

INLAND REVENUE'S POWERS OF SEARCH AND SEIZURE AND TAXPAYERS' CONSTITUTIONAL RIGHTS

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For the first time in New Zealand, this article investigates the role that the New Zealand Bill of Rights Act 1990 has played in New Zealand taxation case law. 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. The article demonstrates that the absence of constitutional rights in New Zealand, constitutional entrenchment and the inclusion of s 4 in the Bill of Rights Act 1990 have accounted for differing outcomes in the courts.

1. INTRODUCTION

The aim of this article is to examine the treatment by the Courts in New Zealand of the Commissioner of Inland Revenue's (the Commissioner) powers of search and seizure¹ in light of the constitutional regime.

The document at the heart of the constitutional regime is the *New Zealand Bill of Rights Act 1990* (NZ) (BORA), which is not constitutionalised. New Zealand does not have a single written constitution and it is one of only three countries in the

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

world without a full and entrenched written constitution (the others are Britain and Israel). 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. The BORA is one of the key written sources of New Zealand's constitution and it 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 However, the BORA is neither entrenched nor supreme law and can be repealed by a simple majority of Parliament.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 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.²

The Commissioner is charged, pursuant to s 6A(3) of the *Tax Administration Act 1994* (NZ) (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, found in ss 16 and 17 of the TAA, are intended to assist in this task.

The present article illustrates several factors that contribute to the treatment of the Commissioner's powers of search and seizure by the Courts, including:

- (a) privacy under s 21 of the BORA underpins the test of unreasonableness;

² Section 6 of the BORA provides:

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.

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(b) apart from legal professional privilege and the non-disclosure right level of protection, taxpayers' claims to privacy appear to be largely irrelevant but reasonable in terms of s 21 of the BORA; and

(c) audit and investigations are merged functions of the Commissioner in New Zealand.

Consequently, the tax authorities in New Zealand have been able to conduct searches that would be considered 'unreasonable' and prohibited in other jurisdictions.

Following on from this introduction, Part 2 sets out a brief review of the New Zealand constitutional and legislative provisions. Part 3 of this article expands on the interaction of the Commissioner's powers of search and seizure under the TAA with the BORA. Part 4 analyses public law remedies that may be available to taxpayers via the BORA and, finally, Part 5 concludes the salient outcomes of the research.

2. THE LEGISLATIVE AND CONSTITUTIONAL PROVISIONS

While the BORA is technically an ordinary statute, rather than being supreme law, it arguably serves the same function as a constitutionalised Bill of Rights, notwithstanding s 4, which prohibits a court from invalidating a statutory provision because it is inconsistent with any of the rights contained in the Act.³ The Courts in New Zealand have generally given the BORA a

³ *BORA*, 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.

purposive construction, one that gives due attention to the nature, or underlying values, of the right that has been engaged by the issue(s) before the Court.⁴

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

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

Section 16 of the TAA provides for warrantless searches, stating:

(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 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 books and 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.

⁴ *R v Jefferies* [1994] 1 NZLR 290, 302-303. Richardson J 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.

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(2) Despite section 103(3)(b)(ii) of the *Search and Surveillance Act 2012*,⁵ 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 access and under s 16C(2) a warrant is required for removal and retention of documents.

Section 16 follows that any person may be required to furnish information or produce books or documents in accordance to section 17 of the TAA. Section 17(1) of the TAA provides:

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 books and 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

⁵ The amendment to s 16(2) of the TAA was made under the *Search and Surveillance Act 2012* (NZ) s 302(3) by replacing ‘The occupier of land’ with ‘Despite section 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.

or connected with any other function lawfully conferred on the Commissioner.

In 1998, the Committee of Experts on Tax Compliance identified a gap in the legislation which unduly advantaged taxpayers and hence needed some revision. The Committee pointed out:

In order to achieve an equitable levying of taxes, the Inland Revenue Department should, in principle, possess or have access to all information which might affect a taxpayer's liability to tax. The department's resources should be focused on ensuring that all taxpayers pay the correct amount of tax on time. Its resources or energy should not be dissipated in disputes over whether or not it is entitled to have access to a particular item of information.⁶

The operational scope of ss 16 and 17 of the TAA, with respect to width of the Commissioner's power to request information and documents from all persons for the purposes of collecting tax, is subject to the interaction of the BORA and the relevant revenue Acts.

