ORDER RESCINDING EXISTING SUPPRESSION ORDERS IN RESPECT OF THE JUDGMENT OF 2 SEPTEMBER 2011, MADE BY THE HIGH COURT ON 15 SEPTEMBER 2011. IN PLACE OF THOSE ORDERS, ORDERS PROHIBITING PUBLICATION IN NEWS MEDIA, ON THE INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASES OR PUBLICATION BY ANY OTHER MEANS UNTIL FINAL DISPOSITION OF THE TRIAL ORIGINAL JUDGMENT.
REDACTED VERSION MAY BE PUBLISHED.

IN THE SUPREME COURT OF NEW ZEALAND

SC 125/2010
SC 128/2010
SC 129/2010
SC 130/2010
SC 131/2010
SC 132/2010
SC 133/2010
SC 135/2010
SC 138/2010
SC 139/2010
SC 2/2011
[2011] NZSC 101

OMAR HAMED
TAME WAIRERE ITI
PHILLIP PUREWA
MARAKI TEEPA
EMILY FELICITY BAILEY
TRUDI PARAHA
TE RANGIWHIRIA KEMARA
RAWIRI KIYOMI ITI
URS PETER SIGNER
RUANATIRI HUNT
VALERIE MORSE

v

THE QUEEN

Hearing: 3 and 4 May 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and Gault JJ

Counsel: A T I Sykes and T M Wara for Appellant Teepa
R E Harrison QC, T B Afeaki and G M Fairbrother for all other Appellants
J C Pike and R J Collins for Crown

Judgment: 2 September 2011

JUDGMENT OF THE COURT

A The appeals of Mr Tame Iti, Mr Te Rangiwhiria Kemara, Mr Urs Signer and Ms Emily Bailey are dismissed.

B The appeals of the other appellants are allowed in part. The video surveillance evidence (other than footage of vehicles on Reid Road) is inadmissible against those appellants. All the other disputed evidence is admissible against them.

REASONS

ELIAS CJ

[1] The appeal concerns the powers of search of the police, raising points of constitutional principle and Bill of Rights protections. It can readily be accepted that the police need legal powers to investigate apparently serious criminal offending and that such powers may include powers of surveillance. Parliament has not however provided legislative authority for covert filmed surveillance, despite recommendations that it should do so. The courts cannot remedy the deficiency through approval of police action taken in the absence of lawful authority without

destruction of important values in the legal system, to the detriment of the freedoms guaranteed to all.

The appeal

[2] In bush, on Tuhoe-owned lands in the Urewera Ranges, it is alleged that the appellants participated between November 2006 and October 2007 in military-style exercises using firearms, live ammunition, and Molotov cocktails. The appellants have connections with the privately-owned lands (those who are of Tuhoe descent either as beneficiaries of the owner incorporations or through whakapapa, and the other appellants as their invitees). All appellants are charged with offences contrary to the Arms Act 1983 arising out of the possession and use of the firearms and Molotov cocktails.[1] For such offences the maximum penalty is imprisonment for four years.[2] Four of the appellants (Te Rangiwhiria Kemara, Tame Iti, Urs Signer and Emily Bailey) are also charged under s 98A of the Crimes Act 1961 with participation in an organised criminal group. The indictment simply recites the terms of s 98A(1) in describing those participating as "knowing that their participation contributed to the occurrence of criminal activity, or [being] reckless as to whether their participation may have contributed to the occurrence of criminal activity". Although the objective of the criminal group (a necessary element of the definition of an "organised criminal group" under s 98A(2)) is not specified in the indictment, it has been treated in the lower Courts as being the objective of seizing by force an area of land, believed to be within the tribal lands of Tuhoe, through serious acts of violence.[3] Section 98A is an offence which, at the relevant time, carried a maximum penalty of imprisonment for five years.[4]

[3] The appeal concerns pre-trial rulings to admit prosecution evidence challenged as having been improperly obtained both through trespass and in breach

---

1 Arms Act 1983, s 45(1)(b).

2 Section 45(1).

3 See *R v Bailey* HC Auckland CRI-2007-085-7842, 15 December 2009 [*Bailey – Admissibility*] at [82] and *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499 at [91]. A letter from the Crown Solicitor at Auckland in respect of one of the appellants recites 11 offences of serious violence alleged to be within the objectives of the group, including murder, arson, kidnapping, and using a firearm against a law enforcement officer.

