

RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE IN TAX CASES: CANADIAN AND NEW ZEALAND APPROACHES COMPARED

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Abstract

This article investigates the role that the New Zealand Bill of Rights Act 1990 has played in New Zealand taxation case law and provides a comparison with the role played by the Canadian Charter of Rights and Freedoms 1982 in Canadian taxation cases. To determine this, the article analyses the interaction of the New Zealand Commissioner of Inland Revenue's powers of search and seizure under ss 16 and 17 of the Tax Administration Act 1994 and s 21 of the Bill of Rights Act 1990 and compares it to the interrelation of the Canadian Minister of National Revenue Agency's powers of search and seizure under s 231 of the Income Tax Act 1985 (Canada) and the Charter of Rights and Freedoms 1982. The article demonstrates that, notwithstanding some differences in the prescribed search and seizure measures in the respective jurisdictions, real difference between two countries is the assessment of what counts as reasonable and unreasonable search and seizure.

1.0 INTRODUCTION

The aim of this paper is to examine and contrast the treatment by the courts in New Zealand and Canada of the revenue's¹ powers of search and seizure² for documents and the requirement for taxpayers' to furnish information on the Commissioner's request in light of the respective jurisdictions' and the wording of the relevant enactments. Subsequently, it considers whether some amendments analogous to Canada's constitutionalised protections for taxpayers should be adopted in New Zealand.

The documents at the heart of the constitutional regimes of these two countries is the Charter of Rights and Freedoms 1982 (the Charter) in Canada and the Bill of Rights Act 1990 ("BORA") in New Zealand. In Canada, the Charter, implemented by a superior law, is constitutionalised³ and empowers the judiciary to invalidate legislation that is inconsistent with its provisions. In contrast, New Zealand's BORA is not constitutionalised.

New Zealand does not have a single written constitution and it is one of only three countries in the world without a full and entrenched written constitution. New Zealand's constitution, which is the foundation of their legal system, is drawn from a number of important statutes, judicial decisions, and customary rules known as constitutional conventions. New Zealand's BORA, is predicated on statutory construction as a means of protecting underlying rights and ensuring legislative consistency with human rights norms. However, the BORA is neither entrenched nor supreme law and can be repealed by a simple majority of Parliament. Because it is not supreme law, the constitution is in theory comparatively easy to reform, requiring only a majority of Members of Parliament to amend it. Although courts in New Zealand are denied the power to strike down any

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¹ Commissioner of Inland Revenue (New Zealand) and Minister of National Revenue Agency (Canada).

² *R v Jefferies* [1994] 1 NZLR 290 (CA) at 300, where Richardson J said: "A search is an examination of a person or property and a seizure is taking of what is discovered."

³ The Charter of Rights and Freedoms (1982) (the Charter) was enacted by the Constitution Act 1982.

legislation, s 6 of the BORA is a directive to the judiciary to, whenever possible, interpret a provision in a manner consistent with the rights and freedoms contained in this Bill of Rights.⁴

The Commissioner of New Zealand Inland Revenue (“Commissioner”) is charged, pursuant to s 6A(3) of the Tax Administration Act 1994 (“TAA”), with the statutory duty to assess and collect the highest amount of revenue from taxpayers that is practicable over a period of time. This is a substantial and complex statutory task. The Commissioner’s powers of search and seizure of evidence, found in ss 16 and 17 of the TAA, are intended to assist him/her in this task. The Canada Revenue Agency’s (CRA) powers of search and seizure of evidence can be found in ss 231 and 232 of the Income Tax Act 1985 (Canada)(“ITA”).

The table below shows dramatic increase in the use of Inland Revenue’s search power in the last five years.⁵

Year	General s 16 access	Warrant for access to private dwelling: s 16(4)	Section 16C removal warrant
2007	7	5	
2008	11	13	
2009	8	8	
2010	14	13	12
2011	41	16	8

During the 2012 year, Inland Revenue conducted 40 searches under s 16.⁶ The author believes the key reason which has resulted in this increase in the Commissioner’s use of s 16 accesses is to address non-compliance stemming from Inland Revenue’s 2009 compliance program⁷ to focus on the hidden economy, tax evasion and fraud investigations. Another reason for increased use of s 16 access seems to be Inland Revenue’s role to generate sufficient revenue to fund government programs. However, from 2008 due to economic downturn impacts, some taxpayers were non compliant.

While it is generally agreed that the differences in the two tax regimes are not technical, the tax search and seizure cases that are examined in this paper highlight that the outcomes in the courts of the two countries are different. The tax authorities in New Zealand have been able to conduct searches that would be considered “unreasonable” in Canada and prohibited in that country by the Charter.

The present paper considers the following factors that might contribute to the different search and seizure regimes in the two countries:

⁴ Bill of Rights Act 1990, s 6 provides:

“6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

⁵ Graham Tubb, “Commissioner of Inland Revenue’s power of Search and Seizure: sections 16, 16B and 16C Tax Administration Act”, (Paper presented at the New Zealand Law Society, Taxation Conference, Auckland, 1 September 2011).

⁶ Radio New Zealand, 6 January 2013. <http://www.radionz.co.nz/news/business/125026/ird-to-explain-to-public-its-search-powers>

⁷ <http://www.ird.govt.nz/compliance>.

- (a) the wording of the relevant enactments and hence the degree of legislated protection for tax payers against search and seizure;
- (b) the interpretation of statutory words in light of rights against search and seizure, and different conceptions of what those rights mean in the two countries;
- (c) taxpayer’s claims to privacy based on the higher law constitution in Canada as opposed to the statutory Bill of Rights in New Zealand; and
- (d) different approaches to exclusion of evidence for breach of rights.

Part two of the paper sets out a brief review of the New Zealand and the Canadian constitutional and legislative provisions. Part three of this paper discusses the relevant cases from each jurisdiction and expands on the interaction of the Commissioner’s powers of search and seizure under the TAA with the BORA. That interaction is contrasted with the interaction of the Canada Revenue Agency’s powers pursuant to the ITA with the Charter. Part four analyses public law remedies that may be available to taxpayers via the BORA and the Charter. Finally, part five concludes the salient outcomes of the research.

2.0 THE LEGISLATIVE AND CONSTITUTIONAL PROVISIONS

2.1 *The New Zealand Framework*

The Bill of Rights Act is an ordinary statute (not supreme law). While it contains the same rights as might be expected in a constitutionalised Bill of Rights, s 4, prohibits a court from invalidating a statutory provision because it is inconsistent with any of those rights.⁸ Rather s 6 of the Act directs a court to find a consistent interpretation where that “can” be done.

The Courts in New Zealand have generally given the BORA a purposive construction, one that gives due attention to the nature, or underlying values, of the right that is engaged.⁹

Section 21 of the BORA, the section most germane to this paper, provides:

“21 Unreasonable search and seizure
Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.”

For its part, the TAA sets out the Commissioner’s powers of search and seizure. First, however, s 6 A (2) sets out a general duty of the Commissioner.

Section 6A(2), The Tax Administration Act 1994 (TAA) provides:

“**[Care and management of taxes]** The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.”

⁸ Bill of Rights Act 1990, s 4 provides:

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) decline to apply any provision of the enactment—
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

⁹ *R v Jefferies* [1994] 1 NZLR 290 at 302-303. Richardson J at the Court of Appeal noted:

But rights are never absolute. Individual freedoms are necessarily limited by membership of society. Individuals are not isolates. They flourish in their relationships with each other. All rights are constrained by duties to other individuals and to the community. Individual freedom and community responsibility are opposite sides of the same coin, not the antithesis of each other.

Section 16, TAA provides for warrantless searches. Section 16(1) and 16(2) provides:

- “16 Commissioner may access premises to obtain information
- (1) Notwithstanding anything in any other Act, the Commissioner or any officer of the Department authorised by the Commissioner in that behalf shall at all times have full and free access to all lands, buildings, and places, and to all books and documents, whether in the custody or under the control of a public officer or a body corporate or any other person whatever, for the purpose of inspecting any documents and any property, process, or matter which the Commissioner or officer considers necessary or relevant for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, or considers likely to provide any information otherwise required for the purposes of any of those Acts or any of those functions, and may, without fee or reward, make extracts from or copies of any such documents.”
 - (2) Despite s 103(3)(b)(ii) of the Search and Surveillance Act 2012¹⁰, the occupier of land, or a building or place, that is entered or proposed to be entered by the Commissioner, or by an authorised officer, must—
 - (a) Provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section; and
 - (b) Answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the Commissioner or the officer, in writing, or by statutory declaration.”

There are exceptions to warrantless searches. Under s 16(4) for a search of a dwelling house a warrant is required to permit access¹¹ and under s 16C(2) a warrant is required for removal and retention of documents.

Section 17 follows, requiring that any person to furnish information or produce books or documents on request of the Commissioner. Section 17(1) of the TAA provides:

- “17 Information to be furnished on request of Commissioner
- (1) Every person (including any officer employed in or in connection with any Department of the Government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish in writing any information and produce for inspection any documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.”

The operational scope of ss 16 and 17 under the TAA, with respect to width of the Commissioner’s power to request information and documents, is subject to potential impact of the BORA and the relevant revenue Acts.

2.2 The Canadian Framework

¹⁰ Section 103 of the Search and Surveillance Act (SSIA) 2012 provides form and content of search warrant. Section 103(3)(b)(ii) of the S SIA 2012 provides that a search warrant may be—
(b) Subject to any conditions specified in the warrant that the issuing officer considers reasonable, including (without limitation)—

(ii) a condition that the occupier or person in charge of a place must provide reasonable assistance to a person executing the warrant if, in the absence of such assistance, it would not be practical to execute the warrant without undue delay.

The amendment to s 16(2) of the TAA was made under the Search and Surveillance Act 2012 section 302(3), by replacing “The occupier of land” with “Despite s 103(3)(b)(ii) of the Search and Surveillance Act 2012, the occupier of land”; effective on a date to be appointed by the Governor-General by Order in Council, or 1 April 2014.

¹¹ The search of residential dwellings must be exercised within a context of individual rights set out in the New Zealand Bill of Rights Act 1990, the Privacy Act 1993 and the Evidence Act 2006.