3. COMMISSIONER'S POWERS OF SEARCH AND SEIZURE OF EVIDENCE

3.1 Search

In broad terms, a search is an examination of a person or property. Section 16 of the TAA provides a right of access to the Commissioner and 'any officer of the Department authorised by

⁶ Committee of Experts on Tax Compliance, New Zealand Government, *Tax Compliance: Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance*, December 1998, 114 [9.3].

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the Commissioner in that behalf'. Such access constitutes a 'search' and the Commissioner carries out these 'searches' to secure the record for evidential purposes.

Protection against unreasonable search and seizure is one of the rights protected by s 21 of the BORA.⁷ 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. However, where that person has no authority, the approach of the Court of Appeal in New Zealand in defining the terms 'search' and 'seizure' for purposes of s 21 of the BORA, offers little assistance to taxpayers.⁸ In *R v Boucher*,⁹ the use of interception warrants for the purpose of obtaining evidence from suspected persons did not infringe the rights guaranteed by the BORA. The Court held that existence of written authorisation is not a condition precedent to the exercise of the right of access. Justice Blanchard observed in his judgment that:

Most warrants are issued with that very purpose in mind. We are not moved by the suggestion that the use of a warrant in circumstances like the present, and for such a purpose, infringes rights guaranteed by the Bill of Rights. Parliament has decided that it is in the interests of justice that, under conditions prescribed by it and under the supervision of the High Court, eavesdropping techniques are to be made available to the police for the detection of serious crime. If and to the extent that such surveillance within the limits of

⁷ See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis, 2005) ch 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.

⁸ *R v Boucher* [2002] 1 NZLR 105, 113 (Court of Appeal); *R v Peita* (1999) 5 HRNZ 250, 254 (Court of Appeal).

⁹ *R v Boucher* [2002] 1 NZLR 105, 113.

the warrant constitutes a search and/or a seizure, what is done is rendered lawful.¹⁰

Section 21 of the BORA adopts the test of reasonableness and not illegality.¹¹ Courts have recognised that the manner in which search is carried out may render a reasonable search as unreasonable. The tests of lawfulness and reasonableness are not the same. A lawful search might be unreasonable where it was conducted in an unreasonable manner. An unlawful search, when conducted in an unreasonable manner, raises a prima facie presumption that it is an unreasonable search and therefore in breach of s 21 of the BORA.¹² In *Shaheed*,¹³ unlawful search did not lead to an automatic finding of unreasonableness. The Court of Appeal in *R v Williams*¹⁴ considered both when a search would be unreasonable and when the admissibility for improperly obtained evidence under s 30 of the *Evidence Act 2006* (NZ). According to Glazebrook J:

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

¹⁰ *R v Bouwer* [2002] 1 NZLR 105, 113 [38]. In *R v Peita* (1999) 5 HRNZ 250, 254 Blanchard J opined that the entry into airspace above the appellant's property was not an unreasonable search and rights guaranteed by the Bill of Rights were not breached.

¹¹ *R v Jefferies* [1994] 1 NZLR 290, 304.

¹² *R v Williams* [2007] 3 NZLR 207, [16] (Court of Appeal); *R v Wojcik* (1994) 11 CRNZ 463, 465 (Court of Appeal).

¹³ *R v Shaheed* [2002] 2 NZLR 377, 418 (Court of Appeal). From 1996 the Court frequently declared that a finding of even significant illegality did not lead to an automatic finding of unreasonableness.

¹⁴ *R v Williams* [2007] 3 NZLR 207.

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balancing exercise would normally lead to the exclusion of the evidence, even where the crime was serious.¹⁵

However, if the error was not noticed in advance of the search undertaken 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.¹⁶

Further, while the Commissioner must be mindful that in performing a search, s 6A(2) of the TAA¹⁷ requires him to exercise care; a failure to do so will not of itself render the search unreasonable. The circumstances surrounding a search and the subject matter of it will be determinative.

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.¹⁸ Notably, the words 'full and free access'¹⁹ to, inter alia, 'books and documents' that the Australian Commissioner of Taxation considers 'necessary or relevant' for collecting tax are preceded by the words 'shall at all times'.²⁰ These words indicate the potential for an unconstrained search (so long as the search is

¹⁵ *R v Williams* [2007] 3 NZLR 207, [145].

¹⁶ *R v Williams* [2007] 3 NZLR 207, [144].

¹⁷ Section 6A(2) of the TAA provides:

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.