4 Crimes Act 1961, s 98A(1). The maximum penalty was raised to 10 years by s 5(1) of the Crimes Amendment Act 2009.

of the protection against unreasonable search and seizure contained in s 21 of the New Zealand Bill of Rights Act 1990. The evidence includes physical items left on the land after the exercises and photographs of such items on site. It also includes film obtained from motion-activated hidden cameras placed by the police over a number of months on the Tuhoe-owned land in the areas where the exercises were expected to be held. The prosecution relies on these films for identification of the accused and as a record of what they were doing.

[4] The facts are fully covered in the reasons given by Blanchard J and need not be repeated. Much of the investigation carried out by the police between November 2006 and October 2007 did not yield anything of evidential value (principally because exercises occurred in different locations than had been anticipated by the police or because expected exercises were cancelled).[5] The admissibility of evidence obtained from police investigations on the land in November 2006 was not in dispute on the appeal. In the result, the evidence in issue concerned police investigations undertaken in January 2007 on Paekoa Track, in June 2007 at Rangitihi, in August 2007 near Whetu Road and of vehicle movements along Reid Road, and in September and October 2007 near Whetu Road.

[5] In the High Court, most of the disputed evidence (including all the filmed surveillance) was found by Winkelmann J to have been improperly obtained[6] but was admitted under s 30 of the Evidence Act 2006 on the basis that its exclusion would be disproportionate to the impropriety.[7] On appeal, the Court of Appeal, disagreeing with the High Court, held that the police entries, physical searches and surveillance filming on the lands was authorised by warrants issued under s 198 of the Summary Proceedings Act 1957.[8] While no s 198 warrant had been obtained for the August entry on to private land at Whetu Road, the Court of Appeal held that the entry was lawful pursuant to an implied licence, since the area was used for recreation by the public without apparent objection from the owners.[9] With respect

---

5 The police knew of the planning for the exercises through their monitoring of telephone conversations between the accused under interception warrants the validity of which is not in issue on the appeal.

6 *R v Bailey* HC Auckland CRI-2007-085-7842, 7 October 2009 [*Bailey – Propriety*] at [256].

7 *Bailey – Admissibility* at [108].

8 *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499.

9 At [70]–[74].

to the film of vehicle movements along Reid Road, the Court accepted that the placement of the camera had entailed trespass but held that there was no breach of s 21 of the New Zealand Bill of Rights Act and that the evidence should be admitted under s 30 of the Evidence Act.[10] The Court of Appeal indicated that, even if it had been of the view that the evidence obtained pursuant to the s 198 warrants had been improperly obtained (contrary to its view that the warrants were valid), it would have admitted the evidence under s 30 for reasons similar to those given by Winkelmann J.[11]

[6] On further appeal to this Court, I agree with the reasons given by Blanchard J for holding, contrary to the view taken in the Court of Appeal, that the warrants under s 198 of the Summary Proceedings Act (with the exception of the warrant of June 2007 and possibly that of September 2007)[12] did not authorise the police entry on to the Tuhoe lands either for the purposes of the physical searches undertaken or for the purpose of setting up the hidden cameras and later retrieving the film taken by them. Section 198 authorises a warrant to be issued for search for "things" believed, on reasonable grounds, to be on the land at the time the warrant is issued. That follows from the language employed in the section and is also the interpretation to be preferred in application of s 6 of the New Zealand Bill of Rights Act. (I do not share the doubts expressed by Tipping J as to the application of s 6 because the powers conferred by s 198 are limits on fundamental rights and freedoms.) The authorisation of search under s 198 for physical things believed to be on the land includes observation and recording which is incidental to the search and any seizure but could not authorise the surveillance of people undertaken through the covert filming. No statutory authority other than s 198 of the Summary Proceedings Act was suggested to authorise entry. And, as the Law Commission report on *Search and Surveillance Powers* concluded, no statutory authority has been provided for surveillance of the kind undertaken through the hidden cameras.[13] That was also the conclusion of the Court of Appeal in *R v Gardiner*.[14]

