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CONSENT SEARCHES AND SECTION 21 OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

Christopher Harker*

This article examines the role of consent under s 21 of the New Zealand Bill of Rights Act 1990. Currently, the New Zealand courts will consider the issue of consent in the context of whether a search is "not unreasonable". However, if "search" is to be defined by reference to reasonable expectations of privacy, then sometimes a consent search should not be a search at all. Therefore, in analysing issues of consent, the first question should always be whether, in light of the consent, there was any intrusion on a reasonable expectation of privacy and so any "search". If there is such an intrusion, and so there is a search, the second question becomes whether that intrusion can be justified as "not unreasonable" in light of the public interest objective it sought to achieve. Many commentators have advocated the adoption of a privacy-based definition of search, but they have not always taken the next step and applied their arguments in the consent search area. The advantage of doing so, and adopting the two-stage approach to consent suggested in this article, is that it will encourage the courts to more clearly articulate their reasoning, and to undertake a more rigorous analysis of the competing issues at stake in consent search cases.

I INTRODUCTION

Section 21 of the New Zealand Bill of Rights Act 1990 (BORA) provides that:

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

Yet, every day in New Zealand public authorities conduct searches and seizures in reliance solely upon the purported consent of the searchee.

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* This article is a shortened version of a 15,000 word research paper submitted for LAWS 505 Public Law in 2010 as part of the Victoria University LLB(Hons) programme. The author has now graduated from Victoria University with an LLB(Hons)/BCA, and is currently working as a law graduate at Russell McVeagh.

Few would dispute that a searchee's consent to a search ought to be capable of rendering a public authority's conduct compliant with s 21 of BORA. Precisely why consent searches do not breach s 21 is not so clear. Does consent mean that there is no "search" at all for s 21 purposes? Or that the search is "not unreasonable"? Or that the s 21 right has been waived? Currently, it appears that a valid consent will make a search not unreasonable. However, drawing on jurisprudence from similar provisions in the United States and Canada,[1] this paper argues that, if search is to be defined by reference to intrusions upon reasonable expectations of privacy, then often consent searches should not be "searches" at all for BORA purposes. The argument for a reasonable expectation of privacy definition of "search" is not new, and has been strongly argued for in the past in the context of surveillance.[2] However, those who advocate such an approach have not always taken the next step and applied their arguments in the consent search area.

Having set out the argument for applying the reasonable expectation of privacy definition of search to consent search cases, the paper then considers what implications this may have for the way the courts approach the requirements of a valid consent under s 21 (such as whether the consent must be informed; when a third party will have authority to consent; and what happens if the searcher reasonably believes there is consent when in fact there is not). Currently the validity of consent is considered simply as part of the general reasonableness analysis. However, adopting the approach advocated above will require the court to undertake a more structured, two-stage analysis. The first question should be whether, in light of the consent, there was any intrusion on a reasonable expectation of privacy, which would constitute a search. If there is such an intrusion, and so there is a search, the second question becomes whether that intrusion can be justified as not unreasonable in light of the public interest objective it sought to achieve.

In theory, adopting such an approach should not significantly alter the requirements of a valid consent. The change I am advocating is not intended to necessarily make s 21 any more or less favourable, in general terms, to either searchers or searchees. However, it should encourage the courts to more clearly articulate their reasoning, and to give adequate consideration to the competing interests at play in any particular case.

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1 These jurisdictions are selected because they have similarly worded provisions relating to unreasonable search or seizure in their respective bills of rights, thus allowing for a direct comparison of whether consent means there is no "search", or that the search is "not unreasonable".

2 See, for example, Scott Optican "What is a 'Search' under s 21 of the New Zealand Bill of Rights Act 1990? An Analysis, Critique and Tripartite Approach" [2001] NZLRev 239 ["What is a 'Search'"]; Scott Optican in Paul Rishworth and others *New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) at 419–428; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [18.9].

II THE CURRENT APPROACH TO CONSENT SEARCHES UNDER BILLS OF RIGHTS

A The New Zealand Approach to Consent Under s 21 BORA

1 Consent goes to reasonableness

The position of the New Zealand courts on the role of consent has never been entirely clear, with many cases simply not giving any reason why it is that consent can render conduct BORA-compliant.[3] However, of those cases that have addressed the conceptual role of consent, most treat consent as going to the question of reasonableness. Express appellate-level support for this proposition can be found in the judgment of the Court of Appeal in *R v Fletcher*,[4] and of the Supreme Court in *Cropp v Judicial Committee*.[5]

R v Fletcher concerned the admissibility of evidence obtained from a search of a vehicle, in circumstances where the vehicle was unlawfully stopped by a police constable, but the search itself was freely consented to. The Court of Appeal said:[6]

> The Judge made a finding that Mr Fletcher "freely consented to the constable's searching the vehicle". There are obvious difficulties in submitting that a search of a vehicle was unreasonable when the person in possession of the vehicle freely consented to the search.

The Court of Appeal went on to conclude that, as a result of the consent, the search was not unreasonable:[7]

> The Judge having heard the conflicting evidence, made a finding that Mr Fletcher freely consented to the search of the vehicle. This consent, given in circumstances where Mr Fletcher knew he did not have to consent, sufficiently separated the search from the unlawful stopping as to render it not unlawful. *We are not persuaded to hold, in the circumstances of this case, that a lawful search, carried out with a freely given consent, was an unreasonable search.* The impugned evidence is admissible. There may arise, of course, cases where the circumstances may, say, adumbrate a consent as to render a sufficiently linked search unreasonable, but this is not such a case. The search was therefore not unlawful. Accordingly, the appeal cannot succeed and leave to appeal is refused.

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3 See, for example, *R v Bradley* (1997) 4 HRNZ 153 (CA); *R v Hjelmstrom* (2003) 20 CRNZ 208 (CA); *R v Moran* CA412/02, 25 March 2003; *R v Rodgers* CA 65/06, 29 May 2006; *R v Gebremichael* CA19/06, 6 July 2006.

4 *R v Fletcher* (2002) 19 CRNZ 399 (CA) at [13], [21].

5 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [21].

6 *R v Fletcher*, above n 4, at [13].

7 Ibid, at [21] (emphasis added).

Cropp v Judicial Committee concerned the validity of delegated legislation.[8] The appellant, Ms Cropp, was a professional jockey who had been charged with an offence under the Rules of Racing of New Zealand Thoroughbred Racing, after testing positive for amphetamine and methamphetamine in a urine drug test.[9] The Rules of Racing were deemed to be made pursuant to the Racing Act 2003.[10] Ms Cropp argued that the drug-testing regime contained in the Rules of Racing was invalid, given that the Racing Act 2003 is presumed not to authorise delegated legislation inconsistent with BORA.[11] One issue before the Supreme Court was whether it could be said that the rules were BORA-compliant (and so not ultra vires the Racing Act 2003) on the basis that the jockeys had, by submitting to the rules, consented to being drug tested under the rules.[12]

In relation to this issue, the Supreme Court explained that consent cannot "put the conduct of a particular search under a lawful rule outside the protection of s 21 of the Bill of Rights Act."[13] Rather, "[d]epending on the manner in which the search is undertaken, a consent may, however, indicate that it is reasonable":[14]

> Whether consent has been given, and if so the quality of that consent, are clearly relevant matters when the Court is assessing the reasonableness of a search. The more specific the consent is to the circumstances in which the search takes place, the more strongly it may support the view that the search was reasonable. Conversely, a general consent, given in advance, would be of little assistance in determining the reasonableness of a search conducted at, say, a jockey's home at 3 o'clock in the morning. Also relevant will be whether a consent is freely given and whether it is an informed consent.

In the case before it, the Supreme Court held that there was no valid consent for s 21 purposes. Blanchard J for the Court said:[15]

> Ms Cropp could never be said, in a Bill of Rights context, to have given her consent freely when she was required to give it before she could obtain a licence to undertake her occupation. Nor could it be said that she had given an informed consent to unlawful testing, except perhaps in the unlikely event that it was pointed out to her when she applied for her licence that the drug-testing regime might be unenforceable. That of course did not happen. … It follows that in this case [Ms Cropp's] consent is of

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8 *Cropp v Judicial Committee*, above n 5, at [1].

9 Ibid, at [1]–[4].

10 Racing Act 2003, s 29(3). See ibid, at [1].

11 *Cropp v Judicial Committee*, above n 5, at [4]–[6].

12 Ibid, at [18]–[24].

13 Ibid, at [21].

14 Ibid.

15 Ibid, at [22].

> no significance in deciding whether the requirement that she provide a bodily sample complied with s 21.