Sections 7 to 14 of the Charter set out the legal rights and s 15 deals with equality rights available to a person in Canada. Canada's analogue to New Zealand's BORA s 21, is s 8 of the Charter. Section 8 of the Charter provides:

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

Section 231.1, Income Tax Act 1985 (ITA) provides:

- (1) An authorized person may, at all *reasonable* times, for any purpose related to the administration or enforcement of this Act,
 - (a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and
 - (b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person... .
 - (c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and
 - (d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all *reasonable* assistance and to answer all *proper* questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

Section 231.1(2), ITA 1985 provides:

"Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3)."

Section 231.3(1), ITA 1985 provides:

- (1) A judge may, on *ex parte* application by the Minister, issue a warrant in writing authorizing any person named therein to enter and search any building, receptacle or place for any document or thing that may afford evidence as to the commission of an offence under this Act and to seize the document or thing and, as soon as practicable, bring it before, or make a report in respect of it to, the judge or, where the judge is unable to act, another judge of the same court to be dealt with by the judge in accordance with this section.

Section 231.3 (5), ITA 1985 provides:

- (5) Any person who executes a warrant under subsection 231.3(1) may seize, in addition to the document or thing referred to in that subsection, any other document or thing that the person believes on reasonable grounds affords evidence of the commission of an offence under this Act and shall ... section.

The operational scope of the CRA's¹² powers of search and seizure under section 231 of the ITA is subject to the Act's interaction with the Charter.

3.0 REVENUE'S POWERS OF SEARCH AND SEIZURE OF EVIDENCE

In broad terms, a search is an examination of a person or property and can embrace a request for information. In *R v Jefferies* search was defined as: "A search is an examination of a person or property and a seizure is taking of what is discovered."¹³

3.1. Search – The New Zealand Approach

¹² Canada Revenue Agency (CRA) was known as Canada Customs and Revenue Agency (CCRA) from November 1999 to December 2003 and Revenue Canada (RC) before November 1999. This paper uses CRA for consistency.

¹³ *R v Jefferies* [1994] 1 NZLR 290 (CA) per Richardson J at p 300.

Protection against unreasonable search and seizure is one of the rights protected by s 21 of the BORA.¹⁴

Section 16 of the TAA provides a right of access to the Commissioner and “any officer of the Department authorised by the Commissioner in that behalf”. Such access constitutes a “search” and the Commissioner carries out these “searches” to secure the record for evidential purposes.

Section 16 of the TAA does not require an officer to provide written proof of the Commissioner’s powers; there is an assumption that a person representing the Inland Revenue and asking for full and free access has the authority to do so.

The Commissioner’s right to “full and free access” under s 16 of the TAA seems to be the antithesis of the taxpayer’s reasonable expectation of privacy. With respect to the equivalent Australian provision in s 264 of the Income Tax Assessment Act 1936 (Cth), the High Court of Australia has interpreted the phrase to grant the Commissioner of Taxation access to all parts of the relevant place or building and to the entirety of the taxpayer’s books and documents.¹⁵ Notably, the words “full and free access”¹⁶ to, inter alia, “books and documents” that the Australian Tax Commissioner considers “necessary or relevant” for collecting tax are preceded by the words “shall at all times”.¹⁷ These words indicate the potential for an unconstrained search (so long as the search is being conducted in good faith for the purposes of meeting the Australian Tax Commissioner’s duties). It would appear that the New Zealand wording would be to the same effect as the Australian wording.¹⁸

When the search power under section 16 is being exercised Inland Revenue staff are statutorily empowered under section 16(2)(b) to ask proper questions that are relevant to the inspection of documents, property, processes or matters which occupiers must answer. A refusal to answer a proper question, or leaving without answering it, could result in a prosecution for obstruction.

Accordingly, it seems congruent to consider the judicial interpretation and application of s 16 of the TAA in light of taxpayers' claims to privacy under s 21 of the BORA.

In *Jefferies*,¹⁹ Richardson J explained that the test as to whether a breach of s 21 of the BORA has occurred is twofold. First, and it is established that, a search must be reasonable at inception. Secondly, a search and seizure must be reasonable in execution. In considering when a search would be unreasonable under section 21 of the BORA, Richardson J found:

“A search will be unreasonable if the circumstances giving rise to the search make the search itself unreasonable or if an otherwise initially reasonable search is carried out in an unreasonable manner. Section 21 is a negative provision in that it is a restraint on governmental action and confers no powers on the government. In particular it does not empower a reasonable search.”²⁰

¹⁴ Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis, 2005) chapter 18. The authors’ suggest that the Court of Appeal’s approach to reasonableness has been “as stable as quicksand”, at 553 and note that in the non-criminal area there has been a surprising lack of litigation.

¹⁵ *O’Reilly v Commissioner of the State Bank of Victoria* (1983) 14 ATR 64, (1983) 153 CLR 1 (HCA).

¹⁶ The Income Tax Assessment Act 1936 (Cth) s 264.

¹⁷ See TAA s 16(1).

¹⁸ TAA 1994, s 16B was enacted in 2003 and conferred power to remove books or documents accessed under s 16, to make copies. TAA 1994, s 16C was enacted in 2006 and conferred power to remove books or documents from a place accessed under s 16 for a full and complete inspection.

¹⁹ *R v Jefferies* [1994] 1 NZLR 290 at 304-305.

²⁰ *Ibid*, 301. Also refer to *R v Pratt* [1994] 3 NZLR 21 (CA) per Richardson J. In *Jefferies* the police constable stopped the car containing accused (Jefferies and other three) on the suspicion that the vehicle had been used in the armed robbery. The constable searched the boot of the car, without consent of the accused, and found cannabis with a street value of \$30,000. Subsequently it was found that the accused

In *Hamed v R*, Elias CJ noted that s 21 “protects ‘people, not places’”.²¹ The approach of the Court of Appeal²² in defining the terms “search” and “seizure” for purposes of s 21 of the BORA purposes does not offer much assistance to taxpayers’.

In *Avowal*,²³ searches of taxpayers’ private and commercial premises were undertaken by the officers of the Inland Revenue.²⁴ However, when the search began, Avowal’s employee claimed, after discussion with the company’s lawyer, privilege over all material on the computer hard drives. In the event, the Inland Revenue officers proceeded to have the hard drives cloned and sealed for the court to determine privilege issues. The Inland Revenue officers had also intended to conduct preliminary screening using key word searches on digitally stored data at the residential premises. At that point, the Inland Revenue officers discovered that some of the hard drives they tried to access were encrypted. This rendered a key word search impossible. The officers decided that it would be appropriate to copy the whole hard drive with a view to later using decryption software. Avowal and others²⁵ challenged the legality of the search and copying on several grounds.

Justice Venning²⁶ determined that computer hard drives did fit the extended definition of “book or document” within s 3 of the TAA.²⁷ He held that cloning the hard drive was acceptable without a preliminary screening search to determine whether the information on the hard drive was “necessary” or “relevant” under s 16 of the TAA, reinforcing that there is nothing such as reasonable cause required as a pre-requisite for use of s 16. In respect of the encrypted hard drives, it was held that cloning the hard drives prior to a relevance search being conducted did not render the access unlawful and such a process was reasonable.²⁸ It was also held that the use of the Commissioner’s search and detention powers is constrained by the BORA that prohibits

were not connected with the armed robbery but were charged with possession of cannabis for sale. The Court of Appeal held that the search of the car boot was not illegal and was not an unreasonable search in terms of s 21 of the New Zealand BORA.

²¹ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [17]. As per Blanchard J at [172] in deciding whether a search was unreasonable, three criteria must be applied: the nature of the place of the search; the degree of the intrusion; and the purpose of the search

²² *R v Jefferies* [1994] 1 NZLR 290 at 301; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

²³ *Avowal Administrative Attorneys Limited v District Court at North Shore* (2010) 24 NZTC 24,252 per Venning J. In *Avowal* the Australian Tax Office and the New Zealand Commissioner believed that Petroulias, Ms Denise Clark and others, including Avowal Administrative Attorneys Limited (“Avowal”), were “involved in promoting tax schemes which affected the tax bases of both Australia and New Zealand”.

²⁴ Access to the business premises was pursuant to section 16(1) of TAA and access to residential premises was pursuant to s 16(4) of TAA.

²⁵ There were 8 applicants in the case including Avowal and Mr Petroulias.

²⁶ *Avowal Administrative Attorneys Limited v District Court at North Shore* (2007) 23 NZTC 21,616 (HC) (Baragwanath J, the preliminary decision). The second judgment of Baragwanath J was an interim judgment (*Avowal Administrative Attorneys Ltd v District Court at North Shore* HC Auckland CIV-2006-404-7264, 26 February 2009). Baragwanath J was promoted to the Court of Appeal, and the file was transferred to Venning J to complete the unresolved issues from the interim judgment. Venning J’s judgment is reported at *Avowal Administrative Attorneys Limited v District Court at North Shore* (2009) 24 NZTC 23,252 (HC) at [52]. TAA, s 20(5): In any instance where privilege is claimed, the determination of the existence of such privilege is left to the Court.

²⁷ The Taxation (Tax Administration and Remedial Matters) Act 2011 repealed the definition of “book and document” from s 3(1) of TAA. A definition for “document” had been inserted with effect from 29 August 2011.

²⁸ *Avowal Administrative Attorneys v District Court at North Shore* (2009) 24 NZTC 23,252 (HC) at [136].

“unreasonable searches”.²⁹ It is possible to imagine situations in which the Commissioner’s use of the more intrusive power to search premises would be unreasonable having regard to the information the Commissioner is seeking and available alternative means of accessing that information. The circumstances in *R v Laugalis*³⁰ are such and are an example of when a warrantless search of premises was found to be unreasonable and in breach of s 21 of the BORA.