---

10 At [75] and [89].
11 At [90].
12 See Blanchard J at [153]–[154].
13 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [1.14] and [11.38]–[11.40].
14 *R v Gardiner* (1997) 15 CRNZ 131 (CA) at 136.

[7] I agree also with the reasons given by Blanchard J for rejecting the suggestion that the police had implied licence to enter for investigative purposes.[15] The limited licence accepted by this Court in *Tararo v R*[16] (which excuses from trespass someone who approaches a dwelling house to speak to the occupier) has no application to the present case. Nor does any licence to enter arise out of the circumstance that part of the land (particularly that adjacent to Whetu Road) was accessible and used by members of the public for recreational purposes. In the absence of lawful authority, the police trespass in entering the land meant that all evidence resulting from such entry (derived both from the physical scene examination and the covert filming) was "improperly obtained", requiring consideration of its exclusion under s 30 of the Evidence Act.

[8] I agree also that the evidence was improperly obtained not only by reason of the trespass but because it constituted unreasonable search and seizure, contrary to s 21 of the New Zealand Bill of Rights Act. To his conclusion of unreasonable search, Blanchard J would make an exception for the filming of vehicle movements along Reid Road in August, on the basis that such filmed observation was not a search within the meaning of s 21.[17] I differ with respect to the reasoning relating to the Reid Road filming. I consider it to have been unreasonable search, although I would admit it in application of s 30 of the Evidence Act.[18]

[9] In addition, I would go further than Blanchard J in respect of the filmed surveillance. I consider that the impropriety in relation to such surveillance arose not only because the police were acting unlawfully in trespassing on the land (the warrants obtained under s 198 of the Summary Proceedings Act being invalid), but because it is unlawful to undertake secret filming of people in the absence of any authority prescribed by law. No such authority was available here.

[10] I agree with the application in New Zealand of the purposive approach to what constitutes unreasonable search adopted by the Supreme Court of Canada in

---

15 At [157]–[159].
16 *Tararo v R* [2010] NZSC 157.
17 At [171].
18 See below at [78]–[81].

Hunter v Southam Inc.[19] By it, both what constitutes "search and seizure" and what is "unreasonable" must be assessed in the context of the values underlying s 21. Section 21 protects personal freedom and dignity from unreasonable and arbitrary State intrusion. Whether such intrusion is unreasonable or arbitrary is objectively assessed according to the standard of what limitation on personal freedom can be "demonstrably justified in a free and democratic society".[20] The right protects privacy but, more fundamentally, it holds a constitutional balance between the State and citizen by preserving space for individual freedom and protection against unlawful and arbitrary intrusion by State agents.[21] It describes a "right to be let alone".[22] Police investigation which invades such private space constitutes search within the meaning of s 21. It may be undertaken through remote technology or through in person observation. I therefore take the view, differing from that expressed by Blanchard J,[23] that s 21 guarantees reasonable expectations of privacy from State intrusion.

[11] Whether surveillance amounts to a State intrusion upon reasonable expectations of privacy depends on wider context than property ownership. The values protected by s 21 are not simply property-based, as were the common law protections which preceded it. Rather, they provide security against unreasonable intrusion by State agencies into the personal space within which freedom to be private is recognised as an aspect of human dignity. Such privacy interest has been treated in the Supreme Court of Canada as "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself".[24] The privacy protected by s 21 may be invaded as much through secret filming of individuals as through recording private communications, as the Canadian

---

19 *Hunter v Southam Inc* [1984] 2 SCR 145 at 156–160 per Dickson J.