Instead, the Supreme Court went on to find that the rules were valid as they were justified by the public interest objective they sought to achieve (namely, ensuring race-day safety).[16] The key point for present purposes, however, is that the Supreme Court has taken the view that consent, where it is relevant, is relevant only to the question of reasonableness.

2 *A consent search is still a search*

As is discussed further below, the New Zealand courts have never made clear precisely what the definition of "search" under s 21 should be. However, there do not appear to be any cases in which the presence of consent has meant there was no search. In any case, of course, the idea that consent may mean there is no search for s 21 purposes does appear to have been rejected by the Supreme Court in *Cropp v Judicial Committee*,[17] as noted above.

3 *Consent is not a waiver*

There is some limited support for the proposition that consent acts as a waiver of s 21. Clearly there is no section in BORA which explicitly provides for the waiver of a BORA right. However, presumably what is meant by "waiver" is simply that the right is not exercised. That is, while everyone has the right to be free from unreasonable search and seizure, they are not obliged to be free from it. So, for example, the authors of *Adams on Criminal Law* assert that "[w]hen the accused consents to a search, this can be viewed as a waiver of his or her rights under s 21",[18] and explain that:[19]

> The rights contained in the New Zealand Bill of Rights Act 1990 are provided to particular persons under specified circumstances. Those persons may choose not to require compliance with the Bill of Rights by those who are in authority. They can therefore waive the benefits of the Act, if they so choose.
>
> It is doubtful that all of the substantive rights of the Bill of Rights can be forgone by consent; society would certainly refuse to countenance waivers of such things as the right not to be subject to torture, or to be discriminated against because of colour. Typically, issues of waiver arise in the context of procedural protections, like the right to refrain from making a statement to the police, or the right to retain and instruct counsel. Even the substantive right to be free from unreasonable search can be waived.

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16 Ibid, at [25]–[48].

17 *Cropp v Judicial Committee*, above n 5, at [21].

18 Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [10.8.06(1)(p)]. But see also at [10.8.17(1)].

19 Ibid, at [10.23.01].

Support for the waiver approach can be found in *R v Shaheed*, where Blanchard J said that "naturally, if the accused has given a fully informed waiver of the right in question, there will have been no breach".[20] However, there appears to be very little other support for the waiver approach, and again it is clearly not consistent with the view expressed by the Supreme Court in *Cropp v Judicial Committee*.[21]

B The Fourth Amendment to the United States Constitution

The Fourth Amendment to the Constitution of the United States of America reads:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thus, in a similar manner to the New Zealand BORA, it confers the right to be secure against unreasonable searches and seizures. This similar wording allows for a comparison of the approach taken to the definition of "search", and to the role of consent, in the two jurisdictions.

In the United States, the courts and commentators have addressed head-on the issue of, conceptually, where consent is relevant in the Fourth Amendment analysis. For example, LaFave explains:[22]

> … there are at least three views which might be taken of the process whereby the police conduct a search in reliance upon the permission given by the defendant or another: that the permission involves a waiver of Fourth Amendment rights, and thus must meet the requirements generally imposed with respect to the knowing and intelligent waiver of constitutional rights; that the permission involves merely a voluntary choice, in essentially the same sense that a confession must be voluntary; or, that because the police are only prohibited from making unreasonable searches, that it is sufficient if the police reasonably believed voluntary consent had been given.

In the milestone case of *Schneckloth v Bustamonte*,[23] a purported consent search where the searchee had not been informed of his right to refuse consent came before the United States Supreme Court. The Court therefore had to choose between the waiver standard (which would require informed consent) and the voluntariness standard (which would require that the searchee

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20 *R v Shaheed* [2002] 2 NZLR 377 (CA) at [146].

21 *Cropp v Judicial Committee*, above n 5, at [21].

22 Wayne LaFave *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed, West Publishing Co, St Paul, Minnesota, 2004) at 8. See also Tracey Maclin "The Good and Bad News About Consent Searches in the Supreme Court" (2008) 39 McGeorge L Rev 27 at 29.

23 *Schneckloth v Bustamonte* 412 US 218 (1973).

acted of his or her own free will and was not coerced, but not necessarily that the searchee could be shown to have been aware of his or her right to refuse consent). In a highly controversial decision,[24] the Court adopted the voluntariness standard.

It is not entirely clear at what stage in the Fourth Amendment analysis this "voluntariness" test is to be considered. However, the weight of authority would suggest it is at the reasonableness stage.

1 A consent search is still a search

The United States has adopted a reasonable expectation of privacy-based definition of "search". In *Katz v United States*, the Supreme Court explained that there would be a search where there was an intrusion upon a reasonable expectation of privacy; however "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection".[25] So, for example, the bugging of a telephone box was a search because it intruded upon a reasonable expectation of privacy;[26] however, there was no search where the Coast Guard (with the aid of a flashlight) observed liquor on the deck of a ship,[27] nor where an accused unwittingly let an undercover federal narcotics officer into his house,[28] nor where revenue officers examined an item which had been abandoned.[29]

Hence, one view might be that consent means there is no reasonable expectation of privacy and so no search. Just as where an individual chooses to conduct an activity in plain view of the police, or willingly abandons an item which the police later find, so when that individual chooses to acquiesce to a police request, that individual should be taken to have relinquished any reasonable expectation of privacy which he or she might otherwise have had. Even though there may have been a search in the plain and ordinary meaning of the term, there was no search for Fourth Amendment purposes. This is the approach taken under a similar provision in the Canadian Charter, and, as I argue below, in my view it is the logical corollary of adopting a privacy-based definition of "search".

However, it does not appear to be the approach adopted by the United States courts. Indeed, the majority of the Supreme Court in *Illinois v Rodriguez* said that "[t]o describe a consented search as a noninvasion of privacy and thus a nonsearch is strange in the extreme".[30] That comment was obiter

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24 See, for example, the critique in LaFave, above n 22, at 11–15.

25 *Katz v United States* 389 US 347 (1967) at 351.

26 Ibid.

27 *United States v Lee* 274 US 559 (1927), approved in ibid, at 351.

28 *Lewis v United States* 385 US 206 (1966), approved in *Katz v United States*, above n 25, at 351.

29 *Hester v United States* 265 US 57 (1924), discussed in LaFave, above n 22, at [2.6(b)].

30 *Illinois v Rodriguez* 497 US 177 at 186 (1990).

dicta,[31] but it is nevertheless very difficult to find any express support in the cases for the proposition that a consent search is not a search for Fourth Amendment purposes.

2 *Consent is not a waiver*

The Supreme Court in *Schneckloth v Bustamonte* expressly rejected applying the doctrine of waiver to the Fourth Amendment.[32] However, some have expressed the view that a voluntary consent nevertheless actually is a "waiver", but is simply not called a waiver so as to avoid confusion with the "knowing and intelligent waiver" standard under the Fourteenth Amendment due process rights. For example, Ringel has said that:[33]

> Consent is a waiver of the protection afforded by the Fourth Amendment, an agreement by the target of the search, or by another appropriate party, to forgo his right to put the state to its proof that it had adequate cause to conduct a search. While the reasonableness of the search is not subject to scrutiny once consent has been given, the actual consent to search must meet prescribed judicial standards in order to be considered a valid waiver of Fourth Amendment protection.
>
> …
>
> The result of the revision [in *Schneckloth v Bustamonte*] of the waiver doctrine in the Fourth Amendment area is the removal of "knowledge" as one of the requirements of a voluntary waiver of rights.

Moreover, recently in the Supreme Court decision in *Georgia v Randolph*, Stevens J said that "[w]hen an occupant gives his or her consent to enter, he or she is waiving a valuable constitutional right."[34]

The view that consent acts as a waiver is consistent with the fact that the Supreme Court in *Schneckloth v Bustamonte* imported the voluntariness case law from the Fifth Amendment right not to self-incriminate.[35] Under that right consent clearly must act as a waiver since there is no "unreasonableness" limitation on the right, nor a term the meaning of which could be thought to turn on whether there is consent (such as the terms "search" and "seizure" in the Fourth Amendment).

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31 The ratio of the majority judgment was that a reasonable belief in consent can render a search reasonable. Whether actual consent could mean there was no search at all was not a question the majority had to address to reach their decision. See ibid, at 187.

32 *Schneckloth v Bustamonte*, above n 23.

33 William Ringel *Searches and Seizures, Arrests and Confessions* (2nd ed, looseleaf, ThomsonWest) at [9.2].

34 *Georgia v Randolph* 547 US 103 at 124 (2006).