¹⁸ *O'Reilly v Commissioner of the State Bank of Victoria* (1983) 153 CLR 1.

¹⁹ See the *Income Tax Assessment Act 1936* (Cth) s 264.

²⁰ *TAA*, s 16(1).

being conducted in good faith for the purposes of meeting the Australian Commissioner of Taxation's duties).²¹

A judicial consensus appears to have emerged and seems to be reflected in *Avowal Administrative Attorneys Limited v District Court at North Shore*.²² In *Avowal*, searches of taxpayers' private and commercial premises were undertaken by the officers of the Inland Revenue.²³ However, when the search began, *Avowal*'s employee on site claimed, after discussion with the company's lawyer, privilege over all the 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 others²⁴ challenged the legality of the search and copying on several grounds.

Justice Venning determined that computer hard drives did fit the extended definition of 'book or document' within s 3 of the

²¹ *TAA* s 16B was enacted in 2003 and conferred power to remove books or documents accessed under s 16, to make copies. *TAA* 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.

²² *Avowal Administrative Attorneys Limited v District Court at North Shore* (2010) 24 NZTC 24, 252 (Venning J). In this case, the Australian Taxation Office and the New Zealand Commissioner believed that Petroulias, Ms Denise Clark and others, including *Avowal Administrative Attorneys Limited*, were 'involved in promoting tax schemes which affected the tax bases of both Australia and New Zealand'.

²³ Access to the business premises was pursuant to s 16(1) of the *TAA* and access to residential premises was pursuant to s 16(4) of the *TAA*.

²⁴ There were 8 applicants in the case including *Avowal* and Mr Petroulias.

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TAA.²⁵ It was 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 a reasonable cause required as a prerequisite for the 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.²⁶ It was also held that the use of the Commissioner’s search and detention powers is constrained by the BORA that prohibits ‘unreasonable searches.’²⁷ In the event, these searches were not unreasonable. 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 *Tranz Rail Limited v Wellington District*

²⁵ *Avowal Administrative Attorneys Limited v District Court at North Shore* (2007) 23 NZTC 21, 616 (Baragwanath J, the preliminary decision) (High Court). 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). Justice Baragwanath 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 [52] (High Court). In any instance where privilege is claimed, the determination of the existence of such privilege is left to the Court: *TAA*, s 20(5). The *Taxation (Tax Administration and Remedial Matters) Act 2011* (NZ) repealed the definition of ‘book and document’ from s 3(1) of the *TAA*. A definition for ‘document’ had been inserted with effect from 29 August 2011.

²⁶ *Avowal Administrative Attorneys v District Court at North Shore* (2009) 24 NZTC 23, 252 [136] (High Court).

²⁷ *Avowal Administrative Attorneys v District Court at North Shore* [2010] 2 NZLR 794 (‘interim judgment’)[74], [82] and [84].

*Court*²⁸ are such an example of when a search of premises under warrant was unlawful and unreasonable.

The Court of Appeal 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.²⁹ 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.³⁰

*Tauber v CIR*³¹ considered the lawfulness of search operations under s 16 of the TAA. In *Tauber*, the homes of the taxpayers and their third-party accountant were raided by the Inland Revenue officers as part of an investigation into the pair's tax affairs. One taxpayer argued that he was arbitrarily detained in the course of lengthy searches (this being because his car was blocked in by an Inland Revenue car 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 people involved in the search.

²⁸ *Tranz Rail Limited v Wellington District Court* [2002] 3 NZLR 780, [21] (Court of Appeal). The Court held that the Commission had the power to request information or documents under s 98(a) and (b) of the Commerce Act – a power equivalent to s 17 of the TAA.

²⁹ *Avowal Administrative Attorneys Limited v District Court at North Shore* (2010) 24 NZTC 24, 252; *Avowal Administrative Attorneys v District Court at North Shore* [2010] NZCA 183 (O' Regan J).

³⁰ *Avowal Administrative Attorneys Limited v District Court at North Shore* [2010] NZSC 104 [2].