20 New Zealand Bill of Rights Act 1990, s 5.

21 It is not necessary for the purpose of the present case to consider the extent to which s 21 protects values other than a reasonable expectation of privacy (a matter left open in *Katz v United States* 389 US 347 (1967), and in New Zealand in *R v Jefferies* [1994] 1 NZLR 290 (CA) at 302–303 and *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA)).

22 Described as "the most comprehensive of rights and the right most valued by civilized men" in *Olmstead v United States* 277 US 438 (1928) at 478 per Brandeis J. See also the discussion in *Katz v United States* 389 US 347 (1967) at 350 per Stewart J.

23 Compare Blanchard J at [161].

24 *R v Duarte* [1990] 1 SCR 30 at 46 per La Forest J. See also *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319 per Thomas J who referred to "the right of self-determination and control over knowledge about oneself and when, how and to what extent it will be imparted" as one of the "variety of related values" making up the concept of privacy protected by s 21.

Supreme Court has recognised.[25] In New Zealand, Parliament has provided authority for the interception of communications[26] but has not provided equivalent authority with respect to secret filming.

[12] In principle, there is no reason why activity in public space should, by virtue of that circumstance alone, be outside the protection of s 21.[27] It is consistent with the values in the New Zealand Bill of Rights Act that people may have reasonable expectations that they will be let alone by State agencies even in public spaces in their private conversations and conduct.[28] There is public interest in maintaining as a human right space for privacy in such settings. And in an age when technology makes surveillance impossible to resist, anywhere, the human right described in s 21 would be substantially obliterated if its scope is limited to what cannot be seen or heard by State agencies from public space. It follows that I am also unable to agree with the suggestion made by Blanchard J at [167] that police surveillance in a public place which is not technologically enhanced does not generally amount to a search. If those observed or overheard reasonably consider themselves out of sight or earshot, secret observation of them or secret listening to their conversations may well intrude upon personal freedom.

[13] I do not regard the fact that surveillance is undertaken covertly as a neutral factor.[29] Covert surveillance by the police of people who do not know that they are being observed collides with values of freedom and dignity in the same way as search of their correspondence or interception of their conversations.[30] The right to

---

25 See *R v Wong* [1990] 3 SCR 36 at 46–47 and 53, referring to *R v Duarte* [1990] 1 SCR 30. In *Wong* at 43–44 the Supreme Court of Canada declined to limit the application of the Charter protection in s 8 against unreasonable search to the particular unauthorised audio surveillance in *Duarte*. Rather, La Forest J acknowledged wide protection embracing "all existing means by which the agencies of the state can electronically intrude on the privacy of the individual, and any means which technology places at the disposal of law enforcement authorities in the future".

26 See, for example, Crimes Act 1961, Part 11A.

27 A reasonable expectation of privacy in public spaces was accepted by the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1 (ECHR) at [77]–[78].

28 In *R v Wong* [1990] 3 SCR 36, the Supreme Court of Canada accepted that s 8 protected individuals from unauthorised film surveillance of gambling in a hotel room to which strangers were admitted. La Forest J rejected at 47 "[t]he notion that the agencies of the state should be at liberty to train hidden cameras on members of society wherever and whenever they wish".

29 Compare Blanchard J at [168].

30 As La Forest J concluded in *R v Wong* [1990] 3 SCR 36 at 47, surreptitious video surveillance by State agents without judicial authorisation was, like audio recording of conversations, a notion "fundamentally irreconcilable" with expectations of acceptable government behaviour in "a free and open society".

be "*secure* against unreasonable search"[31] underscores a purpose in allowing citizens to relax vigilance and live their lives with freedom.