35 *Schneckloth v Bustamonte*, above n 23.

3 *Consent goes to reasonableness*

The prevailing view, however, is that where there is voluntary consent to the requisite standard the search or seizure will be reasonable. Hence, in *Illinois v Rodriguez*, the majority held that consent given with apparent authority will suffice because it makes a search not unreasonable,[36] and a number of cases[37] and articles[38] can be cited which treat consent as going solely to the question of reasonableness. For example, in concluding in *United States v Drayton* that there was actual consent, the Supreme Court said "the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable".[39]

C Section 8 of the Canadian Charter

Section 8 of the Canadian Charter of Rights and Freedoms is again similarly worded to s 21 of the New Zealand BORA. It provides that "[e]veryone has the right to be secure against unreasonable search and seizure."[40] Unlike in New Zealand and the United States, however, it appears that, under s 8, where there is good consent there is no search at all.

1 *Consent means there is no search*

The Supreme Court of Canada in *Hunter v Southam* adopted the reasonable expectation of privacy test which had been propounded by the United States Supreme Court 17 years earlier.[41] Consistently, in my view, with this definition of search, the prevailing Canadian view is that where there is consent, there is no search at all. A number of cases can be cited in support of this proposition.[42]

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36 *Illinois v Rodriguez*, above n 30.

37 See, for example, *Florida v Jimeno* 500 US 248 (1991) at 250–251; *United States v Drayton* 536 US 194 (2002) at 207; *Georgia v Randolph*, above n 34, at 111 per Souter J for the majority.

38 See, for example, Peter Goldberger "Consent, Expectations of Privacy, and the Meaning of 'Searches' in the Fourth Amendment" (1984) 75 Journal of Criminal Law and Criminology 319 at 327; Daniel Rotenberg "An Essay On Consent(Less) Police Searches" (1991) 69 Wash U LQ 175 at 175; Christo Lassiter "Consent to Search by Ignorant People" (2006–2007) 39 Tex Tech L Rev 1171 at 1172; Daniel Williams "Misplaced Angst: Another Look at Consent-Search Jurisprudence" (2007) 82 Ind LJ 69 at 74–75.

39 *United States v Drayton*, above n 37, at 207.

40 Canadian Charter of Rights and Freedoms (1982), s 8.

41 *Hunter v Southam Inc* [1984] 2 SCR 145.

42 See, for example, *R v Meyers* [1987] AJ No 328 (QB); *R v Wills* [1992] OJ No 924 (CA); *R v Dyment* [1988] 2 SCR 417; *R v Arp* [1998] 3 SCR 339 at [84]; *R v Law* [2002] 1 SCR 227 at [15].

Fontana and Keeshan have noted that there "appears to be some minor disagreement" over the issue.[43] However, overall they do appear to support the view that a consent search is not a search for s 8 purposes. They say:[44]

> While most of the reported decisions which turn on a finding of valid consent continue to refer to the "search" and the "seizure", O'Leary J in *R v Meyers* pronounced that: "A consensual search and seizure, conducted in a reasonable manner and within the scope of the consent, is not protected by s 8 [of the Charter]." This stemmed from the comment of La Forest J, in *R v Dyment*, that "… the essence of a seizure under s 8 is the taking of a thing from a person by a public authority without that person's consent." It may be simply an ambiguity of phrasing: the validly consented search continues to be a search, in the de facto sense, but it is simply one not subject to further s 8 scrutiny. (footnotes omitted)

2 *Consent is not a waiver*

It should be noted that on occasion the Canadian courts have used the language of waiver in analysing consent searches.[45] For example, in *R v Wills*, Doherty JA for the Ontario Court of Appeal discussed the "waiver" doctrine, which lays down strict standards of consent for the waiving of constitutional rights (such as, that the waiver must be fully informed), and considered (contrary to the view of the United States Supreme Court) that the waiver doctrine should apply to consent searches. He said:[46]

> In my opinion, the requirements established by the Supreme Court of Canada for a valid waiver of a constitutional right are applicable to the determination of whether an effective consent was given to an alleged seizure by the police. The fairness principle which has defined the requirements of a valid waiver as they relate to the right to a trial within a reasonable time, or the right to counsel, have equal application to the right protected by s 8. In each instance the authorities seek an individual's permission to do something which, without that permission, they are not entitled to do. In such cases, fairness demands that the individual make a voluntary and informed decision to permit the intrusion of the investigative process upon his or her constitutionally protected rights.

Technically, one might think, there is a difference between a finding that consent waives the right to be secure against unreasonable search or seizure, and a finding that consent means there is no search or seizure at all. However, this distinction does not appear to have been recognised by the

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43 James Fontana and David Keeshan *The Law of Search and Seizure in Canada* (7th ed, LexisNexis, Canada, 2007) at 532.

44 Ibid.

45 See for example *R v Wills*, above n 42; *R v Borden* [1994] 3 SCR 145; *R v Arp*, above n 42, at [85]–[86]. See also Don Stuart *Charter Justice in Canadian Criminal Law* (4th ed, Thomson/Carswell, Ontario, 2005) at [3.2(k)]; Glen Luther "Consent Search and Reasonable Expectation of Privacy: Twin Barriers to the Reasonable Protection of Privacy in Canada" (2008) 41 UBCL Rev 1.

46 *R v Wills*, above n 42, at [53].

Canadian courts. Rather, it seems the reason for discussing the waiver doctrine is that, because *effectively* when a person consents that person is waiving his or her rights, the waiver doctrine is useful in setting the standard for consent. Ultimately, however, valid consent still goes only to the question of whether there is a search or seizure. For example, later in his judgment, Doherty JA said:[47]

> A valid consent is a waiver of one's s 8 rights. A "consent search or seizure" is, in fact, no search or seizure at all for the purposes of s 8. The question of whether a valid consent exists goes to whether or not there was a search or seizure and not to the reasonableness of the police conduct.

Moreover, this "waiver" standard has not been applied in all consent search cases and may be confined to police criminal investigations. Thus in *R v B (A)* Dambrot J said:[48]

> It seems clear to me that Doherty JA was not addressing consent outside of the context of a police investigation, and that the standard he imposed is not the standard for consent in contexts other than a criminal investigation.
>
> …
>
> If the *Wills* standard does not apply here, then what is the nature of the consent required to exclude the taking of the photographs from being a seizure? I see no compelling reason for the test to be any different than the test for voluntariness of a statement.

Hence, although the Canadian courts have described consent as a "waiver" in some contexts, it is probably more accurate to say that, where there is consent, there is no search or seizure at all for Charter purposes.

III THE APPROACH THE NEW ZEALAND COURTS SHOULD TAKE

Clearly in its ordinary meaning a consent search will often still be a search, being an activity, "in the nature of seeking or looking carefully", undertaken to achieve an end, namely, "to find something not readily at hand, usually because it is concealed or lost".[49] For example, if an individual allows a police officer to enter his or her home to look for evidence then clearly the police officer has, in the ordinary sense of the word, "searched" the home. However, a number of commentators have argued that the New Zealand courts should, like the United States and Canadian courts, adopt a purposive definition of search based around the concept of the reasonable expectation of privacy. If these commentators are correct, in my view it must follow that a validly consented search will not be a "search" at all.

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47 Ibid, at [86].

48 *R v B (A)* [2006] 140 CRR (2d) 365 (ONCJ) at [18].

49 To borrow the words of McGrath J in *Ngan v R* [2007] NZSC 105, [2008] 2 NZLR 48 at [103].

In this section of the paper, I set out by way of background the arguments that commentators have made for the adoption of a privacy-based definition of search in New Zealand, before considering what implications I believe these arguments have in the consent search area.

A The Argument for a Privacy-based Definition of "Search"[50]

1 The historical approach to defining "search"

As a number of commentators have noted, the New Zealand courts have historically failed to engage with the question of when a "search" will have occurred for s 21 purposes.[51] For example, Butler and Butler explain that:[52]

> [d]espite efforts in a number of earlier cases, the Court has resolutely resisted exploring the concepts of "search" and "seizure" in s 21 of BORA. Accordingly, other than in the paradigmatic examples of, say, a police entry onto private premises and of the taking away of evidence as the fruits of that search, the lower Courts and practitioners have been provided with little guidance as to what type of state activity falls within the purview of s 21 of BORA.

