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The meaning of "search or seizure" within section 21
New Zealand Bill of Rights Act 1990.

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This paper is in two parts. Part one will undertake an analysis of the approach of the Court of Appeal to the meaning of "search or seizure" within s 21 BORA. Part two will undertake a critique of this approach, drawing in particular on a Bill of Rights for New Zealand - A White Paper (Government Printer, Wellington, 1987) and Canadian jurisprudence on s 8 of the Canadian Charter of Rights and Freedoms (Charter), and seek to establish a definition of "search or seizure" for the purposes of s 21.

New Zealand's law of search and seizure prior to the enactment of the BORA established a system of statutory exceptions to the fundamental common law principle that an individual's person and property are inviolate.¹ A "search" or "seizure", as it developed at common law, was an activity which would have constituted a trespassory interference with an individual's person or property but for its authorisation by law. In particular, the role of this area of law was to regulate the relationship of the individual and the state, to weigh the competing interests

¹ Scott Caplan "Search and Seizure: An Update on s 21 of the Bill of Rights" [1988] NZ L Rev 215, 216 (Oct 1988).

² Caplan 1988 above n 1, 216.

³ Robertson (ed) *Aspects of Criminal Law* (Brookers, Wellington, 1982) 60 (Adams).

⁴ Scott Caplan "Search and Seizure" in Horroff and Macneil (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1994) 246-247 (Caplan 1994).

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Introduction

In 1990 the Parliament enacted the New Zealand Bill of Rights Act 1990 [BORA]. Since coming into force, the overall impact of the BORA on the law has been revolutionary, despite its formal legal status. It has been said that an example of this revolution is to be found in the impact of section 21 of the BORA on the law of search and seizure in New Zealand. Optican has stated that at least initially the Court of Appeal's approach to the BORA expanded the scope of a "search or seizure" for s 21 beyond its traditional guarantees against trespass or conversion to encompass "any violation of an individual's 'reasonable expectation of privacy'".¹

However, it is stated that "the Court of Appeal has now called into doubt [this] broad notion of search adopted in earlier Bill of Rights' cases."²

It will be argued below, however, that the Court of Appeal has in fact never adopted such a "broad notion of search". At most it might be argued, as in *Adams*, that although the argument "that 'search' describes the phenomenon of intruding into the sphere of privacy that surrounds the individual...seemed to be supported by the early Bill of Rights' cases, it has recently been thrown into question".³

Rather, there has been a consistent absence in the Court of Appeal of a principled approach to the interpretation of a "search or seizure" for the purposes of section 21. The approach of the Court to "search or seizure" is symptomatic of an unsound approach to section 21, the roots of which go to the status of the BORA in the New Zealand legal system.

This paper is in two parts. Part one will undertake an analysis the approach of the Court of Appeal to the meaning of "search or seizure" within s 21 BORA. Part two will undertake a critique of this approach, drawing in particular on *A Bill of Rights for New Zealand - A White Paper* (Government Printer, Wellington, 1985)[*White Paper*] and Canadian jurisprudence on s 8 of the Canadian Charter of Rights and Freedoms[*Charter*], and seek to establish a definition of "search or seizure" for the purposes of 21.

New Zealand's law of search and seizure prior to the enactment of the BORA constituted a system of statutory exceptions to the fundamental common law principle that an individual's person and property are inviolate.⁴ A 'search' or 'seizure', as it developed at common law, was an activity which would have constituted a trespassory interference with an individual's person or property but for its authorisation by law, in particular statute. The role of this area of law was to regulate the relationship of the individual and the state, to weigh the competing interests

¹ Scott Optican "Search and Seizure: An Update on s 21 of the Bill of Rights" [1996] NZ L Rev 215, 216 [Optican1996].

² Optican1996 above n1, 216.

³ Robertson (ed) *Adams on Criminal Law* (Brookers, Wellington, 1998) 909 [Adams].

⁴ Scott Optican, "Search and Seizure" in Huscroft and Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 246, 247 [Optican1995].

and establish the balance deemed appropriate.

At common law, 'search and seizure' was limited to the law of trespass. However, as Optican has noted,⁵ fundamental changes to legal and constitutional systems, in social attitudes (particularly an increasing demand for and recognition of individual rights) and in investigatory techniques, has thrown the legitimacy of this limitation into question. If the role of search and seizure law in the New Zealand legal system is to provide for the balancing of the competing interests of individual and state and establish the justifiable extent of state intrusion upon those individual interests, then it is doubtful whether the common law formulation is capable of fulfilling this role. The enactment of section 21 of the BORA is surely recognition by New Zealand's elected representatives that it is not.

Part I The Court of Appeal approach to "search or seizure" for the purposes of section 21 BORA.

Section 21 of the BORA 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.

I.i The *Jefferies* approach

The first substantial consideration of section 21 BORA was undertaken by the Court of Appeal in *R v Jefferies* [1994] 1 NZLR 290 (CA) [*Jefferies*], which concerned the warrantless examination of a motor vehicle by a police officer. *Jefferies* came before a bench of seven of the Court of Appeal led by Cooke P, providing an opportunity for the establishment of a clear principled approach to s 21. In the event, *Jefferies* establishes no such approach but lays the foundation of an approach to s 21 which seems unsound in principle and contrary to s 21.

Section 21 guarantees to every person the right to be secure against "unreasonable search or seizure". As a matter of basic construction the first inquiry required under s 21 is whether the case at issue involves a "search or seizure" for the purposes of s 21. What then does the Court in *Jefferies* establish a "search or seizure" for the purposes of s 21 to be? Surprisingly, this issue is not directly addressed. No clear statement of principle is established. Although on other questions there is in *Jefferies* significant conflict in judicial approach, the approaches to the definition of "search or seizure" are congruent.

The judgment of Richardson J is of most note in that it does engage in some consideration of a definition of search and seizure, although, remarkably, Richardson J never directly addresses the question of the meaning of "search and seizure" for s 21. Most importantly, the essence of

⁵ *Optican* 1995 above n4, 297.

Richardson J's approach to search and seizure and to s 21 has become established. Richardson J initially appears intent on proceeding on first principles in his analysis of the correct approach to s 21. His Honour sets out "*The interpretation approach*" to the BORA, adopting the purposive approach mandated in *Flickinger v Crown Colony of Hong Kong* [1990-92]⁶ and *Noort v MOT* [1990-92].⁷ However, it is difficult to reconcile Richardson J's actual approach to s 21 with this earlier statement of principle.

Richardson J then, under the heading "*Search and seizure: common law and statute*", sets out definitions of search and seizure, stating that "A search is an examination of a person or property and a seizure is a taking of what is discovered."⁸ In one sense this is the established, common law definition, limiting search and seizure to person or property. However, the meaning differs in a critical respect from the common law, which requires an interference with person or property amounting to a trespass. Richardson J's definition is potentially much broader, its scope dependent on the interpretation of the word "examination". If a meaning extending beyond a trespassory interference is intended then Richardson J's definition diverges substantially from the common law meaning. The stronger argument is that Richardson J intended such divergence.

If this construction applies for the purposes of s 21 then it has major implications for the scope of that section. Plainly, any "examination of person or property" will be subject to s 21; anything not qualifying will not be. A "seizure" is predicated upon and limited by the existence of such "search". If "examination" is read broadly it becomes difficult to think of a state activity which would not be subject to s 21. However, this approach retains the traditional common law limitation to "person or property".

