention of the police. The car was pulled over for having stolen plates. The police intended to arrest both occupants of the car for having stolen plates. Prior to any arrest being made, and prior to any notice of right to counsel, the police questioned B. The questioning was not limited to his knowledge of the car's ownership. The questioning resulted in the seizure of a weapon and drugs.

HELD: Application allowed. The evidence was excluded. The police had articulable cause to stop the car. B was detained when the car was directed to pull over. He was entitled to be informed of his right to retain and instruct counsel at that time. The gun and drugs were conscriptive and non-discoverable evidence. In addition to being subject to an unlawful search, B was unlawfully detained and his right to counsel was breached. The admission of the evidence would bring the administration of justice into disrepute.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 8, 9, 10(b), 24(2).

Criminal Code, ss. 4(3), 354(1).

Counsel:

Tamara Brooks, for the Crown.

Richard Neary, for Z B.

RULING ON APPLICATION TO EXCLUDE EVIDENCE UNDER  
SUBSECTION 24(2) OF THE CHARTER

1 GAGE J.:— This is a matter in which the evidence was heard on Friday the 16th of January 2004 and on Monday January 19th, 2004 I delivered oral reasons excluding the challenged evidence while indicating that written reasons would be supplied at a later date. The following are the written reasons.

PART A – INTRODUCTION

2 1. On the 2nd of August 2003 Z B was one of two occupants of a black Acura motor vehicle that at approximately 6 p.m. was traveling west on Evans Avenue in the City of Toronto. The vehicle came to the attention of Constables Caton and Russell of the Metro Toronto Police Service who were likewise westbound on Evans in a marked scout cruiser. The officers conducted a mobile computer search that disclosed that the plates affixed to the vehicle were stolen. The officers activated the cruiser lights and stopped the Acura. B was a front seat passenger in the vehicle. Prior to an arrest Constable Russell questioned B and the questioning resulted in the seizure of a weapon that is described in the information as a starters pistol, and a quantity of crack cocaine.

3 2. Mr. B applies to this Court to exclude the evidence on the basis that it was obtained as a consequence of an unlawful search and seizure contrary to section 8 of the Charter. He says that the evidence obtained is conscriptive evidence, that the breach of the Charter is serious, that the evidence was not necessarily lawfully discoverable, that there was also a breach of the applicant's 10(b) rights under the Charter and that in accord with the principles enunciated by the Supreme Court of Canada in R. v. Stillman the evidence should be excluded.

4 3. The Crown concedes that the evidence was obtained in a manner that contravened the Charter and that the evidence is conscriptive in nature but that the pistol and cocaine are hard or real items of evidence that were bound to be discovered in the course of a lawful search incident to a lawful arrest of B for the offence of possession of property obtained by crime.

PART B – THE FACTS

5 4. The facts germane to this application, as I find them based on the evidence given in the course of the voir dire are as follows:

- a) Constables Caton and Russell were acting in the execution of their ordinary duties on August 2, 2003 when their attention was drawn to an Acura motor vehicle, occupied by two males, by the manner in which the Acura was being driven. At that point in time Caton and Russell had each been with the MTPS for less than a year;
- b) An on board mobile computer search disclosed that the plates affixed to the outside of the Acura had been reported stolen and a radio transmission between the officers and the dispatch office confirmed that information;
- c) No evidence was placed before this court to establish whether the plates had been recently stolen nor was evidence led to indicate that the vehicle was being operated at the time without the consent of the owner;
- d) The roof lights on the cruiser were activated and the driver of the Acura, who was not the accused, obeyed the implicit direction to pull over to the side of Evans Avenue and stop. PC Caton parked the cruiser directly behind the Acura;
- e) The applicant herein, Z B was a front seat passenger in the vehicle. He was in possession of a starters pistol concealed in his jacket pocket and a quantity of crack cocaine concealed in a pants pocket;
- f) Both officers Caton and Russell testified that before they had approached the vehicle for the first time and before they had engaged in any communication with either occupant of the vehicle they had formed the opinion that they were entitled to arrest both occupants of the vehicle, based on the status of the licence plates, for the offence of possession of property obtained by crime;
- g) PC Russell exited his cruiser, approached the passenger side of the Acura and asked B to provide identification as a result of which B responded that he had no ID document but he verbally provided to PC Russell his actual name, address and birth date. PC Russell testified that although he and PC Caton felt that both accused were liable to lawful arrest for possession of stolen property as soon as the officers had confirmation that the plates were stolen, his intention on the first encounter was not to arrest but rather to make sure there was no possible mistake with the CPIC information and to see if there was an innocent explanation. He testified that in his view: "probably the passenger did

