

Sliding Down the Slippery Slope

By Maureen Duffy

Cases Considered:

[R. v. Loewen](#), 2010 ABCA 255

In the area of national security, the years since the attacks of September 11, 2001, have been characterized by an increased dominance of state power in terms of investigation, interrogation, and detention powers, often at the expense of individual liberties. This dominance has become entrenched in some respects in Canada, as well as in a number of other democratic nations, and in many ways has become so familiar that it arguably represents a new normal, rather than an extraordinary situation.

It is my belief that, while this shift has attracted most attention in the national security arena, and is primarily advanced in that arena, the increasing acceptance that individual rights must give way to state security interests sets the stage for the proverbial slippery slope, lending credibility to arguments for the erosions of individual rights in more traditional criminal matters as well. As an example, the increasing tendency of national governments to allow for warrantless searches in cases in which terrorism is alleged may arguably have served as an undercurrent for the recent decision of the Supreme Court of Canada in [R. v. Gomboc](#), 2010 SCC 55 (overturning a ruling by the Alberta Court of Appeal and upholding a warrantless request by Calgary police to an electrical company to install a recording device, designed to measure electrical usage, to determine whether the person under investigation was growing marijuana).

The *Gomboc* decision has made me assess some earlier decisions of the past few months, all originating in Alberta, in which sometimes questionable conduct by the police has been upheld in the face of claimed *Charter* violations, particularly in relation to search and seizure. There was, for instance, the Supreme Court of Canada's ruling in [R. v. Cornell](#), 2010 SCC 31. In *Cornell*, the Court upheld a ruling that a search, conducted pursuant to a warrant, was "reasonable" in spite of the fact that police stormed the house, caused property damage, and entered with weapons drawn and, among other things, forced the defendant's mentally disabled brother, who was not alleged to have been involved in any crime, to the floor at gunpoint to be handcuffed (*Cornell* at para. 10). For a persuasive commentary on the *Cornell* ruling, see Katherine McLellan, [A Look at the Tactics of the Tactical Response Team in R. v. Cornell: They're No Joke](#) (23 Sep. 2010, The Court).

A couple of Alberta Court of Appeal cases in the past few months similarly involved questionable police searches and seizures (See [R. v. Tran](#), 2010 ABCA 211; [R. v. Loewen](#), 2010 ABCA 255). In the *Tran* case, the trial court had excluded evidence based on a search found to violate a number of the defendant's *Charter* rights, thus entering an acquittal. The Court of Appeal reversed that ruling more for technical reasons related to the form of the factual findings

than based on a determination as to the nature of the search itself. The case is still of interest, however, because of questions about the search, and because of its apparent connection to the later *Loewen* case.

To illustrate my point about a strong deference to the state at the expense of *Charter* rights in criminal cases, I want to focus on the *Loewen* case, and in particular on the dissenting opinion of Justice Ronald Berger, which I found highly persuasive. The case, of course, does not contain any theorizing about over-arching erosions of individual liberties, much less anything about the connection between national security erosions and erosions in criminal cases. That is more my own perspective on the issue. Justice Berger's dissent does raise some important questions about state trampling upon individual liberties, which I believe to be part of this larger trend.

R. v. Loewen: The Facts

Sergeant Topham, of the RCMP, stopped Derek Loewen for speeding. As he approached the car, Topham noticed the smell of “freshly burnt marijuana.” Loewen told Topham that his name was “Jeffery John Will,” and he said he did not have a driver's license. Topham then told him to move to the police car so he could check his identity, and he did a pat-down search for “officer safety reasons” first. He found \$5,410 in cash. Loewen then apparently told Topham that his name was “Jim Garry Hulley” (at para. 3).

Topham issued a speeding ticket in this wrong second name and arrested Loewen for possession of a controlled substance. He then told him he was going to search his car, and he did so, discovering 100 grams of what turned out later to be cocaine (at para. 3). At trial, after a *voir dire*, Justice J.M. Ross ruled that Topham had reasonable grounds for both the arrest and the search, both objectively and subjectively, so she found no *Charter* violations, the cocaine was admitted, and Loewen was convicted (at paras. 3-4).

Loewen at the Alberta Court of Appeal

Justice Frans Slatter of the Alberta Court of Appeal agreed with the trial court. These cases are highly fact specific, and many of the relevant facts are discussed in Justice Berger's dissent, which I describe below. Rather than reiterate the facts in discussing Justice Slatter's Memorandum of Judgment, I will instead summarize some aspects that I find troubling and otherwise refer readers to the decision itself for a more complete accounting of the facts. Essentially, Justice Slatter agreed with the trial court that Topham had both an objective and a subjective belief that justified the arrest and subsequent search (at para. 38, ruling explained at paras. 1-38).