For what purpose does this definition apply? Richardson J's heading states: for "*common law and statute*". The critical question is whether "*statute*" includes the BORA. On "*The interpretation approach*" earlier mandated by Richardson it must follow that the BORA is excluded. However, Richardson J's consideration of s 21, after noting its derivation, turns directly to the question "*When is a search 'unreasonable'*".⁹ Thus, logically, "*search*" (and presumably "*seizure*") is taken, for the purposes of s 21, to have the meaning set out earlier.¹⁰ What is certain is that the definition of "search or seizure" for the purposes of s 21 is never directly addressed by Richardson J.

Indeed, the proposition that "in *R v Jefferies*, the Court of Appeal stated that, for purposes of the Bill of Rights, the term 'search' could encompass any violation of an individual's

⁶ *Flickinger v Crown Colony of Hong Kong* [1990-92] 1 NZBORR 1 (CA) [*Flickinger*].

⁷ *Noort v MOT* [1990-92] 1 NZBORR 97 (CA) [*Noort*].

⁸ *R v Jefferies* [1994] 1 NZLR 290 (CA) 300 per Richardson J [*Jefferies*].

⁹ *Jefferies* above n7, 301 per Richardson J.

¹⁰ *Jefferies* above n7, 300 per Richardson J.

'reasonable expectation of privacy'.¹¹ is difficult to support. Optican cites Richardson J's judgment in support of this proposition. However, that part of Richardson J's judgment cited is not concerned with the meaning of "search or seizure" but the "analysis of the guarantee under s 21". The 'reasonable expectation of privacy' inquiry is thus directed not to the determination of the existence of a "search or seizure" for s 21 but the question of whether this guarantee has been breached; to the 'unreasonableness inquiry' under s 21. Moreover, Richardson J is also concerned to emphasise that "the entitlement" affirmed by s 21 "is to be protected against unreasonable search or seizure", it is not an entitlement to "a 'reasonable expectation of privacy'".¹²

Richardson J's definition of "search" for s 21 and its relationship with "a 'reasonable' expectation of privacy" is made clear by his Honour's conclusion as to how an "assessment of whether a particular search is reasonable or unreasonable"¹³ should be undertaken. Richardson J states that "The starting point must be that any search *is* a significant invasion of individual freedom, that how significant it is will depend on the particular circumstances, and that there may be other values and interests including law enforcement which weigh in the particular case." This statement operates on the assumption that "search" has a clearly defined meaning (is constituted of certain specific activities), a consequence of which is that a "search *is* a significant invasion of individual freedom"[emphasis added] and thus may be an "unreasonable search or seizure" for s 21.

"[I]ndividual freedom" appears to be used as inclusive of and here equatable with the right to a reasonable expectation of privacy. However, Richardson J is not suggesting that something will be a "search" for s 21 if it invades a reasonable expectation of privacy. Richardson J states that "any search", determined on other criteria, will necessarily involve invasions of reasonable expectations of privacy, requiring an assessment of whether there is an "unreasonable search or seizure" for s 21.

On this construction, while any search or seizure will invade reasonable expectations of privacy and trigger s 21, such invasion of privacy is not determinative of the existence of a "search or seizure". Thus, an activity invading a reasonable expectation of privacy but not constituting a "search or seizure" will not be subject to s 21. Indeed, on this approach there is no actual inquiry under s 21 into whether there is a 'reasonable expectation of privacy', but only as to the degree of invasion.

Thus, Richardson J's judgment does not provide that a "search or seizure" for s 21 "encompass[es] any violation of an individual's 'reasonable expectation of privacy'".¹⁴ Rather,

¹¹ *Optican* 1996 above n1, 216.

¹² *Jefferies* above n7, 302 per Richardson J.

¹³ *Jefferies* above n7, 303 per Richardson J. This statement itself approaches "search" as having a clearly defined meaning, presumably that set out by Richardson J at page 300.

¹⁴ *Optican* 1996 above n1, 216.

the strongest argument is that Richardson J intends a “search or seizure” for s 21 to take the meaning his Honour establishes those words have for “*common law and statute*”.

However, Richardson J’s actual approach in *Jefferies* is to simply assume that the facts disclose a “search” for s 21 and to proceed directly to an inquiry into whether it was “unreasonable” for that section. The remaining judgments in *Jefferies* adopt the same basic approach, proceeding on the assumption that the officer’s actions amounted to a search for s 21 without stating the definition of search on which this is based. Thus Cooke P does not identify the question of whether the officer’s actions constituted a “search or seizure” for s 21 as an issue in applying s 21. Cooke P, without establishing the basis for his finding of a search for s 21, moves directly to consideration of the “reasonableness...[of the] search” for that section.¹⁵ The same approach is adopted by Casey, Hardie-Boys, Gault, McKay and Thomas JJ.

Clearly, the Court considered the finding that the officer’s actions constituted a “search” for section 21 was self-evident and therefore that no issue of whether there was a search for s 21 arose. However, given the Court’s recognition of the importance of *Jefferies* as a vehicle for establishing a principled approach to section 21,¹⁶ the absence of any direct consideration in *Jefferies* of the approach to the meaning of a “search or seizure” for s 21 is disappointing. *Jefferies* could be taken to suggest that the words “search or seizure” are of limited importance within s 21. Most importantly, however, *Jefferies*, and in particular Richardson J’s judgment, appears to provide that the words “search or seizure” within s 21 are not to be approached purposively.

I.ii Refinement of the *Jefferies* approach

The approach in *Jefferies*, particularly that of Richardson J, to the meaning of a “search or seizure” within s 21 has, with a few exceptions, been adopted and refined in subsequent cases.

Richardson J’s definition of ‘search’ and ‘seizure’ in *Jefferies*¹⁷ has become established, although on a narrow interpretation of Richardson J’s words. The necessary corollary of this has been the largely implicit rejection of a purposive approach to the meaning of “search or seizure” within s 21. Thirdly, the rule that the existence of a “search or seizure” for s 21 can be ‘assumed’ has also been developed.

In *R v A* [1994] 1 NZLR (CA) the Court had to consider whether participant recording of conversations was a “search or seizure” for s 21. Richardson J affirms the definitions of “search” and “seizure” his Honour established in *Jefferies*. However, Richardson J then sets out two possible interpretations of his words: “On one view there is no search unless there is a trespass against a person or property...no seizure unless physical evidence is obtained [the

¹⁵ *Jefferies* above n7, 295 per Cooke P.

¹⁶ *Jefferies* above n7, 299 per Richardson J.

¹⁷ *Jefferies* above n7, 302 per Richardson J.

common law definition]...The opposite view is that looking and listening are forms of search and the use of mechanical aid is a particular form of such search; and what is seen or heard is a product of the search which in the case of speech may be seized whether by being committed to memory or captured in a recording.”¹⁸

However, Richardson J gives no indication of which interpretation is to apply for s 21. Rather, leaving the meaning of “search or seizure” open, there is a shift of focus. After noting that “Restraints on search and seizure reflect an amalgam of values: property, personal freedom, privacy and dignity.”, Richardson J states that “the crux of the inquiry under s 21 is whether the intrusion was unreasonable.”¹⁹

Richardson J’s statement of the values underlying s 21 repeats his Honour’s words in *Jefferies* and might be suggested to support a purposive approach “search or seizure” for s 21. Further, Richardson J notes, “It is not surprising that American and Canadian Courts alike have emphasised privacy values underlying the protective constitutional provisions and have held the interception and recording of conversations to be within their broad reach”²⁰. However, while these statements might support a purposive approach (centred on privacy values) to s 21 generally they do not establish this as the approach to the meaning of “search or seizure” for that section.