not know the plates were stolen". Notwithstanding this PC Russell asked no questions of B concerning the licence plates and made no further inquiries of B at that time. Russell stated that he did not feel that his safety was threatened in any way when he went to the side of the vehicle on this occasion. He did not detect anything in either the appearance and demeanor of B or the appearance of the interior of the vehicle that caused him to be concerned for his or his partners safety;

- h) On the first visit PC Caton questioned the driver. PC Caton testified that one of the purposes of the first visit was to ascertain who was driving the vehicle and secure identification for both occupants. The driver provided a valid operators license but indicated that he could not provide the ownership papers as the vehicle had been borrowed from a friend. Caton may have been provided by the driver with the name of the owner/friend but he did not make a note of it;
- i) Following the first visit the officers returned to their cruiser whereupon Caton advised Russell that the driver had indicated he had no idea that the plates were stolen and that ownership could not be produced because the vehicle had been borrowed from a friend;
- j) The officers conducted a CPIC search under both names and both searches confirmed that a file existed for each of the occupants. At this point the officers called for back up and waited the arrival of back up. It is at this point that PC Russell indicates that he first has a concern for his safety and the safety of his partner;
- k) The back up consisted of Constables Tahiraj and veteran officer Greenwood. They arrived in a squad car that was parked by Greenwood in front of the Acura;
- l) There was a very brief meeting between the four officers at the front of the Caton/Russell cruiser in which Greenwood confirmed with the original officers that they would be arresting both occupants of the vehicle for the offence of possession of property obtained by crime. In response to questions put to him by the Court officer Greenwood testified that in these circumstances it was his view an arrest of any and all occupants of the vehicle for possession of the plates was justified;
- m) PC Caton, backed up by Greenwood, proceeded to the driver's side of the Acura vehicle and arrested the driver;
- n) PC Russell, accompanied or backed up by Tahiraj, attended at the side of the Acura and asked B to exit the vehicle. B complied. At this point Russell had not exerted any form of direct physical control over B and had not placed B under arrest. Russell was at this point facing B at the side of the vehicle. There is no indication that either the starters pistol or the crack cocaine were either visible or that there were any bulges or other indicia of the presence of an object inside B's clothing. Russell asked B if he had anything on him to which B replied that he had a pistol in his jacket pocket. Russell reached into B's pocket and removed the pistol. Russell then asked B if he had anything else to which question B replied that he had some crack cocaine in his pants pocket whereupon Russell reached into B's pants pocket and removed the cocaine. B was cooperative throughout;
- o) After the cocaine was retrieved PC Russell advised B that he was under arrest for possession of property obtained by crime. He handcuffed him, pat searched him and then for the first time read to him his rights to counsel from a memo on the back of his notebook. B confirmed to Russell that he understood his rights. Russell asked B if he wanted to contact a lawyer "now" and B said "yes".
- p) Officers Tahiraj and Greenwood took B to 22 Division. B was advised in the cruiser that he was also under arrest for the firearms and drug charges that are contained in the informations now before this court.

## PART C – THE LAW

6 5. Section 8 of the Charter provides that:

- 8. Everyone has the right to be secure against unreasonable search or seizure.

7 6. Section 354(1) of the Criminal Code provides that everyone commits an offence who has in his possession any property or thing or any proceeds of any property knowing that all or a part of the property was obtained by or derived directly from the commission of an offence punishable by indictment.