The difficulty arises because the courts have had trouble deciding precisely what interests underlie s 21. At common law there could be no search unless the impugned conduct involved a trespass to person or property.[53] However, other jurisdictions have recognised that in modern society it does not provide sufficient protection for a bill of rights to focus only on physical interferences with people or property. For example, the increasingly sophisticated non-trespassory surveillance and information gathering techniques of police and other public authorities would not be subjected to bill of rights-scrutiny. Hence, as noted above, in the latter half of the 20th century the United States[54] and Canadian[55] courts adopted privacy based definitions of "search".

The wording of s 21 of the New Zealand BORA is based on the wording of the equivalent United States and Canadian provisions, and the section was written with the approaches taken in

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50 After this paper was finalised, the Supreme Court released its decision in *Hamed v R* [2011] NZSC 101. Differing views were expressed concerning whether New Zealand should adopt a privacy-based definition of "search": see in particular at [10] per Elias CJ, at [163]–]171] per Blanchard J, at [220]–[227] per Tipping J, and at [281] per Gault J.

51 See for example Optican "What is a 'Search'", above n 2; Optican, above n 2, at 419–428; Butler and Butler, above n 2, at [18.1.4] and [18.9].

52 Butler and Butler, above n 2, at [18.1.4].

53 Scott Optican "Search and Seizure" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) at 302.

54 *Katz v United States*, above n 25.

55 *Hunter v Southam*, above n 41.

those jurisdictions in mind.[56] Nevertheless the New Zealand courts have historically been reluctant to fully embrace the privacy rationale. While the Court of Appeal appeared to adopt the concept early on in *R v Jefferies*,[57] subsequent cases were more guarded in their approach.[58]

As a consequence of the historic uncertainty as to where the boundaries of s 21 should lie, the approach developed by the New Zealand courts has been to bypass, in borderline cases, the question of whether there is a search. That is, the courts have assumed for the sake of argument that there is a search, but found that, even if there was, it was reasonable.[59]

2 *The argument for a reasonable expectation of privacy test*

Some might argue that there is little to be gained from more explicitly defining the term "search". Although some conduct has been assumed to be a search when arguably it should not be, in such cases the courts have always gone on to find that the conduct was, in any case, not unreasonable. Furthermore, privacy is a highly amorphous concept, and privacy-based definitions of search are not without their own difficulties.[60]

Nevertheless, both Optican,[61] and Butler and Butler,[62] have suggested a number of reasons why it might be preferable for the courts to engage in more analysis at the definitional stage. First,

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56 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] 1 AJHR A6 at 103–107.

57 *R v Jefferies* [1994] 1 NZLR 290 (CA) at 302 per Richardson J, at 319 per Thomas J.

58 See for example, *R v Barlow* (1995) 14 CRNZ 9 (CA) at 58; *R v Wong-Tung* (1995) 13 CRNZ 422 (CA) at 426–427; *R v Fraser* [1997] 2 NZLR 442 (CA) at 449.

59 See, for example, *R v Wong-Tung*, above n 58, at 426–427 (surreptitious use of a telephone analyser by police, even if it was a search, was not unreasonable); *R v Fraser*, above n 58, at 452 (no need to consider whether continuous non-trespassory video surveillance of the rear garden of a house was a search); *R v Peita* (2000) 17 CRNZ 407 (CA) at 410 (no need to consider whether aerial surveillance was a search); *R v Smith (Malcom)* [2000] 3 NZLR 656 (CA) at [44] (no need to consider whether surreptitious video surveillance of interior of the accused's residence by undercover police informer was a search); *Ngan v R*, above n 49, at [28] (majority of Supreme Court assuming a police inventory check of items at a car crash was a search, but holding not unreasonable (but compare the approach of McGrath J at [112]–[120])); *Tararo v R* [2010] NZCA 287 at [63]–[65], [2010] NZSC 157 at [4] and [7] (Court of Appeal holding surreptitious video recording of drug purchase transaction on a front porch by an undercover police officer was not a search, but noting there is "room for a different view", and finding in any case not unreasonable; majority of Supreme Court noting that if there was a search, it was reasonable); *Hunt v R* [2010] NZCA 528 at [49] (no need to consider whether police surveillance operations in open country are searches). See also Optican "What is a 'Search'", above n 2, at 251–256.

60 In the United States, in particular, many commentators have been highly critical of the test as developed and applied by the Supreme Court. See, for example, Thomas Clancy *The Fourth Amendment: It's History and Interpretation* (Carolina Academic Press, North Carolina, 2008) at [3.3.5]; Richard Wilkins "Defining the 'Reasonable Expectation of Privacy': An Emerging Tripartite Analysis" [1987] 40 Vanderbilt LR 1077 at 1080.

61 Optican "What is a 'Search'", above n 2; Optican, above n 2, at 428.

properly defining the term "search" will allow it to act as a threshold test for determining whether conduct should fall within the scope of s 21, and thus should be subjected to a reasonableness analysis. It will ensure that the application of s 21 is neither too broad nor too narrow. Secondly, breaking the s 21 analysis down into two stages will help ensure clarity of reasoning. As Butler and Butler explain:[63]

> it is through the exercise of determining whether a particular activity constitutes a "search" or "seizure" that one establishes in a careful, meaningful way what the values at stake are if one then has to engage in a reasonableness assessment. In other words, a rigorous analysis of *why* an activity is a "search" or "seizure" (namely that it intrudes on reasonable expectations of privacy) provides the proper platform on which to base an inquiry as to *when* and *under what conditions* it will be reasonable to allow that expectation to be interfered with. A s 21 analysis that has not been founded on such a basic platform is much more at risk of "misfiring".

Optican has suggested that the adoption of a "tripartite" approach,[64] first suggested in the United States by Professor Wilkins,[65] would provide a structured basis on which to apply the reasonable expectation of privacy test. Under that approach, reasonable expectations of privacy are assessed by consideration of three interrelated inquiries, namely:[66]

> (1) the place or location where the surveillance occurs; (2) the nature and degree of intrusiveness of the surveillance itself; and (3) the object or goal of the surveillance.

This test is also favoured by Butler and Butler, subject to the caveat that s 21 should only protect against intrusions on reasonable expectations of privacy which arise out of law enforcement activities.[67]

B Where There is Good Consent There Should be No Search

The question I seek to address is: if these commentators are correct, and New Zealand should adopt a definition of "search" based around the concept of the reasonable expectation of privacy, does it follow that where there is valid consent there should not be a search at all?

In my view, it does. As noted above, clearly a consent search is, in the ordinary meaning of the term, a "search". However, the implication of adopting a reasonable expectation of privacy

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62 Butler and Butler, above n 2, at [18.9.2].

63 Ibid.

64 Optican "What is a 'Search'", above n 2.

65 Wilkins, above n 60.

66 Ibid, at 1128.

67 Butler and Butler, above n 2, at [18.9.3].

definition is that some conduct which does not fall within the ordinary meaning of the term will constitute a search, while other conduct which does fall within the ordinary meaning of the term will not constitute a search. For example, clearly a police examination of an abandoned item is, in the ordinary sense of the word, a "search" of that item. However, as Optican has explained, there may well be no "search" in such cases if a privacy-based definition is adopted.[68] He writes:[69]

> In *R v Reuben*[70] the Court of Appeal approved the police examination of the contents of a tin that the defendant had dropped on a public footpath when approached by a constable. In holding that the inspection did not violate s 21 of the Bill of Rights, the Court stated that, as a result of his actions, the accused "could not have had any real expectations of privacy in relation to the tin. Accordingly … the tin was abandoned at the time when the constable opened it and … his search of it was lawful and not unreasonable".
>
> Although *Reuben* reaches a sensible result, the Court of Appeal should not have held that the search of the tin was reasonable pursuant to s 21. Instead, the judges should have concluded that, *because the accused behaved in a way that demonstrated his relinquishment of a reasonable expectation of privacy in the container, no "search" of the tin had actually taken place under the Bill of Rights*.

In my view, the same logic should apply in consent search cases. Just as where an individual chooses to conduct an activity in plain view of the police, or chooses to abandon an item which the police later find, so when that individual chooses to acquiesce to a police request should that individual be taken to have relinquished, to the extent of the consent, any reasonable expectation of privacy he or she might otherwise have had.

However, this view does not appear to be shared by either the United States courts (which have adopted the reasonable expectation of privacy test), nor those who advocate adopting the reasonable expectation of privacy test in New Zealand. For example, McGrath J, despite adopting what was (in essence) a reasonable expectation of privacy test in finding that there was no search in the case of *Ngan v R* (which concerned a police inventory check of property recovered from a car accident),[71] did not dissent from the unanimous judgment of the Supreme Court a year later in *Cropp v Judicial Committee* opining,[72] as noted above, that consent can be relevant only to reasonableness. Similarly Optican has said, without any hint of disapproval, that "provided that it is reasonably executed, a

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68 Optican, above n 2, at 443. This point has also been noted by the New Zealand Court of Appeal: see *Hunt v R*, above n 59, at [48].