Indeed, it is not suggested that this is the American or Canadian approach, only that those jurisdictions have held the specific activity to be within the reach of their constitutional provisions. Moreover, Richardson J does not state that this is the case in New Zealand. Rather, as McKay J later notes, “The judgment appears to assume that the recording of a conversation could fall within the words ‘search or seizure’, and to focus rather on the question whether in the particular case the intrusion was ‘unreasonable.’”²¹ Thus, Richardson J’s judgment affirms his Honour’s approach to “search and seizure” in *Jefferies*, with one important difference: it establishes that the definition set out in *Jefferies* may in fact be limited to the common law meaning.

Casey J’s judgment, one of the few exceptions to the dominant approach in the Court,²² will be discussed below.

Robertson J, like Richardson J, reaches no finding on whether the electronic surveillance in *R v A* constitutes a search or seizure for s 21. His honour notes that having read the conclusions of Richardson and Casey JJ, “in the circumstances of the case” he does “not dissent from

¹⁸ *R v A* [1994] 1 NZLR 429 (CA) 433 per Richardson J [*R v A*].

¹⁹ *R v A* above n17, 433 per Richardson J.

²⁰ *R v A* above n17, 433 per Richardson J.

²¹ *R v Barlow* (1996) 2 HRNZ 635 (CA) 684 per McKay J [*Barlow*].

²² Adopting to some extent a purposive interpretation of “search or seizure”.

them”.²³ Also like Richardson J, Robertson J accepts in principle that “the Bill of Rights should be given a purposive interpretation”. However, Robertson J does not state that the meaning of a “search or seizure” for s 21 is to be determined purposively. Indeed, his Honour does not apply this interpretative approach to s 21 to any extent. Rather, without establishing any possible definition of “search or seizure” for s 21, Robertson J adopts explicitly the approach Richardson J follows by inference, namely; “assuming that ‘search and seizure’ could include electronic surveillance”²⁴ and proceeding to consider whether it was unlawful and “more pertinent[ly]...unreasonable.”²⁵

Queen Street Backpackers Ltd v Commerce Commission (1994) 2 HRNZ 94 (CA), like *R v A* concerned with participant recording, does nothing to advance the meaning of “search or seizure” for s 21. Casey J, delivering the judgment of the Court, simply noted that, as in *R v A*, the recording “did not constitute an unreasonable search or seizure.”²⁶

R v Barlow (1996) 2 HRNZ 635 (CA), also concerned with participant recording, has been held to have “called into doubt the broad notion of search [as any violation of an individual’s ‘reasonable expectation of privacy’] adopted in earlier Bill of Rights’ cases.”²⁷ On the above analysis it is difficult to support the proposition that the Court of Appeal had by *Barlow* adopted any such notion of search. Rather, the judgments indicate the Court of Appeal was at best hesitant about adopting such an approach.

In fact, rather than calling into doubt such a notion of “search or seizure” the majority in *Barlow* provide two of the main (albeit limited) statements supporting such a notion in the Court of Appeal.²⁸ These exceptions to the dominant approach in the Court of Appeal will be discussed below. However, these statements in *Barlow* are limited and, in the case of Hardie-Boys J (Cooke P concurring), obiter. Hardie-Boys J in fact adopts the approach of Robertson and Richardson JJ in *R v A*; assuming the activity was a “search or seizure” for s 21 and proceeding directly to the “unreasonableness” question.²⁹

Richardson J implicitly affirms his Honour’s judgment in *R v A*, simply noting that “In *R v A* this Court accepted that participant recording...could constitute search and seizure within s 21. The crux of an inquiry under the section is whether the intrusion was unreasonable.”³⁰

²³ *R v A* above n17, 446 per Robertson J.

²⁴ *R v A* above n17, 446 per Robertson J.

²⁵ *R v A* above n17, 448 per Robertson J.

²⁶ *Queen Street Backpackers Ltd v Commerce Commission* (1994) 2 HRNZ 94 (CA) 98 per Casey J [*Backpackers*].

²⁷ *Optican* 1996 above n1, 216.

²⁸ The other is *R v Dodgson* (1996) 2 HRNZ 300 (CA) 303 per Eichelbaum CJ [*Dodgson*].

²⁹ *R v Barlow* (1996) 2 HRNZ 635 (CA) 667 per Hardie-Boys J [*Barlow*].

³⁰ *Barlow* above n28, 659 per Richardson J.

McKay J, after reviewing the law, accepts in principle that “s 21...express[es] privacy values” and that “in their context the words [of s 21] must be given a ‘fair, large and liberal’ interpretation”, yet then appears to reject such an interpretation of “search or seizure”. Without deciding, his Honour seems to prefer Richardson J’s definition in *R v Jefferies* and *R v A*., namely, “‘A search is an examination of a person or property and a seizure is a taking of what is discovered.’” Moreover, McKay J’s earlier statement displays a preference for the narrow view of Richardson J’s definition,³¹ McKay J noting; “If the words are read in their ordinary meaning, ‘search’ refers to the search of a person...or of some physical thing...[and] ‘Seizure’ also suggests something physical...The words ‘search or seizure’ do not seem apt to cover the recording of conversations.”³²

The Court’s actual approach to s 21 is therefore unanimous, proceeding on the assumption that participant recording is a “search or seizure” to consider the question of “unreasonableness”.

R v Faasipa (1996) 2 HRNZ 50 (CA) simply establishes that “The taking of blood [samples] may be seen as a search; its subsequent use must certainly be seen as a seizure.”³³ Thus, while the specific class of activity involved in *Faasipa* is identified as “search or seizure” for s 21, the definition this finding is based on is not stated. However, the direction of the question of intrusion on privacy to the assessment of whether the “search or seizure” was “unreasonable” and absence of any suggestion that it determines the existence of a “search or seizure” indicate application of Richardson J’s definition.³⁴

This approach is adopted in *R v L* (1996) 13 CRNZ 413 (HC), Anderson J assuming that “unreasonable search of communications” constitutes a “search” for s 21.³⁵

Similarly, *R v Wong-Tung* (1996) 2 HRNZ 272 (CA), which concerned police use of a device which recorded the time and number of any call made to or from a particular telephone, does not address the definition of “search or seizure”. McKay J, noting that “This Court has yet to decide whether the words ‘search or seizure’ can properly be applied to something intangible”³⁶, likewise draws no conclusion by adopting a variation on the earlier ‘assumed “search or seizure” approach’.³⁷ McKay J states; “It is unnecessary in the present case to decide these questions, as even if the words ‘search or seizure’ can apply to the information obtained by the telephone analyser, the action of the police in the circumstances of this case could hardly be described as unreasonable.”³⁸

³¹ *R v A* above n17, 433 per Richardson J.

³² *Barlow* above n28, 683 per McKay J.

³³ *R v Faasipa* (1996) 2 HRNZ 50 (CA) 55 per Hardie-Boys J [*Faasipa*].

³⁴ *R v A* above n17, 433 per Richardson J.

³⁵ *R v L* (1996) 13 CRNZ 413 (HC) 418 per Anderson J [*R v L* 1996].

³⁶ *R v Wong-Tung* (1996) 2 HRNZ 272 (CA) 274 per McKay J [*Wong*].

³⁷ *R v A* above n17, 446 per Robertson J.

³⁸ *Wong* above n35, 274 per McKay J.