8 7. Section 4(3) of the Criminal Code defines possession as (a) personal possession or knowingly having it in the possession or custody of another person or having it in a place for his use or benefit or of another person or (b) in circumstances where two or more have possession with the knowledge and consent of the rest all are deemed to be in possession.

9 8. In order to establish constructive or deemed joint possession under the second branch of the definition there must be evidence of a measure of control on the part of the accused. See: R. v. Terence [1983] 1 S.C.R. 357.

10 9. The mere fact that a person is a passenger in a car that contains stolen property is not sufficient to show that his is in possession of it whatever may be the case as regards the owner and driver of the car. See the very helpful summary of the law found in: R. v. White (1991), 115 A.R. 151

11 10. Where "articulable cause" can be shown a detention for investigatory purposes may be lawful. Per Doherty J. in Simpson:

- "In my opinion, where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some articulable cause' for the detention."

12 11. Articulable cause consists of "a constellation of objectively discernable facts that give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation." The facts must meet an objectively discernable standard. See: R. v. Simpson (1993), 12 O.R. (3d) 182 at 202

13 12. The presence of an articulable cause does not render any detention for investigative purposes a justifiable exercise of common law police powers. Rather it is only the first step. The court must then look to the totality of the circumstances to determine if the detention and the nature and quality of the detention are justified.

14 13. As Doherty J. points out in Simpson:

- "The existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation."

15 14. Section 9 of the Charter provides that everyone has the right not to be arbitrarily detained or imprisoned.

16 15. Detention may arise from either physical restraint, psychological compulsion (where the accused believes that he reasonably has no choice), or a demand or a direction made by the police, where the failure of the accused to comply exposes him to criminal charges. See: R. v. Therens (1985), 18 C.C.C. (3d) 481.

17 16. If the police have the duty to determine whether a person is engaged in a crime or is about to be engaged in crime they should not be obliged to risk bodily harm to do so. The police are entitled, if they are justified in believing that the person stopped is carrying a weapon, to search for weapons as an incident to detention. The question for the court must be whether the search was reasonably related in scope to the circumstances that justified the interference in the first place. See: R. v. Ferris [1998] B.C.J. No. 1415 per Ryan J. at 11

18 17. The question of whether it is reasonably necessary for the officer to search for weapons pursuant to an investigative detention prior to arrest is a question of fact. See: Ferris, op. cit. at 14

19 18. Section 10(b) rights will be engaged upon detention based on articulable cause for investigative purposes and absent exigent circumstances the obligation to inform the detainee of his right to counsel will likewise arise particularly if a search of the detainee's person or property is proposed. See: R. v. Stephen [2003] O.J. No. 634, and R. v. Lewis (1998), 122 C.C.C. (3d) 481 per Doherty J. at para. 28:

- The conclusion that the detention was a lawful exercise of the police investigative power does not absolve the police of their obligation to advise the detainee of his right to counsel. Without deciding whether every investigative detention requires compliance with s. 10(b), I would hold that this investigative detention, which encompassed a search of the respondent's luggage, gave rise to an obligation that the police inform the respondent of his right to counsel: R. v. Debot, [1989] 2 S.C.R. 1140, supra, per Lamer J. at p. 190 (S.C.C.). There was a violation of s. 10(b) of the Charter.

20 19. The constitutional right to privacy requires that unjustified searches by the state be prevented. The court must strike the appropriate balance between the privacy interests of the accused on the one hand and the realities and difficulties of law enforcement on the other hand. See: *R. v. Golden* (2001), 159 C.C.C. (3d) 449

21 20. Warrantless searches are prima facie unreasonable under Section 8 of the Charter. See: *Hunter v. Southam*, [1984] 2 S.C.R. 145

22 21. Evidence obtained as a result of a Charter breach may be characterized as conscriptive or non-conscriptive. See: *R. v. Collins* [1987] 1 S.C.R. 265

23 22. The crucial element that distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterized as "real" or not. Rather it is whether the evidence was secured as a result of the compelled participation or "conscripted" against him. Even though evidence may be "real", in circumstances where it is secured via the compelled participation of the accused it is nevertheless conscriptive. Per Cory J. in *R. v. Stillman* [1997] 1 S.C.R. 607 at para. 76-78.