The smell of marijuana figured prominently in the trial court's ruling, and Justice Slatter pointed out that this smell could indicate either that all marijuana had been consumed, or that the driver still possessed some (at para. 28). The test, he said, was not whether it was “probable” that Loewen still possessed marijuana, but, rather, whether it was “reasonable” to believe that he did (at para. 28). To assess reasonableness, Justice Slatter pointed to the totality of the circumstances, including the smell of freshly burned marijuana, the large bundle of cash, the fact that Loewen was alone in the car, Loewen's use of a false name, and the location of the stop, halfway between Edmonton and Edson (apparently significant in suggesting that Loewen himself had smoked the marijuana). The fact that Topham acknowledged that each of these facts, in isolation, could have innocent explanations was not deemed significant, as, in the totality of the circumstances, they supported his apparently reasonable belief (at para. 30, citing *R. v. Cornell*).

In supporting the trial court's ruling that Topham had a reasonable objective and subjective belief that Loewen possessed marijuana, Justice Slatter appears to have glossed over Topham's actual testimony that the tone of Loewen's response to his question regarding marijuana led him to believe there was no marijuana, or, as stated at some points, to at least doubt whether there was marijuana, but instead caused him to believe that there were some "other" drugs (at para. 25-26; see also Justice Berger's dissent at paras. 77-78, clarifying Topham's testimony regarding marijuana). Justice Slatter expressed little concern over this discrepancy, suggesting that it was not important whether Topham thought there was marijuana or some other drug, as they are all "controlled substances" (at paras. 25-26). Presumably, a belief must actually exist before one questions its reasonableness, either objectively or subjectively, and the trial court's finding was specifically relating to a belief that Loewen possessed marijuana (at paras. 25-26). Particularly on these facts, that distinction cannot be so easily dismissed (see Justice Berger's dissent at paras. 77-78, addressing this point). If Topham did not believe Loewen had marijuana at all, or at least seriously doubted it, then the reasonableness of a belief that he had marijuana seems moot, and this discrepancy seems significant on these facts (see paras. 21-24).

Justice Constance Hunt agreed with Justice Slatter as to the outcome, but based her agreement on the "objectively reasonable grounds" for Topham's belief (at para. 40). She did not believe the issue of subjective belief was properly raised on appeal, because Loewen had conceded subjective belief in his factum, and because Topham testified several times that he believed he had a basis for the arrest and search (at para. 41; see paras. 39-54 for additional bases for Justice Hunt's opinion).

In his dissent, Justice Berger raised serious concerns with the ruling. He started his explanation of the grounds for his disagreement by writing a scathing critique of Topham's handling of the arrest and search. "The investigating officer, Sergeant Brian Topham," he wrote, "is no stranger to the criminal courts in Alberta" (at para. 58).

Justice Berger then provided lengthy excerpts from the transcripts of Topham's testimony. Topham testified to a long record of catching "travelling criminals" on Highway 16 and the surrounding highways around Edmonton. He testified that, in the past three years, he had undertaken approximately 200 such investigations (at para. 58). Topham testified to being a certified instructor in the "pipeline convoy awareness program." Topham described this as a form of "awareness training," in which candidates are taught indicia that could indicate criminal activity, noting "it might be nothing more than a person, say, with a vehicle with fast-food wrappers in it, which would be one of the indicators" (at para. 58).

Topham explained that he looks for physical indicators of stress, such as sweating or shaking hands, "to see if you have something else to take your investigation beyond the traffic stop" (at para. 58). He clarified that these things are signals as to whether to continue an investigation,

but they also might mean, you know what, he's got a dirty car, and he's nervous with policemen. So you kind of have to sit and analyze it all and decide if that totality of that stop, with everything that you see, means anything. And if it doesn't, you do your ticket or warning and send them on their way. If it does, well then you try to go some place (sic) else with the investigation, either by way of detention or arrest or something like that (at para. 58).

Justice Berger followed this astonishing excerpt with the comment:

Given his experience, one would reasonably expect Sergeant Topham to be both well-versed in and mindful of the *Charter* imperatives governing his investigative actions. He is deemed to know that he has no authority to arrest a citizen on a “hunch” that a crime has been committed (at para. 59).

Justice Berger then reiterated that Topham stopped Loewen for speeding, and that he saw a gym bag on the back seat “and nothing else” (at para. 60). He then explained, at length, his conclusion that Topham’s arrest of Loewen was “arbitrary” (at paras. 63-73). He pointed out, for instance, that Topham had testified that the smell of marijuana lingers, and that all the smell indicated was that marijuana had been smoked in recent hours, not that Loewen currently possessed it (at para. 65). He reiterated Topham’s testimony that he saw no drug paraphernalia in the car (at para. 66).

The trial judge had found that Topham had grounds for arrest based on both the smell of marijuana, and the money that Loewen had, concluding that Loewen was in “current” possession of marijuana (at para. 67). This, Justice Berger pointed out, “flies in the face of the evidence” that Topham knew nothing about where the car had been, or who had been in it, in the hours before the stop (at para. 70). In sum, Justice Berger dismissed the smell of marijuana as a basis for the arrest. Topham had also said he was motivated by the tone of Loewen’s voice when denying that he had marijuana, and Justice Berger found this, as well as the discovery of the money, unpersuasive as well, noting that Topham did not come upon Loewen in the midst of conducting a criminal act, and that he had no reasonable grounds for arresting him. Thus, the arrest was arbitrary and unlawful in his view (at para. 73).