The approach in *Wong* is applied in *R v Turner* [1996] DCR 278 (DC), Judge G A Rea noting that "In common with the Court of Appeal in both *R v A* and *Barlow* [and *Wong*] it is not actually necessary for me to determine whether the videotaping, photographing and observations that went on in this case amount to search and seizure...[as] Even if it was held that what was done amounted to a search and seizure, then in my view such search and seizure could not be said to be unreasonable."³⁹

Notably, Judge Rea also reviews the Court of Appeal's approach to search and seizure and explicitly adopts Richardson J's definition in *R v A*, stating, "in broad terms a search is an examination of a person or property and a seizure is the taking of what is discovered." Applying that definition, Judge Rea notes "I would find it difficult to fit videotaping, photographing and personal observations into those concepts...[and] did not amount to search and seizure".

Consistent with this, *Turner* also adopts the dominant Court of Appeal approach in directing the question "Did the police conduct infringe a reasonable expectation of privacy?" not to the determination of a "search or seizure" for s 21 but to whether "such search and seizure...[was] unreasonable."⁴⁰ Similarly in *Frost v Police* [1996] 2 NZLR 716 (HC) Goddard J proceeds directly to consider "The reasonableness of the search"⁴¹

R v Grayson & Taylor [1997] 1 NZLR 399 (CA) likewise applies the broad common law based definition of Richardson J.⁴²

The definition of "search or seizure" for s 21 received substantial consideration in *R v Fraser* [1997] 2 NZLR 442 (CA), Gault J delivering the judgment of a bench of five of the Court of appeal on whether video surveillance constituted a search or seizure.

Drawing on New Zealand, Canadian and United States case law and on the *White Paper*, Gault J's primary conclusion in *Fraser* is that these authorities disclose no real direction as to the correct approach to the definition of "search or seizure" for s 21 and no definition is explicitly stated.

Rather, *Fraser* firmly establishes the approach followed in *Jefferies* as an operative assumption and subsequently developed. The rule is that, "In most, and perhaps all, cases where the conduct of the authorities is determined to be reasonable it will not be material to decide whether or not there has been search or seizure." Gault J notes, "That is the view we

³⁹ *R v Turner* [1996] DCR 278 (DC) 285 per Judge Rea [*Turner*].

⁴⁰ *Turner* above n38, 285 per Judge Rea.

⁴¹ *Frost v Police* [1996] 2 NZLR 716 (HC) 725 per Goddard J [*Frost*].

⁴² *Jefferies* above n7, 300 per Richardson J; *R v A* above n17, 433 per Richardson J.

have reached in this case.”⁴³ Specifically, “Because the conduct of the police in this case was not unreasonable, it is not necessary to make any finding as to whether the video surveillance in the circumstances constituted a search.”⁴⁴

However, Gault J notes, “there will be cases in which it will be necessary to determine whether what is complained of amounts to a search.” Gault J therefore sets out a possible approach for such cases. The starting point is held to be Richardson J’s statement in *Jefferies*, “repeated in *Grayson*...that in broad terms a search is an examination of a person or property.” followed by ordinary usage and corresponding dictionary meanings. The definition of ‘search’ in “legal contexts [being]...an examination or investigation for the purpose of obtaining evidence.” is stated, and “the references in *Black’s Law Dictionary*”. It is noted that this latter definition includes a description of “search ‘in the constitutional sense’ as visual observation which infringes upon a person’s reasonable expectations of privacy.”

Fraser does not explicitly state the definition of “search or seizure” for s 21, thus leaving open the possibility of a purposive definition based on the invasion of reasonable expectations of privacy. However, *Fraser* indicates that adoption of such an approach is unlikely. Gault J’s discussion of the definition of a ‘search’ favours Richardson J’s definition in *R v A*, ordinary usage and broad dictionary definitions.

Further, Gault J’s discussion concludes by emphasising that in *Dodgson* Eichelbaum CJ wrongly cites Richardson J’s judgment in *Jefferies* in support of Eichelbaum CJ’s adoption of a definition of search based on infringement of privacy. Gault J notes that, “In *R v Jefferies* the reasonable expectation of privacy was referred to rather as going to the reasonableness of a search than to whether or not the conduct constituted a search”.⁴⁵ Thus *Fraser* contains the implicit direction that Richardson J’s definition of “search or seizure” for s 21 first stated in *Jefferies* is to be preferred.

It is this direction which subsequent cases have taken from *Fraser*. In *Horne v Police* (1997) 3 HRNZ 510 (HC) Doogue J states that “there was no search...for the purpose of obtaining evidence in the manner in which the topic is addressed in...*Fraser*.”⁴⁶ Read with the statement that, “The appellant could not assert any reasonable expectation of privacy over the vehicle so as to claim that the search, if it was one...was an unreasonable intrusion into his privacy interests”,⁴⁷ the adoption of the implicit direction in *Fraser* seems clear.

In *R v Gardiner* (1997) 4 HRNZ 7 (CA) Blanchard J affirms the approach established in *Fraser*, stating, “We proceed therefore (like the Court in *Fraser*) on the assumption that what

⁴³ *R v Fraser* [1997] 2 NZLR 442 (CA) 449 per Gault J for the Court [*Fraser*].

⁴⁴ *Fraser* above n42, 452.

⁴⁵ *Fraser* above n42, 450.

⁴⁶ *Horne v Police* (1997) 3 HRNZ 510 (HC) 512-513 per Doogue J [*Horne*].

⁴⁷ *Horne* above n45, 513 per Doogue J.

occurred was a search but leaving that question open” to consider “the issue of unreasonableness”.⁴⁸ Blanchard J also directs “reasonable expectations of privacy” to the “unreasonableness” analysis.⁴⁹

The basis on which *Gardiner* finds there was no “unreasonable search or seizure” is noteworthy. While accepting “prolonged video surveillance of private parts of an occupied residential property involved ‘high privacy values’”, *Gardiner* emphasises that “no trespass occurred and there was nothing unlawful in undertaking surveillance in this way.”⁵⁰ The approach in *Gardiner* to s 21 would appear to be directed by traditional common law notions of search and seizure. The dominance of such notions is consistent with the Court of Appeal’s approach to “search and seizure” for s 21 discussed above.

Finally, *Gardiner* explicitly adopts the general approach to s 21 that the Court of Appeal has previously applied, namely, “Pending legislation on the topic, the Courts must rule on a case by case basis.”⁵¹ Why this approach, with respect, cannot be correct is discussed in part II of this paper.

Fraser and *Gardiner* have subsequently been adopted and applied in *R v Bradley* (1997) 4 HRNZ 153 (CA),⁵² *R v Burke* [1998] DCR 680 (DC) and *R v L* (1998) Unreported T277-97 (HC).⁵³

Morunga v Police (1998) Unreported AP27-98 (HC) has held that opening the door of a vehicle and inspecting the windscreen is not a “search” for s 21 but only an inspection or examination. *Morunga* therefore indicates the adoption by the courts of the narrow reading of Richardson J’s definition in *R v A*; essentially the common law definition. *Morunga* also reiterates the rule in *Gardiner* that the existence of a search is to be determined in the particular case as a “question of fact.”⁵⁴

Most recently, *R v Pointon* (1999) Unreported CA227/98 (CA) has applied *Fraser* and *Grayson*. Elias J concludes that as a “‘seizure’ is generally a taking of what is discovered upon a search.”, “It may be doubted whether the removal” of a car from the roadside to a police station without the consent but with the knowledge of the occupants “was indeed a ‘seizure’ within the meaning of s 21.”⁵⁵ Elias J also directs the question of “reasonable expectations of

⁴⁸ *R v Gardiner* (1997) 4 HRNZ 7 (CA) 11 per Blanchard J [*Gardiner*].