The Court of Appeal³¹ upheld the High Court judgment and went further, holding that when the Inland Revenue officers had evidence that computer data would be relevant or necessary, use of key word searches of hard drives as a preliminary screening tool was not required. The application by the taxpayers in *Avowal* for leave to appeal to the Supreme Court had been dismissed on the basis that the legal propositions raised did not have sufficient factual basis and there was an insufficient prospect of success.³²

A recent case, *Tauber v CIR*,³³ challenged the lawfulness of search operation under s 16 of TAA by way of judicial review proceedings. In *Tauber*, the homes of Webb and Tauber and the home of their third party accountant were raided by the Inland Revenue officers, as part of an investigation into the pair’s tax affairs. The taxpayer argued that he was arbitrarily detained in the course of lengthy searches (this being because the taxpayer’s vehicle was blocked in by an Inland Revenue vehicle parking behind it), that there was damage caused to personal items, that officers remained on the property during lunch hours, that Inland Revenue vehicles were parked on private property, and that there was an excessive number of persons involved in the search. Venning J held that the arguments about whether a search has been reasonable in terms of s 21 of the BORA will be limited by the Court to the way the search has been conducted rather than the fact that the Commissioner has decided to undertake the search in the first place. The Court in *Tauber* held that the searches by the Commissioner were not excessive and taxpayers’ had not been arbitrarily detained.³⁴

It appears that the reasonableness of a search will very rarely be subject to judicial review.³⁵ In *Tauber*, the High Court noted that the reasonableness of searching the personal/private space of the occupiers, such as bedrooms, could not be resolved in judicial review proceedings as such allegations were fact intensive. The taxpayer had to wait until an assessment was raised by the Inland Revenue and then challenge the admissibility of evidence obtained under the warrant as one

²⁹ *Avowal Administrative Attorneys v District Court at North Shore* [2010] 2 NZLR 794 (“interim judgment”) at [74], [82] and [84].

³⁰ *R v Laugalis* [1993] 10 CRNZ 350 (CA). In *Laugalis*, the day after the arrest of Mr and Mrs Laugalis, a police officer conducted a further warrantless search of their vehicle which was in police custody. The Court held that the search without a warrant in circumstances where there was no reason not to obtain a warrant was unnecessary and unreasonable and in breach of s 21 of the BORA.

³¹ *Avowal Administrative Attorneys Limited v District Court at North Shore* (2010) 24 NZTC 24,252, [2010] NZCA 183 per O’ Regan J.

³² *Avowal Administrative Attorneys Limited v District Court of t North Shore* [2010] NZSC 104 at [2]

³³ *Tauber v CIR* HC Auckland CIV-2011-404-2036, 31 October 2011. The taxpayer was under Inland Revenue investigation for income suppression, claiming deductions unlawfully, and facilitation of and involvement in tax avoidance arrangements and/or evasion involving associated entities.

³⁴ *Ibid.* The High Court judgment in *Tauber* confirms that the tax Commissioner’s search and seizure powers are likely to be broader than any other branch of the Crown. In a tax case the rule regarding what the warrant must look like is a lot looser than what would be required under a criminal case. The Inland Revenue can bring along anyone they deem appropriate when searching a property, including police, dog control officers and locksmiths.

³⁵ *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433 (CA) at 442, [25]-[26]. In *Gill* the Court of Appeal concluded that the reasonableness of the way in which a search was carried out should be challenged under civil law remedies and/or challenge the admissibility of any evidence obtained in breach of the NZ BORA 1990.

of the arguments in the subsequent proceedings. The Court of Appeal in *Tauber*³⁶ held that s 16(4) of the TAA was to be read subject to overall test of reasonableness and could not be said to be inconsistent with s 21 of the BORA, right to be secure against unreasonable search and seizure. The Court in *Tauber* confirmed that the search of a residential dwelling must be reasonably required, and the “reasonable grounds” requirement in the form prescribed for s 16(4) warrants provided confidence that such an interpretation was aligned with Parliament's intentions in creating this legislation.³⁷

Does s 21 of the BORA constrain the concept of “shall at all times” and “full and free access” and, if so, to what extent? Having considered the judicial interpretation and application of s 16 of the TAA in light of taxpayers' claims to privacy protected by s 21 of the BORA it is arguable that based on s 21 of the BORA, the words “shall at all times” and “full and free” would only be read down³⁸ in the most extreme circumstances or cases. In the author's view, most Inland Revenue investigations that utilise the powers in s 16 of the TAA do not involve forcible entry or unreasonable timing and the access to premises can be justified under s 5 of the BORA as being a reasonable limit to be placed on taxpayers' rights to be free from unreasonable search. A taxpayer is generally supported in demanding that access takes place at a reasonable time but reasonableness of exercise of search power will very rarely be subject to judicial review and may be argued in enforcement actions.³⁹

Further, while the Commissioner must be mindful that in performing a search, s 6A(2) of the TAA requires him/her to exercise care, a failure to do so will not of itself render the search unreasonable. However, exercise of care will not necessarily encompass reasonableness under the BORA. The circumstances surrounding a search and the subject matter of it will be determinative. The law confers on the Commissioner the right to access premises and to remove documents, he/she is not required to exhaust other avenues of inquiry before access and removal will be considered reasonable.

The Search and Surveillance Act 2012 (SSIA) provides a set of safeguards against unjustified intrusions on “reasonable expectation of privacy” and the relevant sections are applicable to Inland Revenue from 1 October 2013 to the exercise of the Commissioner's powers under ss 16(4) and 16C(2) of the TAA.⁴⁰ Section 110 of the SSIA makes it clear that under s 16(1) of the TAA forcible entry is permitted.⁴¹ The author supports Mike Lennard's⁴² view that to a very large extent the Search and Surveillance Act 2012 codifies existing practice and law and makes very few substantive changes. A recently issued operational statement also includes that Inland

³⁶ The taxpayers appealed against the decision to decline judicial review. *Tauber v CIR* (2012) NZCA 411, [2012] 3 NZLR 549, (2012) 25 NZTC 20-143. The Court of Appeal supported Venning J in *Avowal Administrative Attorneys Limited v District Court at North Shore* (2010) 2 NZLR 794 at [29]. The Court of Appeal judgment in *Tauber* gives useful guidance on the standards to be applied in determining whether a warrant should issue, and the circumstances which are likely to be relevant in assessing whether that standard is met.

³⁷ *Avowal Administrative Attorneys Ltd v District Court at North Shore* [2010] 2 NZLR 794 (HC) at [95] and [96], [2010] NZCA 183, [2010] 3 NZLR 661 at [23] cited.

³⁸ New Zealand Courts are directed by the BORA s 6 to give meaning to legislation that as far as is possible is consistent with the rights and freedoms in the BORA.

³⁹ *Tauber v CIR* HC Auckland CIV-2011-404-2036, 31 October 2011.

⁴⁰ The SSIA will be generally relevant and will be particularly relevant when searching the cloud (electronic information held in internet data storage facilities).

⁴¹ SSIA ss 110(c), 113(2)(b) and 131(3).

⁴² Mike Lennard, “Search and Surveillance in the Context of Tax Administration”, (2013) 19:1 *New Zealand Journal of Taxation Law and Policy* 11, 25.

Revenue officers can use reasonable force, including the services of a locksmith, where necessary to open property, such as locked doors and Cabinets.⁴³

3.2 Search – The Canadian Approach

Section 231.1(1) of the ITA empowers the Minister of Revenue as well as any person authorised by the Minister to inspect books and records, examine property and enter business premises for any purpose related to the administration or enforcement of the Act.⁴⁴ By limiting powers in terms of reasonable times, the Canadian legislature has given more recognition to the taxpayer's expectation of privacy⁴⁵, as well as acknowledging the courts' role in assessing when those powers are exercised reasonably having regard to s 8 of the Charter. An assessment of the manner in which the search was carried out must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure.

Taking in to account the relevant Canadian provisions, the paper will now consider the judicial interpretation and application of these provisions in light of taxpayers' claims to privacy.

The Supreme Court of Canada's decision in *R v Dymnt*⁴⁶ has enunciated in greater detail the Charter's role, stating "It is a purposive document and must be so construed".⁴⁷ La Forest JJ further stated:⁴⁸

[A] major, though not necessarily the only purpose of the Constitutional protection against unreasonable search and seizure under section 8 is the protection of the privacy of the individual. And the right, like other Charter rights, must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. Its spirit must not be constrained by narrow legalistic classifications based on notions of property and the like which serve to protect this fundamental human value in earlier times.

In *R v Jarvis*⁴⁹, a decision of the Supreme Court of Canada, Iacobucci and Major JJ stated that taxpayers have a low expectation of privacy where a tax return, a document produced for state purposes, is concerned. When Canada Revenue Agency's (CRA) officials are investigating ITA offences, constitutional protections against self-incrimination prohibit CRA officials from using the powers of ss 231.1(1) and 231.2(1) to compel oral statements or written production of documents and statements for the purpose of determining penal liability. In *Minister of National*

⁴³ Inland Revenue *Operational Statement OS13/01* on "The Commissioner of Inland Revenues's search powers" issued on 26 July 2013, p 2-3. The Operational Statement is applicable from 1 September 2013. The statement outlines how the Commissioner's powers under sections 16, 16B and 16C of the Tax Administration Act will be exercised along with the powers in the Search and Surveillance Act, preserving legal privilege and non-disclosure rights.

⁴⁴ Section 231.1(1) of the ITA refers to the assessment process.

⁴⁵ *R v Cole* 2011 ONCA 218, (2011) 269 CCC (3d) 402 illustrates Canadian approach to reasonable expectations of privacy, without reliance on property rights. In *Cole* the Ontario Court of Appeal held that where a school permitted teachers to store personal information on a work computer, the school could not search that material other than for remote maintenance.

⁴⁶ *R v Dymnt* (1988) 45 CCC (3rd) 244 (SCC). In *Dymnt* the doctor treating Mr Dymnt in a hospital after a traffic accident collected a vial of free-flowing blood for medical purposes without Dymnt's knowledge or consent. Shortly after, appellant explained that he had consumed a beer and medication. The doctor handed the sample to the police officer. The sample was analysed and Dymnt was subsequently charged and convicted of impaired driving. The Supreme Court held that the taking of possession of the blood sample by the police officer amounted to a seizure as contemplated by s 8 of the Charter.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 253.

⁴⁹ *R v Jarvis* (2002) SCC 73, (2002) 219 DLR (4th) 233. In *Jarvis* the Canada Customs and Revenue Agency conducted an administrative audit and criminal investigation simultaneously.

Revenue v Kruger Inc, Pratte JA observed⁵⁰ that s 8 does not merely prohibit unreasonable searches and seizures but goes further and guarantees the right to be secure against unreasonable search and seizure. The right of the authorised person to demand assistance under s 231.1(1)(d) and to ask questions is subject to limitation. It is suggested it may not be reasonable for the authorised person to require assistance from a person if the cost of that assistance significantly outweighs the significance of the matter under investigation.