69 Ibid (emphasis added).

70 *R v Reuben* [1995] 3 NZLR 165 (CA).

71 *Ngan v R*, above n 49, at [111]. (The majority appeared to assume without discussion that there was a search (at [28]), while Tipping J expressly assumed (because the contrary had not been argued) that there was a search, but said that he would "reserve his position on the point" (at [41]).

72 *Cropp v Judicial Committee*, above n 5, at [21].

search conducted pursuant to a valid consent will typically be found reasonable under s 21 of the Bill of Rights".[73] Finally, Butler and Butler have argued that:[74]

> it is the fact of interference with the interests … which constitute a "search" or "seizure", regardless of whether that interference has been done with consent or not. That must be the case because s 21 of BORA should set the legal standards governing the sufficiency of consent in any particular case.

In my view, however, any argument that "search" should be defined according to reasonable expectations of privacy, but nevertheless a consent search should still be a search, is not sustainable.

First, there is a difficulty with the idea that, as Butler and Butler suggest, the question of consent can be separated from the question of whether there was an intrusion upon the reasonable expectation of privacy. For example, if a police officer requests that an individual turn out his or her pockets and the individual voluntarily complies, how are we supposed to assess the question of whether there was an intrusion on a reasonable expectation of privacy separately from the question of consent?[75] Presumably the court would have to consider whether, in a hypothetical scenario where all the facts were the same, but there was no consent, the conduct would have intruded on a reasonable expectation of privacy, and there would have been a search. But what is our hypothetical scenario? A scenario where the individual emptied out his or her own pockets but only because he or she (for some reason) felt coerced? Or a scenario where the police officer physically emptied out the individual's pockets? In either case we have fundamentally changed the facts.

The second, and perhaps more important, point, is that even if one accepts that we can ignore the consent until the reasonableness stage, in my view it is neither necessary nor desirable to do so. Certainly, those advocating this approach do not adopt it in other contexts. For example, as noted above, Optican has argued that where an accused abandons an item, and so relinquishes any reasonable expectation of privacy in it, there should be no search.[76] Similarly, both Optican,[77] and Butler and Butler,[78] have recognised that, where a third party participant in a conversation consents to the recording of this conversation by police, that would (if it meant there was no intrusion on any reasonable expectation of privacy of the individual complaining) mean there is no search. However,

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73 Optican, above n 2, at 438.

74 Butler and Butler, above n 2, at [18.12.1].

75 A scenario somewhat analogous to this arose in *Grant v Police* HC Christchurch A55/03, 18 June 2003.

76 Optican, above n 2, at 443.

77 Optican "What is a 'Search'", above n 2, at 266.

78 Butler and Butler, above n 2, at [18.11.5] and [18.11.9].

a third party's consent to a search of property, on the other hand, is argued to go to the question of reasonableness.[79] Why separate out the consent question in some contexts but not others?

Both Butler and Butler,[80] and the Supreme Court in *Cropp v Judicial Committee*,[81] appeared to be concerned that the sufficiency of consent, or the conduct of a particular search carried out pursuant to consent, should not be placed beyond s 21 scrutiny. Yet, in order to reach the conclusion that there was no search, the consent must have been sufficient that the particular conduct in question did not intrude upon a reasonable expectation of privacy. For example, the Supreme Court was concerned that a general consent given in advance should not be able to be relied on to justify a search at, say, three o'clock in the morning.[82] However, a search at three o'clock in the morning would be outside the scope of the consent, and so not consented to. Obviously, if there is valid consent, the conduct is not subject to *further* s 21 scrutiny. However, in such circumstances, where there is no intrusion upon any interest protected by the section, further scrutiny will not be required.[83]

IV HOW WILL THE COURTS DETERMINE THE SUFFICIENCY OF CONSENT?

If the courts do adopt the approach I have advocated, what effect will this reconceptualisation of the role of consent have on the requirements of a valid consent? The main impact will be a change in the *process* by which the sufficiency of consent is determined. Currently, the validity of consent is discussed as part of the general reasonableness analysis. However, if the approach I have advocated is adopted, a two-step test is required. First, the court must ask whether the consent was sufficient such that there was no intrusion on a reasonable expectation of privacy. If there is no intrusion then there is no search. However, if there is an intrusion, then there is a search, and the court must then ask whether that search can be justified as "not unreasonable" in light of the public interest objective sought to be achieved by the search (for example, the public interest in law enforcement, or public health and safety).

In theory, breaking the analysis down into a two-step test should not significantly alter the *substantive* requirements of a valid consent. Assuming that privacy is the main interest underlying s 21, the courts should already be considering, within the reasonableness analysis, whether there was

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79 Optican, above n 2, at 441–442; ibid, at [18.32.7]–[18.32.11].

80 Butler and Butler, above n 2, at [18.12.1].

81 *Cropp v Judicial Committee*, above n 2, at [21].

82 Ibid.

83 As I discuss below, in my view to hold that a search which is within the scope of a voluntary consent given with the requisite authority is nevertheless "unreasonable" risks undermining the liberty, self-definition, autonomy and (on one view) dignity rationales underlying s 21.

an intrusion on a reasonable expectation of privacy, and if so, whether that intrusion was justified by the public interest objective of the search. The benefit of splitting the analysis into two steps is that it should encourage the courts to more clearly articulate their reasoning, and should therefore ensure that, going forward, the courts give adequate consideration to the competing interests at play in consent search cases.

A When Will Consent be Sufficient Such That There is No Search at All?

Currently in New Zealand, despite a somewhat equivocal view taken of the matter by the Supreme Court in *Cropp v Judicial Committee*,[84] it does appear that where conduct is within the scope of a voluntary and informed consent given with the requisite authority, it will simply be assumed to be reasonable. In such circumstances the courts appear to find no need to discuss the public interest justification for the search.[85]

This result would continue under the new approach, with the main difference being that the consent would mean there was no search, rather than that the search was reasonable. The main legal issues that would arise at this stage of the analysis would be precisely what is meant by "voluntary and informed", and precisely what constitutes the "requisite authority".

1 Voluntary and informed

A highly controversial issue in the consent search cases and literature is whether (or in what sense) it must be shown that consent was "informed". Obviously, if an individual acquiesces to a request without any awareness of their right to refuse, or of the consequences of acquiescing, that individual's acquiescence was not truly voluntary. The difficult question is really one of burden of proof: should the courts assume people are aware of their right to refuse to consent, or should the courts require the searcher to prove that the searchee was aware of this right?

(a) The United States approach

As noted above, the United States Supreme Court in *Schneckloth v Bustamonte* held that consent must be shown to be "voluntary" in the sense that it was not coerced, but that it need not be informed, in the sense that it need not be shown that the consentee was aware of their right to refuse consent.[86] Stewart J, delivering the opinion of the Court, said that:[87]

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84 See *Cropp v Judicial Committee*, above n 5, at [21], suggesting that the presence of consent, and the quality of that consent, is merely a factor in the reasonableness analysis (and not necessarily decisive).

85 Examples of searchers successfully relying on consent alone include: *R v Fletcher*, above n 4; *R v Edmonds* [2007] NZCA 557; *R v Gebremichael*, above n 3; *R v Rodgers*, above n 3; *R v Bradley*, above n 3. Examples of consent arguments failing, but solely on the ground that there was no true consent, include: *R v Hjelmstrom*, above n 3; *R v Moran*, above n 3.

86 *Schneckloth v Bustamonte*, above n 23.

> whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.

He went on to explain that:[88]

> In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches.

The result of this approach is that, so long as there is no evidence of overt coercion or deception, consent is assumed to be voluntary, because it is assumed the consentee knew of their right to refuse.

(b) The Canadian approach

As noted above, the Canadian courts did not follow the United States approach. In *R v Wills*, Doherty JA took the view that, because when an individual consents he or she is effectively waiving an important criminal process right, the burden is on the Crown to show, on the balance of probabilities, that the consentee was aware of the nature of the conduct being consented to, the right to refuse, and the potential consequences of consenting.[89] This does not necessarily mean the searcher must explicitly inform the searchee of these matters, if the searcher can by some other means prove that the searchee was aware of them.[90] Furthermore, this requirement may be limited to the context of police criminal investigations.[91]

(c) The New Zealand approach

Currently, the New Zealand approach is similar to the United States approach. That is, the consentee will be assumed to be aware of his or her right to refuse unless it is shown that he or she was misled or deceived as to that right.[92]

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87 Ibid, at 227.