⁴⁹ *Gardiner* above n47, 12 per Blanchard J.

⁵⁰ *Gardiner* above n47, 12 per Blanchard J.

⁵¹ *Gardiner* above n47, 13 per Blanchard J.

⁵² *R v Bradley* (1997) 4 HRNZ 153 (CA) 161 per Thomas J [*Bradley*].

⁵³ *R v L* (1998) Unreported T277-97 (HC) 22-23.

⁵⁴ *Morunga v Police* (1998) Unreported AP27-98 (HC) 5 [*Morunga*].

⁵⁵ *R v Pointon* (1999) Unreported CA227/98 (CA) 5 per Elias J for the Court [*Pointon*].

privacy”⁵⁶ to determination of the unreasonableness of a “search or seizure”.

I.iii Support for a purposive interpretation

As noted above, there are a few statements in the Court of Appeal which to a varied extent depart from the dominant approach and support a purposive approach to the meaning of a “search or seizure” for s 21.

The first is Casey J’s statement in *R v A* that, “In the light of the persuasive United States and Canadian authorities, I am satisfied that ‘search or seizure’ should be given a similar extended meaning in our Act, to cover the infringement of reasonable expectations of privacy by electronic listening devices. That was clearly anticipated in the White Paper on the Bill of Rights (1985), with its reference at p 105... to unjustified intrusion on an individual’s privacy, extending not only to the interception of mail, ‘but also to the electronic interception of private conversations, and other forms of surveillance.’”⁵⁷

In *Barlow*, Hardie-Boys J (Cooke P concurring) stated that while “eavesdropping [on a conversation] without the consent of any of the participants...may well be a search”, “participant recording” is not as it “raises no issues of privacy or property rights, which are the values underpinning s 21”⁵⁸ However, this statement provides only limited general support for a purposive approach to “search and seizure”. It does not identify the primacy of privacy rights, maintaining that “property rights” are equally important. More importantly, the statement is obiter, the judgment adopting the dominant approach that the existence of a “search or seizure” can be assumed. Finally, the specific finding that participant recording is not a “search or seizure” adopts a restricted application of the purposive definition suggested. Indeed, Hardie-Boys J’s statement that “the concept of words being ‘seized’ is beyond my grasp” might suggest a preference for a common law definition.

Gault J’s judgment in *Barlow* provides clearer support, stating that something is not a “search or seizure” unless it “amounts to intrusion into privacy”. However, like Hardie-Boys J, Gault J adopts a limited approach to this definition, noting that participant surveillance does not qualify. Indeed, Gault J does not state what would qualify, although he suggests that this test may be satisfied “where premises are entered and visual or aural recording devices concealed so that subsequent conduct and discussions may be intruded upon unknowingly or where sophisticated listening and viewing equipment is employed from a distance”.⁵⁹

The most recent statement, of Eichelbaum CJ in *Dodgson* is more limited than those in *R v A* and *Barlow*. While Eichelbaum CJ establishes that “the reasonable expectation of privacy, from

⁵⁶ *Pointon* above n54, 6-8.

⁵⁷ *R v A* above n17, 440 per Casey J.

⁵⁸ *Barlow* above n28, 667 per Hardie-Boys J.

⁵⁹ *Barlow* above n28, 674 per Gault J.

an objective viewpoint” is one “general factor” in determining whether there has been a “search or seizure” for s 21 it is not stated to be determinative. Indeed, Eichelbaum CJ in fact states that the “starting point” in determining that there was no “search or seizure” in *Dodgson* is that “No intrusion occurred”.⁶⁰ Common law notions therefore remain important.

Statements of support for a purposive interpretation of “search or seizure” within s 21 have not only been rare but have also been more or less limited in scope.

I.iv The dominant approach

The current approach of the Court of Appeal to the meaning of “search or seizure” for s 21 is stated in *Fraser and Gardiner*, which establish that the meaning of those words remains, in principle, open. However, the judgments in those cases implicitly reject a purposive approach to “search or seizure” for s 21, preferring the common law based definition set out originally by Richardson J in *Jefferies*. Moreover, subsequent cases make clear, explicitly⁶¹ or implicitly,⁶² that the narrow interpretation of that definition established in *R v A*, (essentially the common law definition) is adopted.

It has been stated that the Court of Appeal initially adopted a purposive approach to the definition of “search or seizure” for s 21,⁶³ (or at least seemed to support such an approach)⁶⁴ from which the Court then retreated in favour of a common law based definition. However, the analysis undertaken above does not support these conclusions. Rather, the essential features of the dominant approach in the Court to “search or seizure” were laid in *Jefferies* and then applied and developed in subsequent cases, including *Fraser and Gardiner*.

There are two main aspects to this approach. The first, practical adoption of Richardson J’s common law based definition has been mentioned. The rejection of a purposive interpretation implicit in this is reinforced by the Court’s direction of a ‘reasonable expectation of privacy’ test to the determination of whether a given “search or seizure” is “unreasonable”.

The second is the rule that the existence of a “search or seizure” can be assumed, restated in *Fraser* as the rule that in many cases the existence of a search or seizure will not have to be determined. More generally, the necessary result of not establishing a definition of “search or seizure” is that the Court’s approach has proceeded on a case by case basis. *Gardiner* has now established that this approach will only be altered by Parliamentary intervention.⁶⁵ With respect, this approach is wrong.

⁶⁰ *Dodgson* above n27, 303 per Eichelbaum CJ.

⁶¹ *Barlow* above n28, 683 per McKay J.

⁶² *Turner* above n38, 285 per Judge Rea; *Pointon* above n54, 5.

⁶³ *Optican 1996* above n1, 216.

⁶⁴ *Adams* above n3, 909.

⁶⁵ *Gardiner* above n47, 13 per Blanchard J.

Part II The definition of “search or seizure” for the purposes of section 21

II.i A purposive interpretation

The first issue in the interpretation of the right guaranteed by s 21 is the meaning of the words “search or seizure” within that section. The interpretative approach to the BORA is well established. As Richardson J noted in *Noort*, “in interpreting and applying the Act [BORA] it is important to consider the nature and subject matter and special character of the legislation.” In particular, affirming *Flickinger*, “the statement in Part II of civil and political rights is in broad and simple language...It calls for a generous interpretation suitable to give individuals the full measure of the fundamental rights and freedoms referred to.”⁶⁶

Thus Richardson J adopts “A purposive approach to the interpretation of the Bill of Rights” requiring “the identification of the particular right.” This is because “The Bill’s guarantees are cast in broad and imprecise terms and the identification of the object of the particular right allows for the inclusion within its scope of conduct that truly comes within that purpose and the exclusion of activity that falls outside”.⁶⁷

Richardson J earlier noted that the BORA contains “limitations on the absoluteness and generality of the rights and freedoms affirmed in the Act” reflecting “membership of society...duties to other individuals and to the community.” Although the only limitation on most of the rights and freedoms guaranteed in the BORA is imposed by the “general governing provision...s 5”, Richardson J also notes that “In a few instances the statement of the broad right contains its own limitation eg the right to be secure against ‘unreasonable’ search or seizure (s 21)”.⁶⁸

Section 21 therefore requires a two-stage analysis. The first stage in an analysis of s 21, like every provision in part II of the BORA, “calls for a generous [purposive] interpretation suitable to give individuals the full measure of the fundamental [right]...referred to.”⁶⁹ This stage of the analysis is not concerned with the limitation on the right guaranteed by s 21 but with the broadest scope of that right, determined through “identification of the object of the particular right”. Unless the nature and extent of the right guaranteed by s 21 is first established there is nothing the limitation in s 21 can be applied to. Plainly, the first stage in the analysis and application of s 21 is the meaning of the words “search or seizure” within that section.