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

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Justice Venning 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 but not the decision to search. The Court held that the searches by the Commissioner were not excessive and the taxpayers had not been arbitrarily detained.³²

It appears that the reasonableness of exercise of a search will very rarely be subject to judicial review. 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 of the arguments in the subsequent proceedings. The Court of Appeal in *Tauber* held that s 16 (4) of the TAA was to be read subject to an overall test of reasonableness and could not be said to be inconsistent with the s 21 right to be secure against unreasonable search and seizure.³³

The *Search and Surveillance Act 2012* (NZ) provides a set of safeguards against unjustified intrusions on ‘reasonable expectation of privacy’ and will apply from sometime in 2013 to the exercise of the Commissioner’s powers under ss 16(4)

³² *Tauber v CIR* HC Auckland CIV-2011-404-2036, 31 October 2011. The High Court judgment in *Tauber* confirms that the 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 Commissioner can bring along anyone they deem appropriate when searching a property, including police, dog control officers and locksmiths.

³³ The taxpayers appealed against the decision to decline judicial review. *Tauber v CIR* (2012) CA 564/11. The Court of Appeal supported Venning J in *Avoyal Administrative Attorneys Limited v District Court at North Shore* (2010) 2 NZLR 794, [29]. The Court of Appeal judgment in *Tauber v CIR* (2012) CA 564/11 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.

and 16C(2) of the TAA. Lennard suggests that to a large extent the *Search and Surveillance Act 2012* (NZ) codifies existing practice and law and makes very few substantive changes.³⁴

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? It is arguable that the words ‘shall at all times’ and ‘full and free’ would be read down in all but the most extreme cases.³⁵ In the author’s view, most Inland Revenue investigations that use 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 thus supported in demanding that access takes place at a reasonable time. Privacy is a core value being protected by s 21 of the BORA. Privacy underpins the test of unreasonableness contained within that provision.³⁶

The New Zealand Income tax legislation distinguishes between private and non-private premises. An Inland Revenue officer may not enter a private dwelling without the consent of an occupier or pursuant to a warrant.³⁷ Where the occupier of the private dwelling does not consent, a warrant must be obtained under s 16(3) of the TAA. Full and free access follows the issue of the warrant in such cases. 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,³⁸ especially where there was no immediate urgency for the search. In a warrantless

³⁴ Mike Lennard ‘Section 16: Changes to Search and Seizure Powers’ (Paper presented at the New Zealand Institute of Chartered Accountants, Tax Conference, Wellington, 26-27 October 2012).

³⁵ 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*.

³⁶ *Hunter v Southam* (1984) 11 DLR (4th) 641, 652.

³⁷ *TAA*, s 16(4).

³⁸ *R v Laugalis* (1993) 10 CRNZ 350; *R v Wojcik* (1994) 11 CRNZ 463.

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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 notices or documents issued under s 13 of the TAA are valid.³⁹ However, there is no indication in the TAA as to when the absence of a warrant would be in breach of s 16(4) or would amount to the Commissioner failing to perform the care and management function required of him under s 6 of the TAA. The search power under s 16 is very wide.⁴⁰ The table below shows the dramatic increase in the use of Inland Revenue’s search power in the last five years.⁴¹

	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

³⁹ TAA, s 13(3).

⁴⁰ *Chief Executive of Ministry of Fisheries v United Fisheries Ltd* (2010) NZCA 356.

⁴¹ Graham Tubb, ‘Commissioner of Inland Revenue’s power of Search and Seizure: ss 16, 16B and 16C Tax Administration Act’ (Paper presented at the New Zealand Law Society, Taxation Conference, Auckland, 1 September 2011).

During the 2012 year, Inland Revenue conducted 40 searches under s 16.⁴² In seeking to inspect documents, the Commissioner or his duly authorised agent must consider those documents to be ‘necessary and relevant’ for the stated legislative purpose (ie, they must be necessary and 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 tests). ‘Necessary and relevant’ does not mean ‘reasonable’ and may condone overzealous behaviour on the part of the revenue. The revenue will however still have to meet the care and management duties of s 6A of the TAA.

The New Zealand Court of Appeal in *Choudry v Attorney-General*⁴³ was concerned with the powers of access to private premises under s 4A(1), (2), (3) and (6) of the *New Zealand Security Intelligence Service Act 1969* (NZ) (NZSIS). The Court referred to paragraph 3.03 of the Public and Administrative Law Reform Report 1983, which concluded:

the conferring of a power to enter private property is too great an infringement of private rights to be done by implication. Parliament should give specific consideration to the need for it; and its intention to authorise such an interference deserves to be expressed by clear words.⁴⁴

In *Choudry*, the Court specifically stated that s 21 of the BORA, in conferring the right to be secure against unreasonable search and seizure, reflects concern for fundamental values. The Court concluded that a power of breaking and entering into private premises is not implicit in s 4A(1) of the NZSIS.