88 Ibid, at 229.

89 *R v Wills*, above n 42, at [69]; approved in *R v Borden*, above n 45, at [34].

90 *R v Blackstock* (1997) 10 CR (5th) 385 (ONCA) at 388.

91 *R v B (A)*, above n 48, at [18].

92 See *Lord v Police* (1998) 5 HRNZ 92 (HC) at 96–97; *R v Hjelmstrom*, above n 3, at [13]–[15]; *R v Rodgers*, above n 3, at [18]–[21]; *R v Gebremichael*, above n 3, at [26]–[30]; *Cropp v Judicial Committee*, above n 5, at [21]–[22]; *R v Edmonds*, above n 85, at [24].

For example, in *R v Gebremichael*, the police requested and were granted consent to enter Mr Gebremichael's house and take his shoes and clothing, without specifically informing Mr Gebremichael of his right to refuse – but also without misleading him.[93] The Court of Appeal said that it doubted whether the Crown had to prove knowledge that consent may be withheld, and accepted the Crown's submission that "the fact that permission is asked in itself implies that there is a choice whether or not to consent, absent an indication by the police that consent is mandatory".[94] By contrast, in *Lord v Police*, where the police officers incorrectly represented to the accused that if consent was not granted they could get a search warrant, the consent was not valid.[95] Similarly in *Cropp v Judicial Committee*, the Supreme Court explained that a professional jockey's consent to a drug test would be neither voluntary nor informed if she was incorrectly lead to believe that she was required by statutory regulations to consent as a condition of participating in races.[96]

It is worth noting that the Search and Surveillance Bill contains a number of provisions regulating the lawfulness (putting aside BORA) of consent searches,[97] including provisions making it unlawful for certain enforcement officers to conduct certain consent searches without first specifically informing the consentee of his or her right to refuse, and of the purpose of the search.[98] The result, under the current approach of leaving consent to the reasonableness analysis, will be that any consent search conducted in breach of that legal requirement is likely to be ipso facto unreasonable (unless it is considered a minor or technical illegality and was not realised before the search was commenced).[99]

(d) How the New Zealand law might develop under my approach

If consent can mean there is no search at all then, even though a consent search carried out without explicitly informing the searchee of his or her right to refuse may be unlawful (under the Search and Surveillance Bill), it would not necessarily be in breach of s 21 of BORA. It would be

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93 *R v Gebremichael*, above n 3, at [26]–[28].

94 Ibid, at [27]. There was in any event some evidence that the accused was aware of his right to refuse: see ibid, at [29].

95 *Lord v Police*, above n 92, at 96–97.

96 *Cropp v Judicial Committee*, above n 5, at [22].

97 Search and Surveillance Bill 2009 (45-2), cls 88–93. These provisions reflect the recommendations of the Law Commission – see Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [3.62]–[3.118].

98 Search and Surveillance Bill 2009 (45-2), cls 90 and 91.

99 This would be unreasonable in light of the view expressed in *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [21]. Note, however, the differing views expressed in the Supreme Court on the relationship between lawfulness and reasonableness in *Hamed v R*, above n 50 (released after this paper was finalised).

sufficient for s 21 purposes that the searchee was in fact aware of his or her right to refuse, and so voluntarily relinquished any reasonable expectation of privacy.

The difficult question for s 21 purposes would remain whether the searchee's awareness of his or her right to refuse should – in the absence of any misleading or deceptive conduct – simply be assumed (as the New Zealand Court of Appeal in *R v Gebremichael* suggested),[100] or should be an element of a valid consent which the searcher is required to prove. If the latter then, although the police would not be required to explicitly inform the searchee of his or her right to refuse, they would be required to produce some other evidence of the searchee's awareness of that right (for example, a later admission of awareness by the searchee, during questioning after the search).

The reason the United States Supreme Court in *Schneckloth v Bustamonte* did not require proof of awareness of the right to refuse was that the Court considered such a requirement would be overly burdensome on the police, and would reduce the effectiveness of consent searches as a law enforcement tool.[101] However, many commentators have been critical of that Court's approach.[102] They have pointed out that it is very unlikely that an individual would consent to a search which that individual knew would lead to the discovery of incriminating evidence if that individual was aware of his or her right to refuse to do so. They argue that often consent searches are not necessary for law enforcement and are simply a way for police officers to exploit the power imbalance between the individual and the state.[103]

I would point out in response that there are clearly many valid reasons why a public authority might request consent to search other than to take advantage of a power imbalance, and there are many valid reasons why an individual might grant consent other than a lack of awareness of the right to refuse. For the public authority, it may avoid the need to go through the necessary procedures, or satisfy itself to the necessary standard, for invoking a coercive power of search (for example, obtaining a warrant).[104] For the consenting individual, the search may provide an opportunity to dispel any suspicion of his or her guilt in a crime; or the consent may be given with an eye to the advantages for sentencing in co-operation with police;[105] or the consent may be given

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100 *R v Gebremichael*, above n 3, at [26]–[30].

101 *Schneckloth v Bustamonte*, above n 23, at 229–233.

102 See, for example, Glen Luther "Consent Search and Reasonable Expectation of Privacy: Twin Barriers to the Reasonable Protection of Privacy in Canada" (2008) 41 UBCL Rev 1 at 11; Rotenberg, above n 38; Lassiter, above n 38; Marcy Strauss "Reconstructing Consent" (2002) 92 J Crim L & Criminology 211; Maclin, above n 22.

103 Indeed, some go so far as to argue that consent searches should therefore be prohibited altogether: see, for example, Strauss, above n 102, at 211; Maclin, above n 22, at 27–28.

104 LaFave, above n 22, at 4.

105 As noted in *R v Edmonds*, above n 85, at [24].

out of a genuine desire to help the police (for example, if a farmer wanted to consent to the police looking in his barn for a missing child).[106]

Nevertheless, given the very real risk of a police "request" being interpreted by the searchee as a "command", in my view it would be appropriate for the New Zealand courts to follow the Canadian approach and, at least in the context of police criminal investigations, require proof that the individual was aware of his or her right to refuse before being prepared to accept that the consent was truly voluntary.

2 With the requisite authority (third party consents issue)

Third party consent issues can arise in a number of different contexts. One of the most obvious examples is where a third party consents to a search of property. For example, does a flatmate have authority, for s 21 purposes, to consent to a search of another flatmate's room?[107] A less obvious example arises in the context of participant electronic surveillance, where, for example, a participant in a conversation with an accused consented to the conversation being recorded, perhaps because that participant was an undercover police officer or a police informer.[108]

It is beyond the scope of this paper to engage in a full discussion of the circumstances in which the requisite authority will exist in these various contexts. Indeed, particularly in the context of participant electronic surveillance, a vast body of case law and literature has developed, both in New Zealand and overseas.[109] The key point for present purposes, however, is to recognise that, if my approach is adopted, then the question of whether the requisite authority to consent exists must turn on whether, given that the third party has given consent, there was any intrusion upon the reasonable expectation of privacy that the searchee might otherwise have had.

B When Might Consent be Insufficient on its Own But Still be a Factor in the Reasonableness Analysis?

If the standards set out above are not met (that is, if the conduct is not within the scope of a voluntary and informed consent given with the requisite authority), then there will be a search, and

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106 This example is given by the Law Commission, above n 97, at [3.70].

107 In *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC) at [27], the Court held that joint tenants of a residential property each possess the authority to consent to entry by police. However, that case concerned the law of trespass. If privacy is to be viewed as the main interest underlying s 21, it is not immediately clear that the same rule should apply.

108 Another context is voluntary third party disclosure of information, such as bank records or blood test results. See, for example, the discussion in Butler and Butler, above n 2, at [18.11.5(1)].

109 In the United States context, see, for example, *Lopez v United States* 373 US 266 (1963); *United States v White* 401 US 745 (1971). In the Canadian context, see, for example, *R v Barrett* [1995] OJ No 920 (Prov Div); *R v Duarte* [1990] 1 SCR 30. In the New Zealand context, see, for example, *R v A* [1994] 1 NZLR 429 (CA); *R v Barlow*, above n 58; *R v Smith (Malcom)*, above n 59; *Tararo v R*, above n 59.

that search must be justified as not unreasonable in light of the objective sought to be achieved by the intrusion. Depending on the reason why the consent argument failed at the "no search" stage, however, it may still be a relevant factor at the reasonableness stage. Examples of the types of situations where an element of "consent" may be a relevant factor in the reasonableness analysis include:

(a) where there is a reduced but not extinguished expectation of privacy; and

(b) where the searcher has a reasonable but mistaken belief in consent.