3.3 Search - The New Zealand Approach Compared with the Canadian Approach

As we have considered the judicial interpretation and application of search provisions in light of taxpayers' claims to privacy in two countries, the paper will now outline the similarities and differences in the enactments, and in their interpretation and application in each country.

Privacy is a core value being protected by s 21 of the BORA and s 8 of the Charter. Privacy underpins the test of unreasonableness contained within the s 21 (BORA) and s 8 (Charter). Both New Zealand and Canadian courts are mindful of every persons' privacy, but at the same time they also consider public interest. In the judgment of the Supreme Court of Canada in *Hunter v Southam*,⁵¹ Dickson J opined:⁵²

The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by section 8, whether it is expressed negatively as a freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by the government must give way to the government's interest in intruding on the individuals privacy in order to advance its goals, notably law enforcement.

However, New Zealand courts have provided too much solicitousness for public interest as opposed to taxpayers' interests. While considering the Bill of Rights, in *New Zealand Stock Exchange*⁵³ Lord Templeman noted the statutory duty on the Commissioner to assess income and to see that the wider interests of the community are protected.

Both the New Zealand and Canadian Income tax legislation distinguish between private and non-private (commercial) premises and the associated expectations of privacy. In New Zealand, an Inland Revenue officer may not enter a private dwelling without the consent of an occupier or pursuant to a warrant obtained under s 16(4) of the TAA. Full and free access follows the issue of the warrant in such cases and the decision to grant warrant is subject to 'reasonably necessary in all the circumstances'. However, the threshold for this requirement is very low as shown by *Tauber*. The failure to obtain a search warrant in respect of a non-consensual search of private premises is likely to render the search unreasonable. A number of criminal cases have found this to be so,⁵⁴ especially where there was no immediate urgency for the search. In a warrantless search carried out under s 16(1) of the TAA, a taxpayer can request confirmation in writing that the officer has authority to search. In those situations any notice or documents issued under s 13 of the TAA are

⁵⁰ *Minister of National Revenue v Kruger Inc* [1984] 2 FC 535 (CA) at 548. A search is unreasonable if it is unjustified in the circumstances eg for a particular offence being committed, the Commissioner authorizes general search and seizure. In *Kruger* the Court opined that the warrant requirement under the Income Tax Act provides protection to individual's rights under s 8 of the Charter.

⁵¹ *Hunter v Southam* (1984) 11 DLR (4th) 641 (SCC). In *Hunter* search and seizure by investigation officers at Southam's business premises pursuant to s 10 of the Combines Investigation Act 1970 was found in violation of s 8 of the Charter and was therefore of no force.

⁵² *Ibid*, 652. This case led to amendments to the ITA in s 86 which reduced Commissioner's general power of entry in two significant ways: (i) restricting right of access to *all reasonable times*; (ii) Drawing a distinction between *place of business* and *dwelling house*.

⁵³ *New Zealand Stock Exchange v Commissioner of Inland Revenue* (1991) 13 NZTC 8,147 at 8,149.

⁵⁴ *R v Laugalis* (1993) 10 CRNZ 350; *R v Wojcik* (1994) 11 CRNZ 463.

valid.⁵⁵

Canadian tax legislation subs 231.1(2) provides that an authorised person may not enter a dwelling house without the consent of the occupant except under the authority of a warrant under s 231.3. Subsection 231.3(3) of the ITA lays down several grounds that must be satisfied before a judge may grant such a warrant, including a purpose relating to the administration or enforcement of the Act and a belief on reasonable grounds that entry into the premises will be refused. The section then gives the judge the discretion to make such order as is appropriate in the circumstances to carry out the purposes of the Act. Hence reasonable expectations of privacy are inherent in the Canadian framework itself.⁵⁶ By contrast, in New Zealand a judicial officer need only be satisfied under s 16(4) of the TAA that the Commissioner requires physical access to perform his function under the section, which results in low protection for taxpayer against search and seizure.

The search power under s 16, TAA is very wide.⁵⁷ In seeking to inspect documents, the Commissioner of Inland Revenue or his duly authorised agent must consider those documents to be “necessary or relevant” for the stated legislative purpose (ie they must be necessary or relevant for collecting taxes under the Inland Revenue Acts, carrying out of other functions conferred on the Commissioner, or obtaining information otherwise required for the purpose of any of the Inland Revenue Acts or Commissioner’s functions). The equivalent Canadian tax administration section⁵⁸ substitutes a “reasonable time and purpose” test in place of “at all times, necessary or relevant”. The guidelines “necessary or relevant” are subject to the BORA restriction of reasonableness in execution but in author's opinion sometimes this may condone overzealous behaviour on the part of the revenue.⁵⁹

The Canadian courts draw a distinction between the audit functions of the Canadian revenue and its investigation role.⁶⁰ This reflects the importance the Canadian law attaches to fundamental rights and freedoms. If a compliance audit becomes an investigation, Charter rights and freedoms become paramount. Should the court find that an “audit” was more in the nature of an “investigation”, audit evidence may be excluded and further evidence obtained through the execution of a search warrant may also be excluded, as the evidence gathered from the audit may no longer form a proper basis upon which a search warrant may be issued. Arguably, in New Zealand the merged functions of audit and investigation reflect the lower status attached to individual rights and freedoms because, unlike in Canada, they are not protected by a supreme law.

In *Semayne’s Case*,⁶¹ Lord Coke stated, “The house of everyone is to him as his castle and fortress”. The individual’s right to privacy in his home is indeed one long recognised by the judiciary. An individual’s expectation of privacy in a commercial setting is less stringent. This

⁵⁵ TAA 1994, s 13(3).

⁵⁶ *Gernhart v The Queen* [2000] 2 FC 292, (2000) 181 DLR (4th) 506; *Norwood v R* [2001] 1 CTC 299 (FCA); *R v Tessling* [2004] 3 SCR 432 (SCC).

⁵⁷ *Chief Executive of Ministry of Fisheries v United Fisheries Ltd* (2010) NZCA 356.

⁵⁸ ITA 1985, s 231.1.

⁵⁹ *Tauber v CIR* HC Auckland CIV-2011-404-2036, 31 October 2011. In *Tauber*, the homes of Webb and Tauber were raided by the Inland Revenue officers, as part of an investigation into the pair’s tax affairs. During investigation the Inland Revenue officers searched a child’s bedroom and took the photograph of an open underwear drawer and also damaged personal items.

⁶⁰ *R v McKinlay Transport Ltd* (1990) 68 DLR (4th) 568 (SCC), (1990) 68 DLR (4th) 568 (SCC); *R v Jarvis* (2002) SCC 73; 219 DLR (4th) 233. *McKinlay and Jarvis* makes it clear that taxpayers have very little privacy interest in the materials and records that they are obliged to keep under the ITA, and that they are obliged to produce during an audit. The requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.

⁶¹ *Semayne’s Case* (1604) 77 ER 194 (QB) at 195 per Lord Coke.

distinction is reflected in s 16 of the TAA which permits free and full access without a warrant in respect of searches of commercial premises but to enter private premises the search must be either consensual or pursuant to a search warrant. In *R v A*,⁶² the surreptitious recording of statements made by a suspect to a police informer wired for sound were held to be within the broad reach of s 21 of the BORA. The phrase “search and seizure” covered the intrusion into a person’s private sphere using listening devices. Richardson J noted that the “deepest personal values were at stake”⁶³ when police intercept and record conversations.

The interpretation of reasonable expectations of privacy varies between New Zealand and Canada.⁶⁴ In Canada, the courts take a more robust approach to protect the taxpayer’s privacy than in New Zealand.⁶⁵ In *Norwood*,⁶⁶ during Norwood’s business audit at an accountant’s office, the auditor entered a private office to use a telephone and discovered and photocopied handwritten notes from the working file relating to corporation. The auditor had not requested access to file notes and did not advise the taxpayer or accountant of their discovery. The taxpayer was assessed based inter alia on the notes and was ordered to pay interest and penalties. On the taxpayers’ appeal, the Minister of Revenue disclosed discovery of the notes. It was held that the taxpayer had reasonable expectation of privacy in their accountant’s notes. The manner by which the auditor obtained the notes was not in accordance with s 231.1 of the ITA and breached s 8 of the Charter. In *Robert*,⁶⁷ the procedural safeguards in the Charter were by-passed by the investigators who also violated the principles of fundamental justice. In New Zealand under s 16B TAA, the Commissioner does not require a warrant or the consent of the occupier, to remove documents for copying the documents either on site or elsewhere. Under s 123 SSIA 2012, Inland Revenue officers are authorized to seize other documents that are in plain view during s 16 search. Therefore, the author believes that a case like *Norwood* would have been decided differently in New Zealand.

While the courts in Canada have accepted that in the taxation area the revenue needs to be afforded some leeway to properly carry out its functions, they have also recognised that certain aspects of privacy cannot be ignored in the name of regulatory efficiency.⁶⁸

Canadian courts have identified privacy as being at the core of an individual’s liberty in society. In Canada, s 8 of the Charter requires overall reasonableness of the search, rather than the mere necessity of producing a warrant. However, a statutory power for a warrantless search, if reasonable, may not result in the search being declared invalid in both countries. In *Greffe v The Queen*,⁶⁹ the Supreme Court held that the absence of reasonable and probable grounds for a warrantless search violated the appellant’s constitutional right under s 8 of the Charter to be secure against unreasonable searches.⁷⁰ Under s 21 of the BORA, Inland Revenue also must have a reason for implementing a search and must carry it out in a reasonable manner. However, it is difficult to see that the care and management function condoned in s 6A of the TAA add anything to these tests. The Canadian courts are mindful of the context in which a search takes place and

⁶² *R v A* [1994] 1 NZLR 429.

⁶³ *R v A* [1994] 1 NZLR 429 at 433.

⁶⁴ *R v Jefferies* [1994] 1 NZLR 290 at 301 per Richardson J

⁶⁵ *R v Tessling* [2004] 3 SCR 432 (SCC). In *Tessling* the Supreme Court of Canada noted that: “Expectation of privacy is a normative rather than a descriptive standard” at [42].