⁴² Radio New Zealand, ‘Business News: Summer Report’, *IRD to explain to public its search powers*, 6 January 2013 (Lee McLaughlin) <<http://www.radionz.co.nz/news/business/125026/ird-to-explain-to-public-its-search-powers>>.

⁴³ *Choudry v Attorney-General* [1999] 2 NZLR 582 (Court of Appeal).

⁴⁴ *Choudry v Attorney-General* [1999] 2 NZLR 582, 593.

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However, in *CIR v New Zealand Stock Exchange*, Richardson J said:

Nothing in the language used or in the general scheme of the section suggests that a closely confined approach is intended. On the contrary, it is expressed in the widest terms.⁴⁵

Section 110 of the *Search and Surveillance Act 2012* (NZ) now makes it clear that under s 16(1) of the TAA forcible entry is permitted. Therefore, the merged functions of audit and investigation also reflect the lower status attached to individual rights and freedoms and they are not protected by a supreme law.

In *Semayne's Case*, Lord Coke stated 'The house of everyone is to him as his castle and fortress.'⁴⁶ 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 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*,⁴⁷ 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'⁴⁸ when police intercept and record conversations.

⁴⁵ *Commissioner of Inland Revenue v New Zealand Stock Exchange* (1990) 12 NZTC 7259, 7,262 (Court of Appeal). For the *New Zealand Stock Exchange* case details see Section 3.2 below.

⁴⁶ *Semayne's Case* (1604) 77 ER 194, 195.

⁴⁷ *R v A* [1994] 1 NZLR 429.

⁴⁸ *R v A* [1994] 1 NZLR 429, 433.

In *Jefferies*,⁴⁹ Richardson J explained that the test as to whether a breach of s 21 of the BORA has occurred is twofold. First, a reasonable expectation of privacy may render a search and seizure unreasonable. Second, a search and seizure may be unreasonable ab initio or because of the way in which it was conducted. The Inland Revenue must have a reason for implementing a search and must carry it out in a reasonable manner. However, it is difficult to see that these tests add anything to the care and management function provided for in s 6A of the TAA.

3.2 Seizure (information supplied on request)

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* (NZ) 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.

In *New Zealand Stock Exchange v Commissioner of Inland Revenue*,⁵⁰ the taxpayers were sent notices under s 17(1) of the *Inland Revenue Department Act 1974* (NZ).⁵¹ 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, upholding the decision of

⁴⁹ *R v Jefferies* [1994] 1 NZLR 290, 304-305.

⁵⁰ *New Zealand Stock Exchange v Commissioner of Inland Revenue* (1991) 13 NZTC 8,147.

⁵¹ Equivalent to s 17 of the TAA.

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the Court of Appeal, 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*⁵² 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. His Lordship noted:

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.⁵³

The Court of Appeal had previously noted that s 17(1) is 'expressed in the widest terms'⁵⁴ and that 'nothing in the language used or in the general scheme of the section suggests that a closely confined approach is intended.'⁵⁵ The Court of Appeal further stated that s 17(1)

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.⁵⁶

⁵² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene MR).

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

⁵⁴ *Commissioner of Inland Revenue v New Zealand Stock Exchange* (1990) 12 NZTC 7259 (Richardson J).

⁵⁵ *Commissioner of Inland Revenue v New Zealand Stock Exchange* (1990) 12 NZTC 7259, 7,262.

⁵⁶ *Commissioner of Inland Revenue v New Zealand Stock Exchange* (1990) 12 NZTC 7259, 7,262.

In considering the BORA, Lord Templeman noted the statutory duty on the Commissioner to assess income and to see that the wider interests of the community are protected. He believed that, accordingly, 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. In the *Stock Exchange* case,⁵⁷ a broad broom and shovel was given to the New Zealand Inland Revenue to sweep and collect information.

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.⁵⁸ Tax cases particularly illustrate that the Courts have been prepared to legitimise incidents of unreasonable search and seizure. For example, in *R v Wojcik*,⁵⁹ 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*,⁶⁰ the illegal search and seizure by police in *R v Wojcik*⁶¹ 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

⁵⁷ *Commissioner of Inland Revenue v New Zealand Stock Exchange* (1990) 12 NZTC 7259, 7,262, 7259. This case did not follow *James Richardson & Sons Ltd* principle. In *James Richardson & Sons Ltd v MNR* [1984] 1 SCR 614, 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'.