1 Where there is a reduced but not extinguished expectation of privacy

In some situations, even though an argument based around consent may not be effective to *extinguish* the reasonable expectation of privacy (and so result in a finding of no search), the element of consent or voluntariness may reduce the *degree* of intrusion on the reasonable expectation of privacy. The fact that the search was less intrusive on privacy may, in some cases, make it easier to show that the search was justified as "not unreasonable" in light of the public interest objective the search sought to achieve. For example, it may excuse a lack of prior authorisation by warrant.

(a) Voluntary participation in activities conditional on consent

Where consent is made a condition of participation in an activity, often that consent will not be truly voluntary. For example, as noted above, in *Cropp v Judicial Committee* the Supreme Court explained that a professional jockey's consent to a drug test would be neither voluntary nor informed if she was incorrectly led to believe that she was required by statutory regulations to consent as a condition of participating in races.[110] Because the drug tests were ultimately held to constitute reasonable searches as they were justified by the importance of race day safety, the deemed consent was irrelevant to that analysis.

However, presumably in some cases, the fact of voluntary participation in an activity, with advance notice that being searched is a condition of participation, may be of some relevance in the s 21 analysis. Although it must be unlikely to result in a finding of "no search", it may help show the reasonable expectation of privacy was reduced, and so be relevant at the "reasonableness" stage. For example, in the Canadian case of *R v Campanella*, the fact that the accused chose to enter the courthouse knowing her bag would be searched at the door meant that she had a reduced expectation of privacy in respect of her bag.[111] She had the opportunity, before entering, to ensure that there was nothing private in her bag that she did not want to be seen.[112] This, combined with the importance

110 *Cropp v Judicial Committee*, above n 5, at [22].

111 *R v Campanella* [2005] OJ No 1345 (ONCA) at [23].

112 Ibid, at [3].

of ensuring safety at the courthouse, and the impracticality of obtaining a warrant for each search meant that the warrantless search of her bag was not unreasonable.[113]

Hence, the question in any particular case will be whether, when a person chooses to participate in an activity with prior knowledge of the possibility of being searched, that prior knowledge extinguishes the reasonable expectation of privacy, reduces it (as in *R v Campanella*),[114] or is of no relevance at all (as in *Cropp v Judicial Committee*).[115] It is only in the latter two scenarios that the question of whether the conduct can be justified as "not unreasonable" in light of its public interest objective will arise.

(b) Searches of the person which are offensive to human dignity

It might be argued that some searches are so inherently intrusive, and offensive to society's values, that individuals should not be able to consent to them even if they want to. That is, that some conduct is so intrusive that, even if it is within the scope of a voluntary and informed consent given by the individual in question (and not a third party), nevertheless that conduct should have to be justified by its public interest objective, with the consent, although not irrelevant, nevertheless being insufficient on its own to render the conduct BORA-compliant.

In *R v Jefferies*, Thomas J explained that:[116]

> 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. While necessarily phrased in terms of individual values, the community has a direct interest in the recognition and protection of this broad right to privacy. It is a valued right which is esteemed in modern democratic societies.

The argument in favour of restricting the authority of individuals to consent to searches of their person hinges on the dignity rationale. In the context of voluntary euthanasia it has been argued that to intentionally take a human life, even when that person consents, reduces the value of all human lives, and is offensive to the dignity of all human beings.[117] Similarly it might be argued that a public strip search, or a cavity search, is degrading to the dignity of all humans. Therefore, it would

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113 Ibid, at [22]–[26].

114 Ibid.

115 *Cropp v Judicial Committee*, above n 5.

116 *R v Jefferies*, above n 57, at 319.

117 See for example Carolyn Doyle and Mirko Bagaric "The Right to Privacy: Appealing, but Flawed" (2005) 9 International Journal of Human Rights 3 at 19–20.

be argued, this conduct does intrude upon the values protected by s 21, and should amount to a search, even when the individual consented. The individual's consent would then be merely a factor in the reasonableness analysis, with the search ultimately having to be justified in light of its public interest objective.

There is some weight in such arguments. Ultimately, however, I do not consider that they are sustainable. While some conduct is inherently offensive to human dignity, clearly to remove one's ability to choose to consent can equally be considered an affront to dignity.[118] More importantly, not to recognise an individual's authority to consent to a search of their person would clearly be inconsistent with the various liberty, self-definition and autonomy rationales advanced under s 21. As Doherty JA said in the Canadian context:[119]

> While it is necessary to avoid an overly broad approach to consent, it is also necessary to recognize that valid consents reinforce the principle of individual autonomy which underlies the rights set out in the *Charter*. Individuals are free to define their own privacy interests and to yield those interests when so inclined. In recognizing that a valid consent must be an answer to any subsequent claim of a s 8 violation, our law recognizes that autonomy. (citations omitted)

2 *Where the searcher has a reasonable but mistaken belief in consent*

What if the searcher reasonably believes, on the facts available to him or her at the time, that there was a valid consent (that the consent was voluntary and informed; that the scope of the consent extended to the particular search, and that the consent was given with the requisite authority), but once all the evidence is before the court, it becomes clear that, viewed objectively, there was not in fact valid consent?

In such a case I would argue that there is in fact an intrusion on the individual's reasonable expectation of privacy, and so there is a search.[120] The question is whether, in light of the searcher's reasonable belief in consent, and the public interest objective the searcher sought to achieve, the intrusion upon the protected interest was not unreasonable. In the context of police searches this would depend largely on the lengths to which the police should be expected to go to verify the authority of those purporting to consent, in light of the practicalities of policing and the public interest in law enforcement.

One of the few New Zealand cases dealing with the question of whether, and in what circumstances, a reasonable belief in consent will suffice is *R v Bradley*, which concerned the admissibility of evidence obtained against Mr Bradley in a police search of a dwelling house.[121] In

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118 Ibid, at 20.

119 *R v Wills*, above n 42, at [47].

120 This is consistent with the approach taken in *R v Wills*. See ibid, at [85].

121 *R v Bradley*, above n 3, at 156.

that case, the police were looking for suspects believed to have been driving a stolen car, and had been informed that the suspects were at the dwelling house.[122] The police entered the dwelling house in circumstances described by Thomas J, who wrote the judgment of the Court of Appeal, as follows:[123]

> Wishing to preserve an element of surprise, the police parked their car down the road. A sergeant and a dog-handler positioned themselves so as to cover the front door of the house. Constable Holmes and another police officer then approached open ranch-slider doors off an elevated balcony. They clambered on to the balcony and Constable Holmes went to the open doors. … Standing at the door, he introduced himself to the persons in the room, some of whom were sitting on a couch. He said that he was looking for three suspects and identified them by name. One of the suspects was in the adjoining kitchen and he immediately acknowledged his presence. Constable Holmes then asked if he could look around the house for the two remaining suspects and was told by the woman in the group; "Go for it, do what you want". The constable knew that Mr Bradley was a resident at that address.

The police subsequently, upon entry, discovered drugs and invoked s 18(2) of the Misuse of Drugs Act 1975 (which allows for a warrantless search where a constable has reasonable grounds for believing that drugs are present).[124] However, one of the issues in the case was whether the initial entry, pursuant to the woman's consent, was lawful and BORA-compliant.[125] In relation to this issue, most of the Court of Appeal's discussion concerned whether reasonable grounds existed for believing the woman had authority to consent. The Court assumed (perhaps because the point was not disputed) that, where apparent authority exists, it may be sufficient. Thomas J said:[126]

> *It was accepted by Mr Speed, we consider correctly, that valid consent to a search may be given by an occupier of the property where his or her conduct and the circumstances which pertain reasonably lead the police officer to conclude that the person had authority to give that consent*. Whether such consent has been given is a question of fact to be determined from all the circumstances. Similarly, in this case, whether it was reasonable for the constable to conclude that the woman who responded to his question had the authority to consent is also a question of fact to be resolved having regard to all the relevant facts.
>
> In the circumstances of this case, we consider the invitation issued by the woman occupant was sufficient to constitute permission for the police to carry out a search of the house for the remaining suspects.

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122 Ibid.