⁶⁶ *Norwood v R* [2001] 1 CTC 299 (FCA).

⁶⁷ *R v Roberts* (1998) 42 WCB (2d) 152, [1998] CLB 2,264.

⁶⁸ *Ibid.*

⁶⁹ *Greffe v The Queen* (1990) 55 CCC (3rd) 161.

⁷⁰ *Ibid.*, 183. In *Greffe* the police could not provide the accused (*Greffe*) with the reason for the arrest and conducted a strip search and rectal exam suspecting that he was carrying drugs.

have reaffirmed the distinction between the thresholds of reasonableness of searches in criminal and civil matters and the lower expectation of privacy that attaches to the latter which undermines the Charter's protection.⁷¹ The difficulty is when situations are not so clear. In *Children's Society*,⁷² La Forest J at the Supreme Court of Canada stated that s 7 of the Charter⁷³ "guarantee of life, liberty and security of person also includes a right to privacy not unlike that found in s 8".

The judicial interpretation and application of the of search provisions in light of taxpayers' claims to privacy in the two countries demonstrates that in Canada a number of factors are relevant to determining whether a legislated power of intrusion will constitute a search within s 8 of the Charter. These factors will include the purpose of the legislation; the degree of intrusion; whether entry and observation is permitted; whether removal of items is permitted; the degree of reasonable expectation of privacy having regard to the subject matter of the legislation. It is opined that if a case like *Tauber*⁷⁴ occurred in Canada, a court would have found breach of search powers under the Income Tax Act and a flagrant disregard for the Charter. In *Tauber*, arguments about whether a search has been reasonable in terms of the BORA, were limited by the Court to the way the search has been conducted.⁷⁵ Under the Charter expectation of privacy and the overall test of reasonable threshold is much higher. In Canada while assessing the reasonableness of a search courts consider both "reasonable time and purpose" (s 231.1, ITA)⁷⁶ compared to the term "necessary or relevant"(s 16(1), TAA). Hence, the New Zealand provisions seem to be contrary to the principle that individuals are entitled to a high expectation of privacy in relation to residential property.⁷⁷ There is no guaranteed right to privacy in the New Zealand Bill of Rights Act.⁷⁸

3.4 Seizure – The New Zealand Approach

Under s 17 of the TAA, any person may be required to furnish information or produce documents requested by the Commissioner for the enforcement or administration of the Income Tax Act 2007 or for any other purpose lawfully conferred on the Commissioner. Section 17 does not specify the form that the Commissioner's request is to take, thus implying that oral communication is sufficient to meet the statutory test.

Accordingly, the paper will now consider the judicial interpretation of s 17 of the TAA in the light of taxpayers' claims to privacy under s 21 of the BORA.

⁷¹ *R v McKinlay Transport Ltd* (1990) 68 DLR (4th) 568 (SCC); *R v Jarvis* (2002) SCC 73, (2002) 219 DLR (4th) 233.

⁷² *R v Children's Aid Society* [1995] 1 SCR.315 at 369, 122 DLR (4th).

⁷³ Section 7 of the Charter reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

⁷⁴ *Tauber v CIR* [2012] NZCA 411, [2012] 3 NZLR 549, (2012) 25 NZTC 20-143.

⁷⁵ In *Tauber* the Court of Appeal held that it was not excessive for the Commissioner to have had the number of staff involved that he/she did, or to have taken a long time about the search, or to have searched roof spaces or personal records, or to have allowed officers to take their lunch on the taxpayer's property.

⁷⁶ The Revenue in Canada must, prior to the issuing of a warrant, provide information on oath establishing the facts on which the application is based (ITA 1985, section 231.3(2)). The application for the warrant must be reasonably specific as to any document or thing to be searched for and seized ITA 1985, section 231.3(3).

⁷⁷ Under the TAA, the warrant protection goes only to whether the Commissioner needs access to a dwelling and not to whether he/she should be trying to exercise the access power in the first place. See *Tauber v CIR* [2012] NZCA 411, [2012] 3 NZLR 549, (2012) 25 NZTC 20-143 at 563, [49].

⁷⁸ *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [77]. In contrast *Tessling* and *Edwards* shows that the Canadian courts did not rely on property rights to decide that a search which breached reasonable expectations of privacy was unreasonable. *R v Edwards* [1996] 1 SCR 128; *R v Tessling* 2004 SCC 67, [2004] 3 SCR 432.

In *New Zealand Stock Exchange v Commissioner of Inland Revenue*,⁷⁹ the taxpayers were sent notices under s 17(1) of the Inland Revenue Department Act 1974.⁸⁰ The Stock Exchange was asked to provide investment portfolio information on a fixed number of their largest clients, while information was sought from a bank on all persons who had dealt in commercial bills through that bank since 1986. Neither notice identified a particular taxpayer who was the subject of the Commissioner's inquiry, nor was there any reference to a belief by the Commissioner that a particular taxpayer's affairs should be investigated. The Privy Council ruled that the Commissioner was entitled to require information concerned with a class of unidentified possible taxpayers for the purpose of enabling his statutory functions to be carried out. Lord Templeman adopted the extremely high *Wednesbury*⁸¹ unreasonableness standard to be applied to the Commissioner's actions. Lord Templeman stated that the Commissioner was not restricted to information requests where he had a specific taxpayer in mind and they were not unduly oppressive or burdensome. He noted:⁸²

It is impossible to insert that limitation as a matter of statutory construction. The limitation could only be inserted as a matter of policy by a process of judicial legislation on the grounds that Parliament could not have intended to confer on the Commissioner a power so wide as not to be subject to such a limitation.

The Court of Appeal had previously noted that s 17(1) is "expressed in the widest terms"⁸³ and that "nothing in the language used or in the general scheme of the section suggests that a closely confined approach is intended."⁸⁴ The Court of Appeal further stated that s 17(1):⁸⁵

...applies to both the furnishing of information and the production of books and documents. It is both requested and sufficient that the Commissioner consider such information (or books or documents) 'necessary or relevant' for either of the stated purposes. Those purposes are not related to the liability of any particular person for any tax...

Lord Templeman believed that the application of s 17 could not be seen to be unreasonable for the purposes of s 21 of the BORA. This finding places great emphasis on the wide powers that the Commissioner is granted under s 17 of the TAA and exercise of such powers is not unreasonable.

A purposive construction does not always lead to a generous interpretation in favour of an individual's fundamental rights and this has been particularly so in cases involving search and seizure.⁸⁶ One particular tax case⁸⁷ illustrates that the courts have been prepared to legitimise incidents of unreasonable search and seizure. In *R v Wojcik*,⁸⁸ the Court of Appeal ruled that the evidence seized by police from a drug dealer's car and home was unlawful and unreasonable and was in breach of s 21 of the BORA. However in *Wojcik v Police & Anor*,⁸⁹ the illegal search

⁷⁹ *New Zealand Stock Exchange v Commissioner of Inland Revenue* (1991) 13 NZTC 8,147 (PC). It was an appeal by taxpayers to the Privy Council, who upheld the decision of the Court of Appeal.

⁸⁰ Equivalent to s 17 of the TAA.

⁸¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229. Lord Greene MR laid down the test.

⁸² *New Zealand Stock Exchange v Commissioner of Inland Revenue* (1991) 13 NZTC 8,147 at 8,149.

⁸³ *Commissioner of Inland Revenue v New Zealand Stock Exchange* (1990) 12 NZTC 7259 per Richardson J at 7,262.

⁸⁴ *Ibid*, 7,262.

⁸⁵ *Ibid*, 7,262.

⁸⁶ *R v Jefferies* [1994] 1 NZLR 290 at 299.

⁸⁷ *R v Wojcik* (1994) 11 CRNZ 463 (CA).

⁸⁸ *Ibid*.

⁸⁹ *Wojcik v Police* (1996) 17 NZTC 12,646 (DC).

and seizure by police in *R v Wojcik*⁹⁰ did not affect the rights and duties of the Commissioner. Under s 17 of the TAA, the Commissioner was entitled to obtain information from the police and use a taxpayer's seized property (three diaries) as the basis for making an assessment. The Court held that since the Commissioner obtained the information from the Commissioner of Police under s 17 of the TAA, it was not tainted by unlawfulness and unreasonableness under s 21 of the BORA.

As noted earlier,⁹¹ reasonableness in New Zealand is to be assessed at the time a search or seizure is to take place, considering the manner of the search while it is actively taking place. It is not permissible to view searches (or seizures) with hindsight and to justify them in the light of the results. Richardson J has stated:⁹²

The assessment of the particular values underlying the right in the particular case and the balancing of those interests against the public interest in the carrying out of the search, have to be made at the moment the search is to begin. Only in that way is there adequate focus on securing and vindicating individual rights on the one hand and recognising any imperatives of law enforcement on the other.

Having considered the judicial interpretation and application of search provisions in light of taxpayers' claims to privacy, it appears that a full range of information may be required by the Commissioner pursuant to s 17(2) of the TAA. As long as the Commissioner meets the care and management requirements of s 6A of the TAA, it is highly unlikely that the BORA will be of any effect, as the section does not necessarily encompass reasonableness under the BORA. Similarly, it seems that a New Zealand taxpayer can do little to resist the Commissioner seizing documents by claiming the documents are not relevant to filing of an income tax return,⁹³ or that information or property was obtained by the police during an unreasonable and unlawful search under s 21 of the BORA.⁹⁴ Some recent cases have renewed the challenge to the exercise of the Commissioner's search and seizure powers based on the procedural safeguards afforded and civil liberties protected by the BORA.⁹⁵ The decisions in *Avowal and Tuber* also reflect that the use of the Commissioner's

⁹⁰ *R v Wojcik* (1994) 11 CRNZ 463.

⁹¹ *R v Jefferies* [1994] 1 NZLR 290 at 304-305 per Richardson J.

⁹² *Ibid.*

⁹³ *Schwass and Robertson v Mackay* (1983) 6 NZTC 61,641 (HC) at 61,642. The High Court decision questioned whether the Commissioner needed to have reasonable grounds for considering information, books or documents to be necessary or relevant; or whether it was enough that the Commissioner merely considered them so. Casey J noted for the Court that the words "reasonably" or "has reasonable grounds" were not contained in s 17(1) because Parliament had not deemed it necessary.