⁵⁸ See, eg, *R v Jefferies* [1994] 1 NZLR 290, 299.

⁵⁹ *R v Wojcik* (1994) 11 CRNZ 463 (Court of Appeal).

⁶⁰ *Wojcik v Police* (1996) 17 NZTC 12,646 (District Court).

⁶¹ *R v Wojcik* (1994) 11 CRNZ 463.

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tainted by unlawfulness and unreasonableness under s 21 of the BORA.

As noted earlier,⁶² reasonableness 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 therefore arguable that a roving search or seizure by definition is unreasonable as the circumstances are not known in advance and cannot be judged until either has occurred. It is not permissible to view searches (or seizures) with hindsight and to justify them in the light of the results. Justice Richardson has stated:

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.⁶³

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. Similarly, it seems that a taxpayer in New Zealand can do little to resist the Commissioner seizing documents by claiming the documents are non-business related⁶⁴ or that information or property was obtained by the police during an

⁶² See text accompanying n 49 above.

⁶³ *R v Jefferies* [1994] 1 NZLR 290, 304-305.

⁶⁴ *Schwass and Robertson v Mackay* (1983) 6 NZTC 61,641, 61,642 (High Court). 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. Justice Casey 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.

unreasonable and unlawful search under s 21 of the BORA.⁶⁵ Some recent cases⁶⁶ 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. The decisions in *Avowal* and *Tauber* also reflect that the use of the Commissioner's search and seizure power is to be read with the BORA. The cases

[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

⁶⁵ *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.

⁶⁶ *Vinelight Nominees Ltd v CIR* (2005) 22 NZTC 19,298 (High Court); *Chesterfield Preschools Ltd v CIR (No 2)* (2005) 22 NZTC 19,500 (High Court); *Next Generation Investments Ltd v CIR* (2006) 22 NZTC 19,775 (High Court). 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 s 27(3) of the BORA. 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 a 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. Justice Fogarty held that the Commissioner's power of investigation under s 17 of the TAA are not to be restricted by the principle of litigation on an even basis.

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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.⁶⁷

The courts in New Zealand are particularly mindful of allowing a statute to work, as evidenced by the cases discussed in this paper.⁶⁸ The demarcation line between public and private interest is weighted in favour of the State.⁶⁹

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 validate unlawful conduct. 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 has no answer.

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.

⁶⁷ *New Zealand Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] 2 NZLR 99, [62-64].

⁶⁸ See also *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (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.

⁶⁹ *Wojcik v Police* (1996) 17 NZTC 12,646; *R v Collis* (1990) 2 NZLR 287 (Court of Appeal).

Section 20 of the TAA deems certain information between a qualified tax advisor and his/her client to be privileged.⁷⁰ It would be unlawful for the Commissioner in his care and management function under 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 Inland Revenue, it is highly likely that such actions would be deemed unreasonable in terms of s 21 of the BORA. Therefore, the BORA in its present form, appears to add 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.

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 an unlawful search may still be reasonable.

4. REMEDIES

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',⁷¹ which examines, inter alia, the nature of the breach, seriousness of charges, centrality of evidence to the case and so on. It has proved to be a powerful mechanism for securing police compliance. However, difficulties still remain

⁷⁰ 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 the Canadian *Income Tax Act 1985* by providing for a defence using the common law privilege in s 232.

⁷¹ 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 (Court of Appeal). In this case, 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.

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with judicial interpretation and application of s 30 of the *Evidence Act 2006* as guided by the *Williams* approach.⁷² 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 Commissioner in New Zealand when the violations are deemed unreasonable. In *R v H*,⁷³ Richardson J noted there was a *prima facie* rule of exclusion of evidence obtained in consequence of a breach of the BORA. In such a case, evidence can be admitted only where the breach is inconsequential (impliedly not unreasonable), where there is no link between the breach and the obtaining of evidence or where the evidence would have been discovered in any event. The justification for allowing evidence to be admitted despite a breach of s 21 is ‘that the overriding interests of justice require it.’⁷⁴ 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*,⁷⁵ the potential to obtain monetary compensation for a breach of s 21 of the BORA cannot be discounted, Cooke P stating:

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

⁷² S L Optican, ‘R v Williams and the Exclusionary Rule: Section 30 of the Evidence Act’ (2011) 3 *New Zealand Law Review* 507, 543.