24 23. The admission of conscriptive evidence that could have been discovered in any event without a breach of the Charter will rarely operate in a manner that affects trial fairness. The same cannot be said for conscriptive evidence that would not have been discovered other than as a result of conduct that offends the Charter. See: *R. v. Burlingham* [1995] 2 S.C.R. 206

25 24. As an incident to a lawful arrest, police officers have a common law power to conduct a reasonable search of the person arrested. The principles applicable to such searches are as follows:

- "As incident to a lawful arrest, a peace officer has the right to search the person arrested and take from his person any property which he reasonably believes is connected with the offence charged, or may be used as evidence against the person arrested, or any weapon or instrument found upon the person arrested, but he need not have reasonable grounds to believe that either such weapons or evidence will be found. It is the fact that the search of the person is made as incident to a lawful arrest which gives the peace officer the authority to search the person arrested."
- See: *R. v. Morrison* (1987), 35 C.C.C. (3d) 437 at 442 per Dubin J.A

26 25. In order to affect a lawful arrest an arresting officer must possess reasonable and probable grounds to believe that the arrestee has committed an offence. The Supreme Court of Canada has defined reasonable and probable grounds in the following manner:

- .... the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.
- The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:
  - The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a prima facie case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.'

- There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.
- See: *R. v. Storrey* [1990] 1 S.C.R. 241

27 26. If the evidence is shown to have been obtained as a result of a breach of the Charter the court must consider whether it should be excluded under section 24(2) of the Charter. In *Collins*, the Court identified three broad categories of factors bearing on a s. 24(2) determination:

- (a) the effect of the admission of the evidence on the fairness of the trial;
- (b) the seriousness of the Charter violation; and
- (c) the effect of exclusion on the repute of the administration of justice.

28 27. It is appropriate to commence the consideration of what evidence should or should not be excluded from the trial process with the evidence obtained most proximate to the Charter breach and then work towards evidence arising more remotely. The rationale is described by Sopinka J. in *Burlingham*:

- The rationale behind the exclusion of evidence lying in close proximity with the Charter breach stems from the fact that, in the case at bar, such evidence, if tendered at trial, detracts from the integrity of the trial and thereby infringes both the fairness principle and reliability principle evoked by *L'Heureux-Dubé J.* in her reasons in the instant appeal. There is an overlap between these two principles in so far as unconstitutionally obtained information may well constitute unreliable evidence, especially when the particular constitutional right that has been breached is the right to counsel. In any event, even if the improperly obtained evidence were reliable, considerations of reliability are no longer determinative given that the Charter has made the rights of the individual and the fairness and integrity of the judicial system paramount: *Hebert*, [1990] 2 S.C.R. 151, *supra*, at p. 178.
- In response, I underscore that we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the Charter. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).

#### PART D – APPLICATION OF THE LAW TO THE FACTS

29 28. I am satisfied that, based on the reduced speed of the vehicle combined with the reluctance of the driver of the Acura to drive beside the police cruiser, Officers Russell and Caton were justified in conducting the plate search of the vehicle and that they had “articulable cause” to stop the vehicle in which B was a passenger for the purpose of investigating the offence of possession of motor vehicle license plates obtained by crime contrary to section 354(1) of the Criminal Code. This satisfies the first portion of the two-part *Simpson/Waterfield* test.

30 29. The issue then becomes of whether or not the subsequent questioning and search of B conducted by Russell was reasonably related in its purpose and scope to the circumstances that justified the stopping of the vehicle in the first place.

31 30. I am satisfied that there was a detention of B when the Acura vehicle in which he was a passenger was directed to pull over. Alternately, the detention of B commenced at the moment that he was directed by Russell to roll down the window and answer questions concerning his identity. The case law suggests that at this point section 10(b) rights are engaged with the consequence that B was entitled to be informed of his right to retain and instruct counsel without delay.