123 Ibid.

124 Ibid, at 157.

125 Ibid, at 160–161.

126 Ibid (emphasis added).

…

> Mr Speed urged upon us that the constable should have made further inquiries. He should have asked, Mr Speed elaborated, if the woman lived at the house and confirmed that she had the authority to permit him to enter. We do not consider that the constable was under any such obligation. The question whether he could reasonably accept the woman's response as conveying permission to enter the house and conduct the search must be assessed against normal standards of human behaviour in New Zealand. The position may be different in Canada or in the US. But we consider that in this country, unless something out of the ordinary is present, the response of an unidentified occupier purportedly exercising authority can be taken at face value.

On the particular facts of that case, the right outcome may well have been reached. However, it is not, in my view, immediately apparent that a reasonable belief in consent will always suffice for s 21 purposes, particularly if there is evidence that the belief, albeit reasonable, was in fact mistaken (whether as to voluntariness or authority or scope).[127] It would in each case be necessary to balance the public interest objective of the search (be it law enforcement, or public health and safety, or some other regulatory objective) against the intrusion on privacy which occurred. The benefit of adopting my approach would be to make clear that such a balancing process is required, and to provide an analytical framework within which to undertake that process.

V POSSIBLE CRITICISMS OF MY APPROACH

In this section I set out some possible criticisms that may be made of the approach I have advocated in this paper and attempt to (pre-emptively) respond to them.

A Will it Weaken the Substantive Protections Afforded by BORA?

One concern readers may have with my approach is that, if a consent search is not a "search" for BORA purposes, then a subset of conduct by public officials will be removed from BORA scrutiny, which may risk weakening the substantive protection affirmed in BORA.

My approach is not, however, intended to make s 21 more generally favourable to either searchers or searchees. One of the key points to recognise is that, under my approach, a consent search will only fall outside of s 21 if, and to the extent that, the conduct in question was within the scope of a voluntary and informed consent given with the requisite authority. Under the current approach, searches meeting these requirements will, in any case, invariably be held not to be

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127 In respect of reasonable belief in authority to consent, the same view as in *R v Bradley* (that is, that apparent authority to consent may suffice) appears to have been taken by the United States Supreme Court (see *Illinois v Rodriguez*, above n 30), although it may not be followed in Canada (see *R v Wills*, above n 42, at [85]–[90]). In addition, if the Search and Surveillance Bill 2009 (45-2) is enacted as it currently reads, then searches conducted pursuant to apparent but not actual authority will be unlawful (which may well make such searches ipso facto unreasonable, depending on the view one takes of the relationship between lawfulness and reasonableness).

unreasonable.[128] There is therefore no loosening of the requirements of a valid consent under my approach. If anything, if a finding of valid consent is to mean that there is no search at all (rather than merely having consent mixed up with other "reasonableness" issues), this might encourage the courts to take a more stringent approach to the requirements of a valid consent.[129]

On the other hand, if the requirements of a valid consent are met, such that there has been no intrusion upon the individual's protected rights, then it is difficult to see any benefit or purpose in undertaking a s 21 reasonableness analysis. Indeed, as discussed above, to hold conduct unreasonable in such circumstances would, arguably, restrict the individual's ability to consent, which would itself be inconsistent with the liberty, self-definition, autonomy and (on one view) dignity rationales underlying s 21.

B Are You Not Just Shifting the Reasonableness Analysis to an Earlier Stage?

It may be argued that all I am really doing, in this paper, is suggesting we move the "reasonableness" analysis to an earlier stage. For example, I have said that the reason a search conducted at three o'clock in the morning would not normally be consented to (where a general consent is given in advance), is that the search will be outside the implied scope of the consent. Some readers might be concerned that, by assuming that people generally only consent to a "reasonable" search, I have simply transferred the assessment of reasonableness to the question of whether there is a search at all.

It is true that I am suggesting we move some factors which previously were considered at the reasonableness stage forward into the question of whether there is a search at all. However, to suggest that this is all my approach achieves would be somewhat simplistic. As the discussion in Part IV makes clear, my approach does not simply move all consent issues to the question of whether there is a search. Instead, it splits up the analysis into a two-stage approach. First, when considering whether there was a "search", the court would focus on objective factors specific to the individual (such as the voluntariness, authority and scope of the consent given), to determine whether the individual's privacy was intruded upon. Then, at the reasonableness stage, quite different factors are considered. The focus is instead on the public interest objective which the search sought to achieve, and whether that objective justifies the intrusion on the individual's privacy (for example, whether a search carried out pursuant to a reasonable, but mistaken, belief in consent can be justified by its public interest objective).

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128 As noted above under the heading "When Will Consent Be Sufficient Such That There Is No Search at All?", I am not aware of any case in which an otherwise lawful search, which was within the scope of a voluntary and informed consent given with the requisite authority, has been held to be unreasonable under s 21 of BORA.

129 Indeed, in this paper I have advocated the adoption of a stricter approach to the issue of, for example, whether there must be proof that the searchee was aware of his or her right to refuse consent.

It is this breaking down of the analysis into two stages that is the real advantage of my approach. It ensures that the competing values (of individual privacy against the public interest objective of a search) are separately analysed and balanced against each other, and not simply merged into one at the reasonableness stage.

C Will it be Confusing for Officials?

Some readers may be concerned that my approach could be difficult for public officials exercising search powers pursuant to statute (such as Fisheries officials, Society for the Prevention of Cruelty to Animals officers, the Commerce Commission, and so on) to readily understand and apply on a day-to-day basis.

For example, one concern may be that having a subset of searches, in the ordinary sense of the word, which are not classified as such for the purposes of the term "search" in s 21 of BORA, could be a confusing distinction to apply in practice. In response to this concern I would make two points. First, the distancing of the legal meaning of the term "search" from its ordinary meaning is an inevitable consequence of adopting a purposive, privacy-based definition of "search". Therefore, this concern is really part of a broader objection to adopting a reasonable expectation of privacy-based test. Second, whether a consent search is defined as a "search" for BORA purposes is unlikely to have any direct impact on public officials carrying out their day-to-day activities. Far more important for a public official seeking to conduct a consent search is that the requirements for a valid consent are clearly laid out by the courts (something which, I would hope, my more structured analytical framework would help the courts to achieve).

Another concern may be that, under my approach, often a consent search will not be subject to a s 21 reasonableness analysis unless and until the conduct strays beyond the scope of the consent, at which point the reasonableness requirement in s 21 would suddenly apply – a transition which may be difficult to recognise and deal with in practice. My response to this second concern is that where conduct exceeds the implied scope of a consent it is *already* the case that officials and the courts must be able to determine the precise point at which this occurred. The issue currently arises when addressing the question of whether a consent search is (putting aside BORA) lawful. If the searcher, say, enters onto private property pursuant to a limited consent, his or her search will become an unlawful trespass at the point at which he or she exceeds the consent, unless some other source of lawful authority for the search can be pointed to (for example, because evidence of drugs was found, and so the officer invoked s 18(2) of the Misuse of Drugs Act 1975).[130] Furthermore, in principle, it is right that officials and the courts should seek to determine the exact limits of a consent when determining whether conduct is BORA-compliant. To the extent that adopting my approach ensures that such an analysis is undertaken, this should be viewed as a good thing.

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130 This was the scenario that arose in *R v Bradley*, above n 3.

VI CONCLUSION

Currently in New Zealand, as in the United States under the Fourth Amendment, a consent search is a search. However, where the conduct is within the scope of a voluntary and informed consent given with the requisite authority, it will almost never be held to be unreasonable. This accords with the plain meaning of the term "search". However, if the courts are to define "search" by reference to reasonable expectations of privacy, then it follows that, as in Canada under s 8 of the Charter, often a consent search should not be treated as a search at all.

If such an approach were adopted, the courts would have to engage in a two-stage analysis, asking first whether there was an intrusion upon a protected interest such that the conduct in question amounted to a search, and second, if there was an intrusion, whether the conduct could nevertheless be justified as not unreasonable on some public interest ground.

Applying such a test, it is likely that there would be no search in most cases where the conduct was within the scope of a voluntary and informed consent given with the requisite authority. On the other hand, if the consent was not truly voluntary (for example because it was a condition of participating in an activity), or if there was merely a reasonable but mistaken belief in consent, then there would still be a search. However, such factors might be relevant in the reasonableness analysis.

This approach is not intended to make s 21 more generally favourable to either searchers or searchees. Certainly, it should not result in a weakening of the substantive protection afforded by BORA. Rather, the advantage of my approach is that it provides a structured framework within which the competing values (of individual privacy against the public interest objective of a search) can be separately analysed, instead of simply being merged into one at the reasonableness stage. This should help ensure that, in any particular case, the competing values at stake are properly balanced against each other, with a just result being reached, and clearly articulated reasons for that result being given.