Having found the arrest arbitrary and unlawful, Justice Berger then explained that the search, too, was unlawful. He returned to Topham’s testimony that the tone of Loewen’s voice, when denying that there was marijuana in the car, led him to believe there must be other drugs, aside from marijuana, in the car, and he compared Topham’s asserted bases for the search to those searches found invalid that were based on hunches or on “nervousness of the accused” (at para. 77, citations omitted).

Justice Berger acknowledged that Topham may well have been curious to see what was in the duffle bag on the back seat, but said “[c]uriosity, even when motivated by an intention to expose criminal conduct, must yield to *Charter* imperatives” (at para. 79). Justice Berger distinguished another recent Supreme Court of Canada case, *R. v. Nolet*, 2010 SCC 24 (upholding a warrantless search connected to a roadside stop), as he noted that the search in that case, also of a duffle bag, was a lawful regulatory search and thus not comparable to Topham’s search of Loewen’s car (at para. 80).

Justice Berger cited the Supreme Court of Canada case, *R. v. Grant*, 2009 SCC 32, for the proposition that, under s. 24(2) of the *Charter*, the question arises as to whether a reasonable person, under all the circumstances, “would conclude that the admission of the evidence would bring the administration of justice into disrepute” (at para. 82, quoting *R. v. Grant* at para. 68). After explaining the relevant precedent (at paras. 82-94), Justice Berger wrote:

On the whole of the evidence, I conclude that Sergeant Topham should have known that he had no authority to search the vehicle. Good faith is not made

out. Nor is inadvertence. Extenuating circumstances are absent. The first avenue of inquiry favours exclusion of the evidence (at para. 95).

Justice Berger then noted that the Court must next consider the seriousness of the *Charter* infringement (at para. 96). After explaining the proper standard to apply (at paras. 82-101), Justice Berger concluded “[t]he impact of Sergeant Topham’s deliberate conduct on the Appellant’s liberty and privacy interests was both serious and significant” (at para. 102). Thus, he concluded, the evidence should have been excluded.

After explaining the specific bases for his disagreement with the majority opinion, Justice Berger concluded:

This Court should not condone state deviation from the rule of law. The Court must be mindful of the need to disassociate itself from evidence that is the product of unlawful conduct. The more deliberate the unlawful conduct, the greater need for the Court to disassociate itself from it (at para. 106).

Again, scathingly critiquing Topham, Justice Berger concluded:

In my opinion, the *Charter*-infringing conduct in this case supports the conclusion that Sergeant Topham displayed an unreasonable ignorance and disregard of his *Charter* obligations to the Appellant (at para. 107) ... In my opinion, viewed reasonably and from a long-term perspective, the admission of the evidence would have a serious negative effect on the repute of the administration of justice and as such I conclude that the evidence seized from the motor vehicle must be excluded (at para. 110).

Thus, Justice Berger concluded that he would have quashed the conviction and substituted an acquittal (at para. 111).

Conclusions

I chose Justice Berger’s dissent to illustrate my larger point, because it is well reasoned, and it is difficult to quarrel with his analysis. And yet, this was an analysis in a dissenting opinion.

The evidence that Topham infringed on Loewen’s *Charter* rights appears overwhelming. Topham’s own testimony appears to support the idea that he had nothing more than a “hunch,” to quote Justice Berger’s characterization of his testimony, on which to base his arrest and search.

One thing that struck me as interesting was Justice Berger’s detailed description of Topham’s conduct. The *R. v. Tran* case, referenced above, also involved a Sergeant Topham as the arresting officer, and also involved a highly questionable search of a car after a traffic stop, the assertion that a search and arrest were undertaken based on Topham’s “hunch” that the defendant had drugs, and an expressed concern, at least by the trial judge, that Topham’s conduct meant that admitting the evidence would bring the administration of justice into disrepute (*Tran* at paras. 3, 21). In *Tran*, the trial judge, Justice Keith Yamauchi, had excluded the evidence, but the decision was overturned on appeal on a number of bases (See generally *R. v. Tran*, 2010 ABCA 211).

In *Loewen*, Topham testified to undertaking 200 of these investigations in a three-year period, so the question arises as to whether the Topham in that case was the same Topham who followed his “hunch” to the questionable arrest and search in Tran (see [R. v. Tran](#), 2008 ABQB 287, at para. 3, describing that the arrest in that case also occurred on Highway 16 and discussing the fact that Sergeant Topham was an instructor for Operation Pipeline, as was the Sergeant Topham in *Loewen* (at para. 58)). One would hope that an arresting officer’s “hunch” is not now the standard for reasonableness of arrests or searches and seizures.

Obviously, this trend goes beyond one arresting officer, as other recent rulings demonstrate. It appears that an asserted need to advance investigation is increasingly trumping individual rights and that searches, arrests, and seizures are likely to be upheld, even in the face of seemingly egregious *Charter* violations. That is discouraging to say the least.