It could be said that this approach is so plainly required that explicit adoption is unnecessary. The dominant approach in the Court of Appeal, however, has implicitly rejected a purposive approach to the meaning of “search or seizure” for s 21 in favour of a common law-based

⁶⁶ *Noort* above n5, 151 per Richardson J.

⁶⁷ *Noort* above n5, 153 per Richardson J.

⁶⁸ *Noort* above n5, 151-152 per Richardson J.

⁶⁹ *Noort* above n5, 151 per Richardson J.

approach.

With respect, this approach is clearly wrong. The words “search or seizure” in s 21 must be purposively interpreted as the first stage in a s 21 analysis. This establishes the broad reach of s 21; what is subject to s 21 and will be in breach of that section if “unreasonable”. This approach is logical; any activity which does not implicate the right guaranteed by s 21 can be engaged in by those subject to the BORA without triggering s 21. This allows s 21 to fulfil its core function, the regulation of state activities which intrude on the right guaranteed by s 21.

To determine the meaning of a “search or seizure” for s 21 the purpose of the right guaranteed by s 21 must first be established. In *Jefferies* Richardson J, addressing the question “When is a search ‘unreasonable’”, stated that “the right...[guaranteed by s 21] reflects an amalgam of values: property, personal freedom, privacy and dignity.”⁷⁰

However, Thomas J held that “Essentially, s 21 is concerned to protect those values or interests which make up the concept of privacy. Privacy connotes a variety of related values; the protection of one’s property against uninvited trespass; the security of one’s person and property, particularly against the might and power of the state; the preservation of personal liberty; freedom of conscience; the right of self-determination and control over knowledge about oneself and when, how and to what extent it will be imparted; and recognition of the dignity and intrinsic importance of the individual”.⁷¹ Finally, in *Barlow Hardie-Boys* J (Cooke P concurring) stated, “privacy or property rights...are the values underpinning s 21”.⁷²

Excepting Thomas J’s statement, this might suggest that s 21 provides “a general guarantee against the deprivation of property”. However, as Butler has noted, “such a broad role for the provision is inappropriate.” Rather, “the absence of reference to the right to property yet the constant reference [in the *White Paper*] to privacy indicates that privacy is the true focus of s 21 and that a person intent on invoking that provision must demonstrate the presence of some such interest before the section is triggered.”⁷³

That the purpose of the right guaranteed by s 21 is to protect the privacy of the individual is clear. The *White Paper* discusses the correct approach to Article 19 of the draft Bill (identical to s 21) in paragraphs 10.144 to 10.161. The purpose of s 21 is made clear in paragraph 10.144, which states, “Freedom from unreasonable search and seizure is an aspect of the privacy of the individual.”

This is reinforced in paragraph 10.152 which notes, “The purpose of the Bill is to apply the

⁷⁰ *Jefferies* above n7, 302 per Richardson J.

⁷¹ *Jefferies* above n7, 319 per Thomas J.

⁷² *Barlow* above n28, 667 per Hardie-Boys J.

⁷³ Andrew Butler “The scope of s 21 of the New Zealand Bill of Rights Act 1990: Does it provide a general guarantee of property rights?” [1996] NZLJ 54, 63.

protection against unreasonable search or seizure not only to acts of physical trespass but to circumstances where state intrusion on an individual's privacy in this way is unjustified." The *White Paper* makes clear, therefore, that the first question under s 21 is whether there has been "state intrusion on an individual's privacy" and therefore a "search or seizure" for s 21. Only after establishing this does the question of whether it "is unjustified" ("unreasonable" within s 21) arise.

The purposive interpretation of "search or seizure" for s 21 this mandates is: any state action which constitutes an intrusion on individual privacy. This is supported by paragraph 10.156 of the *White Paper*, which discusses the Canadian approach to s 8 of the *Charter*, wherein 'unjustified state intrusions on...[individual] privacy' and 'unjustified searches' are equated.

The question this raises is; how is it to be determined that a particular state activity is an intrusion on individual privacy? Although the *White Paper* provides no explicit statement, it clearly directs that the approach adopted by the Canadian Supreme Court to s 8 of the *Charter* in *Hunter v Southam* (1984)⁷⁴ is to be adopted for s 21. Thus paragraph 10.157 states, "A similar approach to Article 19 [s 21] by the New Zealand courts is likely." Even without such explicit direction Canadian s 8 jurisprudence is relevant to the interpretation of s 21, given that section 21 adopts the precise words of the *Charter*, with the addition of the words "whether of the person, property, or correspondence or otherwise."

It could not be suggested that the inclusion of those additional words justifies the Court of Appeal's rejection of a purposive approach to "search or seizure" within s 21. The *White Paper* makes clear that those words were included to ensure that the application of the protection in s 21 would be purposive and not limited by a common law approach to "search or seizure". Thus paragraph 10.152 states that s 21 "should extend not only to the interception of mail, for example, but also to electronic interception of private conversations, and other forms of surveillance."

The *White Paper* refers to a "reasonable expectation of privacy" test in the context of paragraphs discussing the Canadian approach to the question of whether a given search is unreasonable or not. This could be said to lend support to the Court of Appeal's direction that this test is properly part of the 'unreasonableness' assessment under s 21 and not the determination of a "search or seizure". However, as will be discussed, the term 'reasonable expectation of privacy' is used in *Hunter* and subsequent Canadian cases in a fundamentally different way to the limited formulation adopted in *Jefferies* and subsequent Court of Appeal decisions.

Given the origins of s 21 and the statements in the *White Paper*, the adoption by the Court of Appeal of an approach to s 21 which differs fundamentally from the Canadian Supreme Court's approach to s 8 of the *Charter* cannot, with all respect, be supported. The roots of this

⁷⁴ *Hunter v Southam* (1984) 11 DLR 4th 641 (SCC) per Dickson J for the Court [*Hunter*].

difference in approach are clearly in the legal status of the BORA, as Richardson J notes, enacted as “an unentrenched statement of rights which does not override inconsistent legislation”. Given this, it would be true to state that in practice s 21 will “play a different role” in New Zealand to that played by s 8 in Canada.⁷⁵

However, the fact that s 21 does not override inconsistent legislation does not affect the approach to be adopted to the meaning of a “search or seizure” for that section. It cannot justify the adoption by the Court of Appeal of an approach which differs fundamentally from that intended by the drafters of the section enacted by Parliament. It does not diminish the importance of Canadian (and United States) jurisprudence to the interpretation of s 21 which, given the legislative history of s 21, would seem highly persuasive.