32 31. The court must be careful to adopt a practical approach to both the necessity for and the timeliness of the provision of the 10(b) caution. At the moment that the officers pulled over the vehicle in which B was a passenger they had already reached a conclusion that barring a mistake in the computer information or an innocent explanation all occupants of the vehicle would be arrested for possession of property obtained by crime. Assuming for the moment that a caution at the time of the first visit was premature it is clear that thereafter there was more than adequate time and opportunity to advise B of his Charter rights while the

officers were waiting for the back up cruiser and before questioning of B was commenced. In these circumstances I find that there was a breach of B's section 10(b) right to be advised of his right to retain and instruct counsel. This court cannot speculate on how B might have responded to the questions put to him by PC Russell if he had been properly advised of his section 10(b) rights.

33 32. I am satisfied that in the circumstances that presented themselves in this case an investigation pursuant to articulable cause would justify the stopping of the vehicle and a questioning of B to determine his identity for the purpose of checking whether he was an owner of either the plates or the vehicle, and to determine his knowledge or lack of knowledge concerning the status of the licence plates affixed to the vehicle. Constable Russell would also have been justified under the reasoning and rationale described in the Ferris case, had he been so inclined, in making a visual appraisal of the interior of the vehicle and the appearance of B in order to determine whether there was any basis to be concerned for his or his partners personal safety and if such observations resulted in a reasonably based apprehension of the presence of a weapon, to conduct a search.

34 33. I find that at the point that PC Russell left the side of the Acura after the first visit, having determined B's identity, and having had the opportunity to make a visual inspection of the interior of the vehicle and the appearance and demeanour of B, there was no remaining basis for a further investigative detention of B and no justification for a search ancillary to that detention.

35 34. At that point Russell had no concern for his safety and the accused before the court had been entirely co-operative. After the first visit Russell had received information from his partner that the driver had indicated that the vehicle was borrowed and that he knew nothing about stolen plates. At that point Russell had no basis upon which he could form a belief that the passenger was in any way controlling or directing either the motor vehicle or any of its attachments or contents. The CPIC check did not supply the officers with grounds to arrest or detain for any other reason.

36 35. In these circumstances the Crown quite properly conceded that the subsequent demand that B exit the vehicle and respond to questioning prior to his arrest was unlawful and a breach of B's right under section 8 of the Charter to be secure against unreasonable search or seizure.

37 36. The Crown contends that the evidence ought to be admitted notwithstanding the breach pursuant to the reasoning in Collins primarily on the basis that the evidence was lawfully discoverable. Whether or not the evidence was lawfully discoverable hinges on the question of whether or not B was lawfully arrested for the offence of possession of property obtained by crime. If B was lawfully arrested for the offence of Possession of property obtained by crime then he was properly subject to a lawful search incidental to arrest and the starter gun and drugs would have been discovered. On the other hand if his arrest was not based on reasonable and probable grounds and he was not therefore lawfully arrested he would not be subject to a search incidental to arrest and there is no alternate means through which it is suggested that the items would have been discovered.

38 37. Section 354 of the Code requires not only possession but also knowledge that the property in question was obtained by the commission of crime. There is no evidence that the plates were recently stolen. Leaving aside the question of the elements of possession there are no circumstances present upon which an inference of knowledge could be properly founded.

39 38. The question of possession is the more problematic issue from the Crown's point of view. Mere presence in a motor vehicle that is stolen is not sufficient to establish possession of that motor vehicle unless there is some degree of control being exercised. In this case, it is not the motor vehicle that was stolen but rather the plates that were affixed to the motor vehicle. Licence plates are a generic part of any motor vehicle. There is no indication that there was anything about the manner in which the plates were affixed, nor the appearance of the plates that would give rise to an inference that B knew that the plates were stolen or that he had exercised any control or possession of the plates. It is clear that he was not operating the vehicle to which the plates were affixed and there is no evidence that he was directing or controlling the operation of that vehicle. Constable Russell made no inquiries concerning B's knowledge of the status of the plates. To the contrary, he says that he assumed that probably B would not know that the plates were stolen.