⁷³ *R v H* [1994] 2 NZLR 143 (Court of Appeal). Mr D, an accountant, disclosed to the police his employer’s (Mr H) documents relating to corrupt use of fishing information.

⁷⁴ *R v H* [1994] 2 NZLR 143, 150.

⁷⁵ *Simpson v Attorney General* [1994] 3 NZLR 667 (Court of Appeal).

human rights violations. There is no reason for New Zealand jurisprudence to lag behind.⁷⁶

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

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).⁷⁷

Section 6 of the *Crown Proceedings Act 1950* (NZ) stops the Crown from 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 of the BORA, 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, of itself that 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'.⁷⁸

Hence, when determining the appropriateness of exclusion of improperly obtained evidence, the New Zealand courts have taken an inconsistent approach in balancing the impropriety of admitting the evidence with the public interest in admitting the evidence.

5. CONCLUSION

This article demonstrates that the key reasons for different outcomes in New Zealand courts is attributable to the absence of constitutional rights in New Zealand. Procedural safeguards afforded and civil liberties protected by the New Zealand BORA

⁷⁶ *Simpson v Attorney General* [1994] 3 NZLR 667, 676.

⁷⁷ *Simpson v Attorney General* [1994] 3 NZLR 667, 691.

⁷⁸ *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (Court of Appeal); *Upton v Green* [1996] 2 HRNZ 305 (High Court).

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should have a place in protecting taxpayers from abuses by the New Zealand revenue authorities. The fact that the revenue authority in New Zealand generally acts in a fair manner regarding quantification and procedural processes misses the point. The fact is, without adequate safeguards, the potential for the abuse of process is heightened. It is dangerous for the Commissioner to have such a high discretionary power threshold. Such power may result in improper use⁷⁹ and, without specific legislation, there is a risk that taxpayers may inadvertently compromise their privilege and tax advice document non-disclosure rights. Therefore, there should at least be a legal framework in the TAA which provides minimum protections for the taxpayers caught up in this process.

In New Zealand, the binding rulings and appeal processes conducted with the Inland Revenue are not equivalent to independent third party decision making. The New Zealand tax Ombudsman cannot investigate Inland Revenue's decisions on tax assessment and imposition of shortfall penalties. It can only investigate Inland Revenue's administrative conduct. It is also unlikely that a Tax Ombudsman would be able to operate as a substitute for an established tax court system. Undoubtedly, resource constraints play a significant role in this area.

Politicians repeatedly show us the truth of French philosopher Montesquieu's observations:

Political liberty is to be found ... only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.⁸⁰

⁷⁹ *Schwass and Robertson v Mackay* (1983) 6 NZTC 61,641.

⁸⁰ L Montesquieu (ed), 'L'Esprit de Lois, Book XI, Ch. 6 (1748)' in SM Cahn, *Classics of Modern Political Theory: Machiavelli to Mill* (Oxford University Press, 1997) 351.

The decision to insert s 4 into the BORA has denied taxpayers a higher expectation of privacy. Further, the White Paper to the Bill of Rights observes in its comment on s 21⁸¹ that it would be inappropriate to attempt to entrench a right that is not by any means fully recognised, which is in the course of development and where boundaries would be uncertain and contentious. A cynic could be excused for thinking that the White Paper's observations mentioned above have little to do with political thought relative to taxpayers and more to do with the desire to hold onto power. The shift of power from the political to the judicial arena is, in the author's opinion, the real reason why politicians are slow to advance an entrenched Bill of Rights.⁸² Rights abuse in New Zealand is potentially far greater as inconsistent law is ultimately superior.

An entrenched BORA represents the taking of power from politicians. Therefore, the development of something more extensive requiring a review of the broader NZ constitutional arrangements, protecting fundamental human rights and ensuring maximum legal protection of rights through judicial means would be a first positive step in providing a truly transparent and independent process of revenue assessment. It would not allow politicians to override it. It would help to protect the integrity of the tax system and ensure that taxpayer's duties are voluntarily complied with. It would have enormous benefits for the government, for the revenue and for taxpayers.

⁸¹ A Bill of Rights for New Zealand: A White Paper 1985 (NZ), [10.144].

⁸² See J Allan, 'You Don't Always get what you Pay for: No Bill of Rights for Australia' (2010) 24 *New Zealand Universities Law Review* 179, 180, 'All bills of rights, to varying extents, transfer power from the elected legislature to the unelected judiciary.'