II.ii “Search or seizure”: the invasion of a reasonable expectation of privacy

In Canada and the United States, the definition of a “search” or “seizure” as any activity that invades a reasonable expectation of privacy is a necessary element of the principled approach in those jurisdictions to s 8 and the 4th Amendment. The approach of the Canadian Supreme Court was established in *Hunter*, which adopted the general purposive approach of the United States Supreme Court to the Fourth Amendment in *Katz v United States* (1967)⁷⁶ in concluding that the guarantee in s 8 at least protects “the right to privacy”. The key passage of Dickson J, who delivered the judgment of the Court in *Hunter* is quoted by Richardson J in *Jefferies*. Dickson J states,

“The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from ‘unreasonable’ search or 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 government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement.”⁷⁷

In apparent reference to this passage, Richardson J notes in *Jefferies* that “reading s 21 literally the entitlement it affirms is to be protected against unreasonable search or seizure. That is not the same as a ‘reasonable’ expectation of privacy. It would be the same if one could ignore the interests of society as a whole or the interests of anyone other than the person whose privacy is affected.”⁷⁸ Richardson J therefore rejects the construction and role of the “‘reasonable’ expectation of privacy.” test described in *Hunter*.

⁷⁵ *Jefferies* above n7, 299-300 per Richardson J.

⁷⁶ *Katz v United States* (1967) 389 US (USSC) [*Katz*].

⁷⁷ *Hunter* above n73, 652-653 per Dickson J.

⁷⁸ *Jefferies* above n7, 302 per Richardson J.

Richardson J states that for s 21 the test is; whether in the particular circumstances of the case the expectations of privacy of “the person...affected” were objectively “reasonable”. Moreover, Richardson J established in *Jefferies* that this test is simply one element in the determination of “unreasonableness” for s 21 and, impliedly, did not determine the existence of a “search or seizure”.

The “reasonable expectation of privacy” test in *Hunter* is fundamentally different. It is critical that it is, as Dickson J states, synonymous with an “unreasonable search or seizure”. Far from focusing on “the person whose privacy is affected” and ignoring “the interests of society as a whole” the test is not concerned with the expectations of a specific individual but with the expectations of the individual in a generic sense as a member of society.

Although *Hunter* does not explicitly state the meaning of a “search or seizure” for s 8, this meaning follows unavoidably from the Court’s purposive approach to s 8. Central to this approach is the adoption of the principle established in *Katz*, that an unauthorised “search” or “seizure” is subject to a “presumption of unreasonableness” for s 8. This establishes the definition of a “search or seizure” for s 8 as; an activity which invades the individual’s ‘reasonable expectation of privacy’. This definition is central to the approach *Hunter* establishes to s 8.

The approach in *Hunter* is based on a two-stage “reasonable expectation of privacy” test. The critical focus of both stages is whether a particular class of state activity invades the “‘reasonable’ expectation of privacy” of the ‘individual’ as a legal and social entity. The question is not whether a specific state action invades a particular individual’s ‘reasonable expectation of privacy’.

The first stage in this “reasonable expectation of privacy” test is the question of whether an activity constitutes a “search or seizure” for s 8. As noted, an activity will constitute a “search or seizure” for s 8 if it invades the ‘reasonable expectation of privacy’ of the individual. This is superficially similar to the formulation of Richardson J.⁷⁹ The fundamental difference is that the test in *Hunter* is focused on the identification (and thereby regulation) of categories of state activity which invade ‘the individual’s’ reasonable expectation of privacy, not the identification of specific state actions which have invaded a specific individual’s privacy. It is the function of this stage of the test in *Hunter* to give individuals the ‘full measure’ of their right to privacy under s 8.

It is the role of the second stage of this test to give effect to the limitation on the individual’s right to privacy in s 8 (and s 21) imposed by the word “unreasonable”. Inclusion of this word recognises the legitimacy of imposing limitations on the individual’s ‘reasonable expectations’ under the first stage of the test, thereby establishing the parameters of the individual’s “‘reasonable’ expectation of privacy” (“unreasonable search or seizure”) for s 8.

⁷⁹ *Jefferies* above n7, 302 per Richardson J.

Thus, although where a “search or seizure” is established for s 8 an individual will by definition have a ‘reasonable expectation of privacy’, whether this is in fact a “‘reasonable’ expectation of privacy” for s 8 is a separate question. Under *Hunter* it is this latter analysis which gives effect to the limitation in s 8 on the right guaranteed, recognising “Individual freedoms are necessarily limited by membership of society.” It is this latter analysis Dickson J refers to in the passage quoted above.

Hunter therefore establishes that the individual may rely on the constitutional protection of section 8 against any activity which intrudes on a reasonable expectation of privacy. However, an individual will only have a “‘reasonable’ expectation of privacy” for s 8 when it is determined on a balancing of the competing interests that the individual’s interest in privacy should prevail (that the state intrusion is unjustified).

As *Hunter* states, the critical question is “*When is the balance of interests to be assessed?*”⁸⁰ The answer in *Hunter* is summarised in paragraph 10.156 of the *White Paper*, which states, “Such assessment could be made after the search has been conducted, but the purpose of s. 8 is to protect individuals from unjustified state intrusions upon their privacy, which requires a means of preventing unjustified searches before they happen. The court held, therefore, that this purpose could only be accommodated by a system of prior authorisation, not one of subsequent validation.” Indeed, *Hunter* emphasises that “a *post facto* analysis would...be seriously at odds with the purpose of s. 8.”

Therefore, although *Hunter* recognises that there will in practice be a balancing of the interests of state and individual in the specific case, *Hunter* also establishes that this balancing will not take place under s 8. *Hunter* establishes that the primary role of s 8 is to ensure that any law authorising an activity constituting a “search or seizure” for s 8 complies with s 8. Section 8 requires such a law to provide sufficient means for the required balancing of interests to take place as a prerequisite to the undertaking of a “search or seizure” in any particular case.

In this context *Hunter*’s two-stage “reasonable expectation of privacy” analysis is clear. Where an activity invades the individual’s ‘reasonable expectation of privacy’ it is a “search or seizure” for s 8. However, where a law authorising a “search or seizure” for s 8 complies with s 8 and the authorising law is complied with in the particular case, the specific “search or seizure” for s 8 will not be an “unreasonable search or seizure” for s 8. In other words, although the individual’s ‘reasonable expectation of privacy’ will be intruded upon by activity constituting “search or seizure” (triggering s 8), where that activity is authorised in accordance with s 8 the individual does not have a constitutionally protected “‘reasonable’ expectation of privacy” for the purposes of s 8.

However, as noted in paragraph 10.157 of the *White Paper*, “The court recognised that it may

⁸⁰ *Hunter* above n73, 653 per Dickson J.

not be reasonable in every instance to insist on prior authorisation by judicial warrant in order to validate governmental intrusions upon an individual's expectation of privacy....[rather] search without warrant is prima facie unreasonable and the court would require the party seeking to justify such search to rebut this presumption of unreasonableness."

Richardson J, citing the later cases of *R v Collins* (1987) 33 CCC 3(d) 1 and *R v Kokesch* (1990) 61 CCC 3(d) 207, has noted that "The Canadian Courts have...[now] taken the view that conformity with the law is an essential element of reasonableness with the result that a search will be reasonable if and only if it is authorised by the law".⁸¹ However, while it might be argued that this change to the approach in *Hunter* should not be adopted for s 21 as this would be contrary to the intention of the drafters of s 21, it cannot justify the Court of Appeal's rejection of the *White Paper's* direction that the approach in *Hunter* be adopted to s 21.