40 39. I accept that PC Russell had an honest subjective belief that he had reasonable and probable grounds to arrest B based on occupancy of a vehicle to which stolen plates were affixed. It is clear however that he lacked the subjective foundation for a reasonable belief that the elements of possession or knowledge of the status of the plates were present and it is equally clear, in my view, that in all the circumstances, objectively discernable reasonable and probable grounds did not exist in relation to B.

41 40. Prior to the commencement of the questioning of B, Constable Russell had no reason to believe that B was in possession of either a weapon or drugs. But for the questioning and absent a search incidental to a lawful arrest, B's possession of the gun and drugs would not have been discovered. I find that the gun and the crack cocaine are both conscriptive and non-discoverable evidence.

42 41. It remains to be determined whether or not the evidence should be excluded pursuant to section 24(2).

43 42. Inasmuch as the impugned evidence is conscriptive and not otherwise lawfully discoverable it will necessarily affect the fairness of the trial. The admission of conscripted non-discoverable evidence runs afoul of the fundamental principle embedded in our criminal law that an accused should not be obliged to incriminate himself and thereby secure his own conviction.

44 43. In this case the evidence was obtained in a fashion closely proximate to the breach of more than one of Mr. B's Charter rights. For the reasons outlined above it is my view that his continued detention after the first visit was not justified and was therefore contrary to section 9 of the Charter. As I have indicated earlier it is also my view that at some time prior to the questioning of B outside the vehicle he was entitled to be informed of his rights to retain and instruct counsel without delay in accord with section 10(b) of the Charter. Finally, PC Russell subjected B to a search of his person at a time when the officer had no lawful justification for doing so.

45 44. I am satisfied that in this case the conduct of Constables Russell and Caton was a result of inexperience and an inadequate understanding of the relevant jurisprudence rather than a deliberate endeavour to circumvent the Charter. Nonetheless if the Court were countenance this conduct it could encourage more experienced and less scrupulous officers to indulge in a warrantless search, without proper foundation for such search, for the ancillary purpose of discovering evidence to buttress grounds for arrest that were otherwise deficient.

46 45. It is equally troublesome that not only Constables Russell and Caton but also senior Officer Greenwood hold the view that any and all occupants of a vehicle to which stolen plates are affixed are properly subject to arrest irrespective of knowledge and/or control. The utility of this strategy to the authorities is readily apparent. Detaining all occupants of the vehicle and placing all of them in jeopardy of criminal prosecution substantially increases the prospect of one of the arrested occupants stepping forward to take responsibility for the stolen goods. The fundamental flaw in the stratagem is that it proceeds from a presumption of guilt and works backward toward innocence. In that way it is antithetical to the presumption of innocence with which every citizen is supposed to be clothed throughout the criminal justice process.

47 46. There can be no doubt that crack cocaine and handguns, be it a starter pistol or not, are seriously dangerous items that are all the more dangerous when combined in the possession of a single individual. Notwithstanding this I find that the evidence must be excluded. I find that the admission of the starter pistol and crack cocaine would bring the administration of justice into disrepute for the following reasons:

- a) The impugned evidence is directly derivative of a police detention and interrogation conducted without lawful justification and in circumstances that contravened Charter rights enumerated under three different sections;
- b) The evidence was conscripted and not otherwise lawfully discoverable;
- c) The production of the gun and the cocaine in response to the unjustified interrogation effectively amounts to a conscripted confession and therefore runs afoul of the fundamental right to remain silent as guaranteed by section 7 of the Charter;
- d) It has long been felt inappropriate that an accused should be required to betray himself. Where virtually the only evidence against him is such a betrayal, the effect is that the accused is required to secure his own conviction. That is contrary to the notions of justice fundamental to our system of law;
- e) While the conduct of the officers was not inspired by bad faith the breach of Mr. B's Charter rights were by no means trivial.