⁹⁴ *Wojcik v Police* (1996) 17 NZTC 12,646. The information obtained by the Commissioner of Inland Revenue under s 17 of the TAA 1994 was not tainted by the reason that the property or information was obtained by the police from an unlawful or unreasonable search under s 21 of the BORA.

⁹⁵ *Vinelight Nominees Ltd v CIR* (2005) 22 NZTC 19,298 (HC); *Chesterfield Preschools Ltd v CIR (No 2)* (2005) 22 NZTC 19,500 (HC); *Next Generation Investments Ltd v CIR* (2006) 22 NZTC 19,775 (HC). In High Court decisions in recent years, judges have renewed the challenge to the exercise of the Commissioner's search powers based on the procedural safeguards afforded and civil liberties protected by the Bill of Rights Act s 27 (3). Under s 27 (3) of the BORA, everyone has the right to bring a civil action against the Crown. The Court in *Vinelight* declined to make a declaration that the Commissioner was not entitled to use his statutory powers under s 17 of TAA to requisition information and documents after a taxpayer had filed challenge proceedings. In *Next Generation Investments*, the liquidators, when faced with a request for information under s 17 were obliged to permit the Commissioner to inspect books and accounts of a company without court order even where the Commissioner was the creditor. In *Commerce Commission v Air New Zealand Ltd* [2011] NZCCLR 21, the Court of Appeal approved the formulation reached in *Vinelight*. In *Chesterfield Preschools Ltd*, the plaintiff had a history of moving assets into different vehicles within the family and there was a risk that they might dispose of their assets. The Commissioner obtained information under s 17 of the TAA to support its application for Mareva injunctions. Fogarty J held that the Commissioner's powers of investigation under s 17 of the TAA are

search and seizure power is to be read with the BORA. The cases⁹⁶ in recent years have indeed suggested that the use of those search and seizure powers by the Commissioner when he/she is engaged in litigation is potentially allowing him/her an advantage over the usual discovery processes and should be a breach of the BORA.

3.5 Seizure – The Canadian Approach

Section 231.3 of the ITA⁹⁷ provides that a Minister of Revenue or any authorized person named in the warrant may enter and search the identified building, receptacle or place and seize, in addition to that which is authorised by the warrant, any other document or thing which the person believes on reasonable grounds affords evidence of an offence under the Act.

The search and seizure must be within the meaning of s 8 of the Charter, which guarantees the individual's right to be secure against unreasonable search and seizure and a reasonable expectation of privacy.

Following the Canadian seizure and privacy provisions, the paper will consider the judicial interpretation and application of those provisions in light of taxpayers' rights against seizure.

In *R v Burnett* while considering the issue of investigations and enforcement of the ITA regarding the documents searched and seized from the defendants and third parties the Tax Court of Canada held that the search of third parties was unlawful because the documents seized were not confined to income tax violations as contemplated by the ITA.⁹⁸ Hartt J in *R v Burnett* stated:⁹⁹

[W]here the alleged misconduct is of a complex nature in which funds are allegedly funneled through a number of interrelated companies with a view to hiding their disposition, it seems to me that the number of documents that may afford evidence of such a violation may well be very great indeed. In such a case, an entire class of documents may in fact be necessary to trace the transactions. Granted many documents in a file may not, in the final analysis, be relevant to any tax violation. However, it may be impossible to preclude their relevance without a detailed examination of all the documents seized.

The Supreme Court of Canada's decision in *R v Law*,¹⁰⁰ holds that the manner in which individual's Charter right was violated resulted in the lawful search being converted into unlawful or unauthorised search and seizure. In *Law*, before the safe reported stolen was returned to the accused, an officer, not involved in the investigation of the theft but who suspected the accused of tax violations photocopied some financial documents found in the safe without obtaining a warrant and eventually forwarded the photocopies to revenue Canada. The Supreme Court while considering the issue of commission of an offence and enforcement of the ITA ruled that the documents were inadmissible in tax proceedings, since they were obtained through unreasonable search,¹⁰¹ and were contrary to s 8 of the charter and taxpayers' expectation of

not to be restricted by the principle of litigation on an even basis.

⁹⁶ *Vinelight Nominees Ltd v CIR* (2005) 22 NZTC 19,298 (HC); *Next Generation Investments Ltd v CIR* (2006) 22 NZTC 19,775 (HC).

⁹⁷ Section 231.3 of the ITA refers to the commission of an offence.

⁹⁸ *R v Burnett* [1985] 2 CTC 227 (TCC). In *Burnett* the officers of National Revenue, acting under an authorisation for search and seizure without examining each document individually, seized a large number of documents in the possession of Mr Burnett and others including a solicitor and two firms of chartered accountants. The court held that seizure from the premises of the solicitor and the chartered accountants were unlawful but other search and seizures were properly authorised and properly executed.

⁹⁹ *Ibid*, 238-239 [53].

¹⁰⁰ *R v Law* [2002] SCC 10, [2002] 1 SCR 227.

privacy.

The seizure of documents in violation of a taxpayer's Charter rights is illegal.¹⁰² In *R v McKinlay Transport Ltd*¹⁰³ the Supreme Court considered whether s 231.3 of the ITA violated s 8 of the Charter.

The question to be answered in *McKinlay* was whether a "seizure" within the meaning of s 8 of the Charter takes place when the taxpayer is obliged to produce the documents in a regulatory context. In *McKinlay*,¹⁰⁴ the Court specifically stated that the fact that the Minister engaged in a fishing expedition and did not partake in a genuine and serious inquiry into a specific taxpayers' liability would be grounds upon which a substantial defence to a request for documents under s 231.3 of the ITA could be raised. The Court noted that s 231.3 envisages the compelled production of a wide array of documents (as do ss 16 and 17 of the TAA in New Zealand). The Court then noted that the legislation extends to parties who are not the subject of an investigation or audit: they can be compelled to produce documents relating to another taxpayer who is the subject of an investigation. The Court also noted the compelled production of documents reaches beyond the strict filing and maintenance requirements of the Act and may extend to documents and information in which the taxpayer has a privacy interest. The privacy issue immediately leads the Court to conclude that the application of s 231.3 constitutes a "seizure" since it infringed on the taxpayer's expectation of privacy. However, the courts still exercised caution in their interpretation of the statute and found the search and seizure as reasonable, documents were relevant to filing of an income tax return and taxpayer's privacy interest with regard to those documents vis-a-vis the Commissioner was relatively low. Therefore, s 8 of the Charter was not violated. The vigor with which the Court arrived at this conclusion reflects the importance of individual rights and freedoms and their place in both the constitution and the national psyche.

3.6 Seizure - The New Zealand Approach Compared with the Canadian Approach

Having considered the judicial interpretation and application of the relevant seizure provisions in light of taxpayers' claims to privacy in the two countries, the paper will now look at the similarities and differences in the enactments, and in their judiciary interpretation in each country.

Under relevant enactments, both New Zealand and Canadian revenue authorities have broad powers to ensure that taxpayers are fulfilling their statutory duties while preparing their tax returns but they still need to apply for warrants to access dwellings. However, in contrast to New Zealand's "necessary or relevant" requirement, the Revenue in Canada must prior to the issuing of a warrant, provide information on oath establishing the facts on which the application is based.¹⁰⁵ The application for the warrant must be reasonably specific as to any document or thing to be searched for and seized.¹⁰⁶ Further, documents seized by the Canadian revenue may only be kept for 120 days. Any documents kept longer than that will be presumed to be kept in breach of s 8 of the Charter unless a judge of a superior or country court has been provided with evidence in support of the Minister of Revenue's belief based on reasonable and probable grounds that there

¹⁰¹ Mr Chan and Mr Law only reported the theft of their safe to the police. This gave the police had no authority to examine and photocopy the contents of the safe. The police officer was not authorized by the Revenue Minister to conduct an audit of the Laws' business.

¹⁰² *R v Lagiorgia* (1987) 42 DLR (4th) 764 (FCA) at 767.

¹⁰³ *R v McKinlay Transport Ltd* (1990) 68 DLR (4th) 568 (SCC).

¹⁰⁴ *Ibid.* In *McKinlay* the Court held that the manner in which Commissioner exercised his power was the least intrusive means to monitor taxpayer compliance.

¹⁰⁵ ITA 1985, section 231.3(2).

¹⁰⁶ ITA 1985, section 231.3(3).

has been a violation of the ITA and that the information may be required in court proceedings.¹⁰⁷

The Canadian approach is more protective of individual rights and freedoms than in New Zealand.¹⁰⁸ In *Jarvis, McKinlay*¹⁰⁹ and *Hunter*,¹¹⁰ the Court considered that only the documents authorised to be seized were those that were strictly relevant to the offence under investigation. As illustrated by the *Stock Exchange* case,¹¹¹ a broad broom and shovel was given to the New Zealand Inland Revenue to sweep and collect information.

It appears that the manner in which the courts consider the relevance of judicial review varies between two countries. In Canada, the courts in *Baron*,¹¹² *Jarvis, Burnett* and *Law*¹¹³ recognised that in appropriate circumstances unfairness in the investigation process leading to an investigation may amount to abuse of power, rendering the Commissioner's decisions subject to judicial review in a separate collateral challenge. However, the current law in New Zealand in *Westpac Banking Corporation* case states that:¹¹⁴

[A]llowing collateral challenge to assessments through judicial review can provide scope for gaming and diversionary behaviour... Collateral challenge involves not just delay but also diversion of effort and resources. The challenge proceedings between Westpac and the Commissioner will be complex and will fully engage the attention and resources of the Commissioner and the Court. The validity cause of action involves an attempt by Westpac to turn the case back on to the Commissioner. If it goes to trial, considerable resources which might otherwise have been devoted to the primary issue between the parties will be diverted to an inquiry into the internal processes of IRD.

*R v Roberts*¹¹⁵ is an extreme example of rights abuse. In that case the Court was extremely

¹⁰⁷ ITA 1985, section 231(3)(6).

¹⁰⁸ *Canada (National Revenue) v Greater Montreal Real Estate Board* (2007) 60 DTC 6,597, [2007] 5 CTC 151. The Federal Court noted that if a decision had been made to audit every client on the lists provided, there would be undeniably a genuine and serious investigation of those individuals.