The approach in *Hunter* was applied in *R v Duarte* (1990),⁸² La Forest J stating, "if the surreptitious recording of private communication is a search and seizure within the meaning of s. 8 of the *Charter*, it is because the law recognizes that a person's privacy is intruded on in an unreasonable manner whenever the state, without prior showing of reasonable cause before a neutral judicial officer, arrogates to itself the right surreptitiously to record communications that the originator expects will not be intercepted by anyone other than the person intended to receive them".⁸³

It is submitted here that the approach adopted in *Hunter* to s 8 applies equally to s 21. That the drafters of s 21 intended this approach be adopted is clear, the *White Paper* (after reviewing *Hunter*) stating in paragraph 10.157 that "This approach is consistent with the drafting of the Fourth Amendment as interpreted by the American Courts. A similar general approach to Article 19 [s 21] by the New Zealand courts is likely."

Supporting this, paragraph 10.150 of the *White Paper* states, "Article 19 [s 21] will empower the courts to review legislation which grants powers of search and seizure either of the person, property, correspondence or otherwise. They will be permissible only if they are not 'unreasonable'. Article 19 will also apply where the manner in which a search or seizure is carried out is challenged, rather than the statutory authorisation for it."

Conclusions

The Court of Appeal's unwillingness to adopt a purposive interpretation of "search or seizure" has combined with their recognition that an approach mandated by Parliament cannot be explicitly rejected to produce the current approach in that Court. The character of that approach has meant that not only has the Court in practice proceeded on the "case by case basis" adopted

⁸¹ *Jefferies* above n7, 304 per Richardson J.

⁸² *R v Duarte* (1990) 65 DLR (4th) 241 (SCC) per La Forest J [*Duarte*].

⁸³ *Duarte* above n81, 252 per La Forest J.

in *Gardiner*,⁸⁴ but in any case where the activity in issue would not satisfy the common law definition⁸⁵ the Court has applied the rule that the existence of a “search or seizure” could be assumed (or was not material) and made no finding.⁸⁶

There is therefore not even a clear “laundry list” of activities which constitute a “search or seizure” for s 21 to reduce the “confusion for lower courts and police.”⁸⁷

Thus, the current approach of the Court of Appeal to the meaning of “search or seizure” for s 21 set out in *Fraser* and *Gardiner* establishes that the meaning of those words remains, in principle, open. However, the judgments in those cases implicitly reject a purposive approach to “search or seizure” for s 21, preferring the common law-based definition set out originally by Richardson J in *Jefferies*. The rejection of a purposive interpretation implicit in this is reinforced by the Court’s direction of a ‘reasonable expectation of privacy’ test to the determination of whether a given “search or seizure” is “unreasonable”.

The second key element in the Court’s approach is the rule that the existence of a “search or seizure” can be assumed, restated in *Fraser* as the rule that in many cases the existence of a search or seizure will not have to be determined. Finally, the necessary result of not establishing a definition of “search or seizure” is that the Court’s general approach has been ‘case by case’. *Gardiner* has now established that this approach will only be altered by Parliamentary intervention.⁸⁸

With respect, the approach adopted by the Court of Appeal to the meaning of “search or seizure”, and therefore s 21, cannot be supported. It directly conflicts with the approach to s 21 mandated by Parliament and in particular in the *White Paper*. Indeed, the Court of Appeal’s approach is not, as *Fraser* suggests,⁸⁹ broadly comparable to the approach adopted in the United States and Canada to their respective guarantees against unreasonable search or seizure. In both jurisdictions it is well established that the meaning of a “search” or “seizure” is purposively defined as, activity which invades a reasonable expectation of privacy.

It is well established that “A purposive approach to the interpretation of the Bill of Rights” is to be adopted.⁹⁰ Indeed, Richardson J affirms this approach in *Jefferies*, noting that Parliament has “mandate[d] a purposive approach to the provisions” of the BORA.⁹¹ The implicit rejection

⁸⁴ *Gardiner* above n47, 13 per Blanchard J.

⁸⁵ In *Faasipa* above n32, 55 per Hardie-Boys J. The taking of a blood sample was ‘clearly’ a seizure.

⁸⁶ Thus *Gardiner* reaches no conclusion on whether and if so to what degree video surveillance is a “search or seizure” for s 21.

⁸⁷ *Optican1996* above n1, 221.

⁸⁸ *Gardiner* above n47, 13 per Blanchard J.

⁸⁹ *Fraser* above n42, 448-449.

⁹⁰ *Noort* above n5, 153 per Richardson J.

⁹¹ *Jefferies* above n7, 299 per Richardson J.

in by the Court of Appeal of a purposive interpretation of “search or seizure” for s 21 and adoption of a broad common law-based definition of “search or seizure” is clearly inconsistent with this.

To reject a purposive interpretation of “search or seizure” for s 21 is to reject a purposive interpretation of s 21. It is the purposive definition of “search or seizure” that “allows [s 21 to include] within its scope...conduct that truly comes within that purpose and...[exclude] activity that falls outside”.⁹² The adoption by the Court of Appeal of the rule that the specific individual’s reasonable expectation of privacy is one factor to be taken into account in determining whether the search or seizure was “unreasonable” for s 21 is not, with respect, to adopt “A purposive approach to the interpretation” of s 21.

The principal justification of the Court of Appeal for adopting the approach it does is the legal status of the BORA, as seen in Richardson J’s approach in *Jefferies*.⁹³ More explicit are the statements of the Court in *Gardiner*, which held that “Pending legislation on the topic [of the meaning of a “search or seizure” for s 21] the Courts must rule on a case by case basis.” With respect, this is wrong. Parliament, in enacting s 21 BORA has legislated on this topic. The interpretative approach to that provision is clear and has been made explicit in the *White Paper*. That the BORA does not override inconsistent statutes in no way affects the courts’ application of the approach Parliament has mandated.

Thus, the finding in *Gardiner* that “There is no mechanism in the law requiring or enabling the authorisation of video surveillance.”⁹⁴ cannot be supported. Parliament clearly enacted section 21 BORA to act as just such a mechanism. If this proposition is correct then the State’s agents can make use of video surveillance at their complete discretion. It is difficult to see how the individual’s right to privacy under s 21 is guaranteed in such a situation.

Finally, it is clear that the Court of Appeal has adopted the “*post facto* analysis” of s 21 that *Hunter* stated “would...be seriously at odds with the purpose of s. 8.”⁹⁵ The approach of the Court of Appeal itself necessitates such an analysis. However, the Court of Appeal has also explicitly adopted such a focus. Thus Richardson J states in *Jefferies* that “The focus under the section is on the particular case in question not on the generality of police and other official searches. The decision turns on the unique circumstances of the particular case.”⁹⁶

The Court’s approach therefore focuses s 21 not on the regulation of classes of activity through the requirement of prior authorisation but on the post-facto assessment of whether specific action was in breach s 21. This approach is directly contrary to the fundamental purpose of s

⁹² *Noort* above n5, 153 per Richardson J.

⁹³ *Jefferies* above n7, 299-300 per Richardson J.

⁹⁴ *Gardiner* above n47, 13 per Blanchard J.

⁹⁵ *Hunter* above n73, 653 per Dickson J.

⁹⁶ *Jefferies* above n7, 304 per Richardson J.

21. For, although it appears that "The Bill (like the Canadian Charter) gives no general guarantee of privacy", it is clear that the fundamental purpose of s 21 is to provide "Protection against improper search or seizure on behalf of the State".⁹⁷ If the approach in *Hunter* were adopted to the meaning of "search or seizure" and therefore to s 21 then this purpose might be achieved.

⁹⁷ *A Bill of Rights for New Zealand - A White Paper* (Government Printer, Wellington, 1985) 103-104, paragraphs 10.144 and 10.145[*White Paper*].

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