¹⁰⁹ *R v Jarvis* (2002) SCC 73, (2002) 219 DLR (4th) 233. The Supreme Court held that the investigators can avail themselves only of that information obtained pursuant to the audit powers prior to the commencement of the criminal investigation. They cannot avail themselves of information obtained pursuant to such powers subsequent to the commencement of the investigation into penal liability. *R v McKinlay Transport Ltd* (1990) 68 DLR (4th) 568 (SCC).

¹¹⁰ *Hunter v Southam* (1984) 11 DLR (4th) 641 (SCC).

¹¹¹ *Commissioner of Inland Revenue v New Zealand Stock Exchange* (1990) 12 NZTC 7259. The *New Zealand Stock Exchange* case did not follow *James Richardson & Sons Ltd* principle. In *James Richardson & Sons Ltd v MNR* [1984] 1 SCR 614 at 625, Wilson J held that the provision could not be employed for a "fishing expedition", and that it was "only available to the Minister to obtain information relevant to the tax liability of some specific person or persons if the tax liability of such person or persons is the subject of a genuine and serious inquiry".

¹¹² *Baron v R* (1993) 99 DLR (4th) 350 (SCC). In *Baron*, warrants were executed to search Baron's residences and law and accounting firms and a large number of documents were seized. Baron appealed to address the validity search warrants issued and executed under s 231.3(3) of the ITA. The Supreme Court held that s 231.3(3) of the ITA was of no effect or force because it was inconsistent with s 8 of the Charter. The Court held that the requirement for a residual judicial discretion to refuse to issue a warrant or to attach conditions in appropriate circumstances, even though the statutory criteria for its issuance have been met, was a prerequisite to a reasonable search and seizure under s 8 of the Charter. In s 231.3(3) of the ITA the word "shall" has been replaced by "may"; it now states that "a judge may issue the warrant".

¹¹³ *R v Jarvis* (2002) SCC 73, (2002) 219 DLR (4th) 233; *R v Burnett* [1985] 2 CTC 227 (TCC); *R v Law* [2002] SCC 10, [2002] 1 SCR 227.

¹¹⁴ *New Zealand Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 at [62-64].

¹¹⁵ *R v Roberts* (1998) 42 WCB (2d) 152, [1998] CLB 2,264. David Roberts and Thomas Viccars attempted to evade income tax by making false or deceptive statements in their 1991-92 tax returns.

concerned with the conduct of Revenue Canada's investigatory process. The investigation and prosecution of this matter was declared to be an abuse of process of such a magnitude as to warrant a stay of proceedings. The Court maintained there was a danger that conducting an investigation under the guise of an audit would become widespread and, in tax matters, the rule of law would be threatened by arbitrary and capricious behaviour. The predominant intention of revenue Canada was to establish a case against the accused based on s 231 of the ITA but the process used was one of deception and abuse. The procedural safeguards in the Charter were by-passed by the investigators who also violated the principles of fundamental justice. The investigators orally and in written correspondence misrepresented the nature of their investigation to the taxpayers and their counsel. They intentionally and deliberately interviewed the taxpayers without disclosing their investigative purpose or administering Charter warnings. They failed to identify themselves properly. They wrote a fundamentally misleading statement to obtain search warrants. The investigators were aware that their conduct was contrary to the Charter, the ITA and Revenue Canada policy. The court stated that:¹¹⁶

Clearly the administration of justice will be prejudiced if the trial continues because what was done by the investigators constitutes a serious and intentional misuse of audit powers under the Income Tax Act and a flagrant disregard for the Charter. This is coupled with the crafting of misleading statements in the information to obtain search warrants and the prosecution report. The actions of the investigators evidence a pattern of policy violations that appear to be standard practice in the Vancouver office of Special Investigations.

It is opined that if a case like *Roberts* occurred in New Zealand, a court would be quick to find an abuse of the process. The difficulty is when situations are not so clear. The courts in New Zealand are particularly mindful of allowing a statute to work, as evidenced by the cases discussed in this paper.¹¹⁷

In *FK Clayton Group Ltd v Minister of National Revenue*,¹¹⁸ the Canadian Court ruled that where a statutory provision which authorises the seizure had been found to be unreasonable, the seizure itself cannot be said to be reasonable. Therefore, the documents were inadmissible in tax proceedings. But s 17(3) of the TAA allows the New Zealand Commissioner to:

...remove and retain any books or documents produced for inspection under this section for so long as is necessary for a full and complete inspection of those books and documents.

In New Zealand, a warrant is required for dwellings' search but the decision to make a seizure rests with the Commissioner and while an unauthorised seizure may be unlawful in New Zealand, it may be reasonable if circumstances show it to be so. Therefore, s 21 of the BORA is potentially damaging to taxpayers as, instead of acting as a safeguard to State abuse, it may be used as an instrument to effectively validate unlawful conduct. For dwellings' searches in Canada, the revenue must satisfy a judge that a seizure is necessary and obtain a warrant prior to the seizure commencing. Failure to do so would probably render the seizure unconstitutional under s 8 of the Charter. Warrantless searches and seizures in both jurisdictions are only possible where it is not feasible to obtain a warrant or there is no longer a reasonable expectation of privacy.

¹¹⁶ *R v Roberts* (1998) 42 WCB (2d) 152, [1998] CLB 2,264.

¹¹⁷ Also refer to *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 283 per Richardson J: "In this country we would regard the importance of making a statute workable – the equivalent of the Canadian 'operating requirements' – as inherent in the interpretation process?". Noort was stopped for driving at excessive speed and declined the optional blood test. The examination by the traffic officer had included no direct question about information as to the right to consult and instruct a lawyer. It was inferred from the officer's evidence that no such information was given to Noort so that s 23(1)(b) of the BORA was not complied with. It was conceded in the Court that the presence of a lawyer might have had some bearing on Noort's decisions and provided him with assistance in the situation in which he found himself.

¹¹⁸ *FK Clayton Group Ltd v Minister of National Revenue* [1988] FCAD1856-01. The Court ordered Canada Revenue Agency to return the seized documents to the taxpayer.

The interpretation and application of the relevant seizure enactments and taxpayers' claims to privacy in two countries shows that the procedural framework in Canada is more transparent and individual rights and freedoms brought more sharply into focus. However, the New Zealand approach is an example of the power retained by the State with regard to its citizens. This is something to which the BORA and TAA has no answer.

Section 20 of the TAA deems certain information between a qualified tax advisor and his/her client to be privileged.¹¹⁹ Under s 20(5) the Commissioner may apply to a District Court judge for an order determining whether or not the claim of privilege is valid. The claim to privilege has been held to be superior to that of the claim made by the Commissioner.¹²⁰ It would be unlawful for the Commissioner in his care and management function (s 6A) to search or seize documents subject to the privilege in s 20. As s 20 is as close to a constitutional defence as a taxpayer may obtain to intrusions by the revenue, it is highly likely that such action would be deemed unreasonable in terms of s 21 of the BORA. Therefore, in the writer's view the BORA in its present form adds little to the statutory protection of taxpayers regarding the level of defence of the non-disclosure right and the right to privacy in a taxation context. In *White*, the Canadian Court¹²¹ struck down the provisions in s 232 of the ITA as unconstitutional because they restricted the right of privilege that was protected in the Charter. Provisions in ss 231.7(1) and 231.1(2) of the ITA ensure that privilege is maintained and provides clear guidance to officials as to what should be done in this very context.

The effect of s 4 of the BORA is to deny New Zealanders a higher expectation of privacy. While the BORA does require a judicial assessment of "reasonable" in the context of a search or seizure, it has to date been of little practical value to taxpayers, as it only guarantees unreasonable searches and seizure.

4. REMEDIES

Having considered the interpretation of the relevant enactments in light of taxpayers' rights against search and seizure in the two countries, the paper will look at the approaches to the exclusion of evidence obtained in breach of taxpayers' claims to privacy in the two countries.

4.1. *The New Zealand Approach*

The approach taken to the exclusion of evidence obtained in breach of the BORA is reflected in s 30 of the Evidence Act 2006 and is determined on the basis of a "balancing approach",¹²² which examines, inter alia, the nature of the breach, seriousness of charges, centrality of evidence to the case, consideration of any bad faith on the part of the State official in obtaining evidence and so

¹¹⁹ To extend the privilege to communications with non-legally qualified tax advisers, a non-disclosure right for "tax advice documents" was introduced via ss 20B–20F of the TAA in 2005. A privilege exception to the revenue authority's investigatory powers is incorporated in Canadian Income Tax Act 1985 by providing for a defence using the common law privilege in s 232.

¹²⁰ *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA). The relevant statute has been amended to alter this common law position.

¹²¹ *White, Ottenheimer & Baker v Canada* (2000) 187 DLR (4th) 581, (2000) 146 CCC (3rd) 28. Also refer to the Court of Appeal judgment in *R v Fink* (2000) 193 DLR (4th) 51, (2000) 149 CCC (3rd) 321 and the Supreme Court judgement in *Lavallee, Rackel & Heintz v Canada* [2002] SCC 61, (2002) 216 DLR (4th) 257.

¹²² The statutory balancing test on evidence exclusion in the Evidence Act 2006 was included after the decision in *R v Shaheed* [2002] 2 NZLR 377 (CA). In *Shaheed* the Court of Appeal held that to determine admissibility of evidence obtained in breach of s 21 of the BORA public interest significantly outweighs the private interest.

on.¹²³ It has proved to be a powerful mechanism for securing police compliance. In *Hamed* the Supreme Court noted that exclusion will be more likely where the evidence was obtained in breach of the BORA.¹²⁴ The Court of Appeal in *Williams*,¹²⁵ considered when a search would be unreasonable and admissibility for improperly obtained evidence under s 30 of the Evidence Act 2006. According to Glazebrook J:¹²⁶

If the illegality or unreasonableness is serious, the nature of the privacy interest strong, and the seriousness of the breach has not been diminished by any mitigating factors such as attenuation of causation or a weak personal connection to the property searched or seized, then any balancing exercise would normally lead to the exclusion of the evidence, even where the crime was serious.

The research illustrates that the exclusion of evidence, while not automatic, is nevertheless a common result of abuse of process in taxation matters. It is likely that exclusion of evidence will become the standard practice for rights violations by the Inland Revenue in New Zealand when the violations are deemed unreasonable. If the error was not noticed in advance of the undertaken search and the crime is serious, a minor or technical error would not normally lead to a finding of breach of right under s 21 of the BORA.¹²⁷

However, difficulties still remain with judicial interpretation and application of s 30 of the Evidence Act 2006 as guided by the *William* approach.¹²⁸ The BORA may be used as a sword and not merely as a shield to state encroachment.

Following the decision in *Simpson v Attorney General*,¹²⁹ the potential to obtain monetary compensation for a breach of s 21 of the BORA cannot be discounted. In *Baigent's Case*, Cooke P stated:¹³⁰

Hitherto the main remedy granted for breaches of the rights and freedoms has been the exclusion of evidence. But that has been because most of the cases have concerned evidence obtained unlawfully; exclusion has been the most effective redress and ample to do justice. In other jurisdictions compensation is a standard remedy for human rights violations. There is no reason for New Zealand jurisprudence to lag behind.

Casey J, also referring to the International Covenant on Civil and Political Rights, stated:¹³¹

I do not regard the absence of a remedies provision in the Act as an impediment to the Court's ability to 'develop the possibilities of judicial remedy' as envisaged in article 3(b).

Section 6 of the Crown Proceedings Act 1950 stops the Crown being sued in tort. This does not extend, however, to a public law action based on the BORA. The Inland Revenue is part of the Crown and under s 3 is subject to the BORA. There is no reason to assume remedies available under the BORA are to be restricted. While it is acknowledged that *Baigent* involved a police search and seizure, that of itself is not a reason to deny the possibility of a successful monetary claim should a search or seizure or other action by the Revenue be deemed "unreasonable".¹³²

¹²³ *Fan v R* [2012] NZCA 114. The Court of Appeal noted that even if the search was not in breach of an enactment, evidence may be excluded because it was obtained unfairly:

¹²⁴ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [191] per Blanchard J.

¹²⁵ *R v Williams* (2007) 23 CRNZ 1 (CA); [2007] 3 NZLR 207[63].

¹²⁶ *Ibid*, 23 CRNZ 1 (CA) at [145].

¹²⁷ *Ibid*, 23 CRNZ 1 (CA) at [144].

¹²⁸ SL Optican, "R v Williams and the Exclusionary Rule: Section 30 of the Evidence Act", (2011) Part 3, *New Zealand Law Review* 507 at 543.

¹²⁹ *Simpson v Attorney General* [1994] 3 NZLR 667 (CA) (*Baigent's Case*).

¹³⁰ *Ibid* at 676

¹³¹ *Ibid* at 691.

¹³² *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA); *Upton v Green* [1996] 2 HRNZ 305 (HC).

Should a case occur in New Zealand similar to *Roberts*¹³³ there would appear to be grounds for pursuing a claim under the BORA¹³⁴ and evidence obtained as a result of breach of the BORA might also be declared inadmissible in the court.¹³⁵

Hence, when determining the appropriateness of exclusion of improperly obtained evidence, the New Zealand courts are given considerable leeway,¹³⁶ in balancing the impropriety of admitting the evidence with the public interest in admitting the evidence.

4.2. The Canadian Approach

Section 24 of the Charter gives discretion to the court to exclude evidence that was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter. The use of the phrase “shall be excluded” only takes effect following a court decision. In *Grefe v The Queen*¹³⁷ at the Supreme Court of Canada, Lamer J stated “it is the long-term consequences of regular admission or exclusion of the evidence on the repute of the administration of justice that must be considered.”¹³⁸

5. CONCLUSION

This paper, demonstrates that there are some differences between two countries, in the wording of the relevant (search and seizure) enactments, the interpretation of statutory words in light of rights against search and seizure, and approaches to exclusion of evidence for breach of rights, but that these generally do not account for the different outcomes in the courts.¹³⁹ The key reason for differing outcomes in the courts of two countries is in the manner the search and seizure was conducted and what counts as reasonable and unreasonable search and seizure. In *Minister of National Revenue v Kruger Inc.*¹⁴⁰ the Canadian Court observed that the Commissioner may authorize search and seizure when he believes on valid grounds that an offence had been committed but that search and seizure must be in respect of that offence. Similarly, the Supreme Court of Canada's decision in *James Richardson & Sons*¹⁴¹ noted that the Commissioner was entitled under subsection 231 (3) of the ITA to demand information about the trading activities of the taxpayer's customers if there was a customer or customers under serious tax investigation. The taxpayer cannot be compelled under subsection 231(3) to provide random sample for check on

¹³³ *R v Robert* (1998) 42 WCB (2nd) 152, [1998] CLB 2,264.

¹³⁴ Under s 27(3) of the BORA, everyone has the right to bring a civil action against the Crown.

¹³⁵ *Vinelight Nominees Ltd v CIR* (2005) 22 NZTC 19,298. The High Court approach (that the purpose of s 17 could not be restricted by the principle of litigation on an even basis) was rejected in *Chesterfield Preschools Ltd v CIR (No 2)* (2005) 22 NZTC 19,500.

¹³⁶ *CIR v Campbell Investments* (2004) 21 NZTC 18,559 (HC), Wild J made obiter findings, and apparently directed reassessments, in relation to GST periods that were not subject to the litigation. In *CIR v Zentrum Holdings Ltd* (2006) 22 NZTC 19,912 (CA) the Commissioner was allowed to introduce a new ground of assessment (sham) in the course of the litigation (indeed, on appeal after the case had been heard in the Taxation Review Authority).

¹³⁷ *Grefe v The Queen* (1990) 55 CCC (3rd) 161.

¹³⁸ *Ibid*, 183; *R. v. Plant* [1993] 3 SCR 281. In *Grefe* the police could not provide the accused (Grefe) with the reason for the arrest and conducted a strip search and rectal exam suspecting that he was carrying drugs. The Supreme Court held that the absence of reasonable and probable grounds for a warrantless search violated the appellant's constitutional right under s 8 of the Charter to be secure against unreasonable searches.

¹³⁹ In *Tauber v CIR* [2012] NZCA 411, [2012] 3 NZLR 549, (2012) 25 NZTC 20-143 if New Zealand tax statutes wording was to be construed by a Canadian court, in the writer's view the search and seizure by Inland Revenue would have been invalidated.

¹⁴⁰ *Minister of National Revenue v Kruger Inc* [1984] 2 FC 535 (CA) at 548 per Pratte JA.

¹⁴¹ *James Richardson & Sons Ltd v MNR* [1984] 1 SCR 614 at 625 per Wilson J.

general compliance by the entire class. The Court pointed out that the general requirements for information should be authorized by regulation applying to all persons within their purview. The Privy Council decision in *NZ Stock Exchange*,¹⁴² provides an interesting contrast to the approach of Canadian Supreme Court in *James Richardson & Sons*¹⁴³ and New Zealand's judicial emphasis on solicitousness for public interest. In *NZ Stock Exchange*, Lord Templeman found that the Commissioner was not restricted to information requests where he had a specific taxpayer in mind and they were not unduly oppressive or burdensome.

The author also believes that procedural safeguards afforded and civil liberties protected by the New Zealand BORA should have a place in protecting taxpayers from abuses by the New Zealand revenue authorities. The role played should be similar to that occupied by the Charter in Canada. In author's opinion, the review of cases demonstrates that the revenue authority in New Zealand tends to act in an unreasonable manner regarding the quantification and procedural processes. The fact is, without adequate safeguards the potential for the abuse of process is heightened. It is unfair on taxpayers for the Commissioner to have such a high discretionary power threshold. Such power may result in improper use¹⁴⁴ and without specific legislation there is a risk that taxpayers may inadvertently compromise their privilege and non-disclosure rights. Therefore, the author believes that to build more fairness into the tax system New Zealand needs a conceptually sound Income Tax provisions for which there should at least be a legal framework in the TAA which provides minimum protections for the taxpayers caught up in this process.

In Canada, the State has accorded its citizens with a degree of respect by recognising individual rights and freedoms in superior law. In doing so, the State has legislated for a more democratic process in the way an individual interrelates with the State. Such a process has not been developed in New Zealand. The binding rulings and appeal processes conducted with the revenue are not equivalent to independent third party decision-making. The New Zealand tax Ombudsman cannot investigate Inland Revenue's decisions on taxpayers' search and seizure, tax assessment and imposition of shortfall penalties. It can only investigate Inland Revenue's administrative conduct. In writer's view, authorizing the Tax Ombudsman to investigate Inland Revenue's search, seizure and assessment powers would enable the Tax Ombudsman to operate as a substitute for an established tax court system.¹⁴⁵ The author hopes that it will be the first positive step in providing an independent process of revenue powers of search, seizure and assessment and would be a vehicle for expeditious reform. Undoubtedly, resource constraints play a significant role in this area.

The author hopes that the explicit framing of relevant enactments which will ensure maximum legal protection of taxpayers' rights through judicial means would be the next positive step in providing a truly transparent and independent process of revenue assessment. It would not allow judiciary to override those fundamental rights as observed in Canada and Income Tax provisions will be conceptually more sound and rational. In author's view like Canada, New Zealand court should also draw a distinction between the audit and investigation functions of Inland Revenue and any evidence gathered from search warrants issued on the basis of audit evidence should be excluded. It will ensure the substance is attached to New Zealand laws pertaining to individual rights. It would help to protect the integrity of the tax system and ensure that taxpayer's duties are

¹⁴² *New Zealand Stock Exchange v Commissioner of Inland Revenue* (1991) 13 NZTC 8,147 (PC).

¹⁴³ *James Richardson & Sons Ltd v MNR* [1984] 1 SCR 614 at 625 per Wilson J.

¹⁴⁴ *Schwass and Robertson v Mackay* (1983) 6 NZTC 61,641.

¹⁴⁵ New Zealand has a four tier judicial system. Taxation Review Authority is the first forum where proceedings are filed. In the past, when the amount of tax in dispute was \$30,000 or less, disputants were able to elect that any unresolved dispute arising could be heard by the Taxation Review Authority acting in its small claims jurisdiction. The judgment of small claims jurisdiction was irrevocable and was binding. However, the small claims jurisdiction had been abolished from 29 August 2011.

voluntarily complied with. It would have enormous benefits for the Government, for the revenue, and for taxpayers.