[14] The reasonableness of the searches in issue on the appeal does not in my view turn on details of ownership or qualities of the land or the connections of the appellants with it. In the present case I take the view that the more critical feature is the absence of lawful authority for police secret surveillance.

[15] Although my views as to the basis for impropriety in the obtaining of the evidence differ only in part from those expressed by Blanchard J, in the end the difference leads me to conclude, in application of s 30 of the Evidence Act, that the filmed surveillance evidence, with the exception of that recording vehicle movements along Reid Road, must be excluded against all appellants. I would however admit under s 30 both the physical evidence discovered on inspection of the sites (including the photographs of the sites as inspected) and the film of vehicle movements along Reid Road, for the reasons given below at [78]–[81].

[16] Before dealing with the application of s 30, it is necessary for me to explain first why I consider that police search which is not authorised by law is unlawful and that unlawful police search is itself unreasonable search, contrary to s 21 of the New Zealand Bill of Rights Act. Both considerations affect the balancing of interests I undertake in application of s 30.

Authority of law is required for State intrusion on personal freedom by search

[17] The New Zealand Bill of Rights Act provides protection for human rights and fundamental freedoms against unreasonable State intrusion. Under s 21 of the Act, everyone has "the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise". As the White Paper which preceded enactment of the legislation stressed, citing the Canadian Supreme Court case of *Hunter*, the list of interests protected is not exhaustive: s 21

[31] New Zealand Bill of Rights Act 1990, s 21 (emphasis added).

"guarantees a broad and general right".[32] While freedom from unauthorised search on private property has long been protected at common law,[33] the former property-based protection expands with human rights values to protect the public interest in "personal freedom, privacy and dignity".[34] Section 21 protects "people, not places".[35] Moreover, security from unreasonable State intrusion will often be a necessary condition of other freedoms, such as freedom of conscience, freedom of expression, freedom of movement, and freedom of association.[36]

[18] Section 21 gives effect to art 17 of the International Covenant on Civil and Political Rights. Article 17 provides that no one is to be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence". The United Nations Human Rights Committee, in General Comment on Article 17, has said that art 17 applies to "[s]urveillance, whether electronic or otherwise", as well as "interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations".[37] All such are treated as prohibited except to the extent authorised by "relevant legislation", complying with the obligations under art 17.[38] The term "unlawful" is interpreted to mean that "no interference can take place except in cases envisaged by the law":[39]

> Interference authorised by States can only take place on the basis of law, which must itself comply with the provisions, aims and objectives of the Covenant.

---

32 "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.154], citing *Hunter* at 158.

33 "A Bill of Rights for New Zealand: A White Paper" at [10.145], citing *Entick v Carrington* (1765) 19 St Tr 1029.

34 See Richardson J in *R v Jefferies* [1994] 1 NZLR 290 (CA) at 302 where he stressed that a search of the person or premises not only invaded property rights, but also constituted "a restraint on individual liberty, an intrusion on privacy and an affront to dignity". See also Thomas J at 319.

35 See *Katz v United States* 389 US 347 (1967) at 351 per Stewart J. Although this was said of the Fourth Amendment, it has been equally applied to s 8 of the Canadian Charter of Rights and Freedoms RSC 1985 App II, No 44: *Hunter* at 158–159 per Dickson J.

36 See *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319 per Thomas J (mentioning the impact of surveillance on freedom of conscience) and *R v A* [1994] 1 NZLR 429 (CA) at 437 per Richardson J (referring to free speech).

37 United Nations Human Rights Committee *CCPR General Comment No 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) at [8].

38 Ibid.

39 Ibid, at [3].

[19] Section 21, like s 8 of the Canadian Charter of Rights and Freedoms, is a constraint on State activity.[40] It does not in itself provide any authority for "reasonable" State intrusion.[41] The right to be secure against unreasonable search does not turn on the reasonableness of police conduct, viewed as a stand-alone inquiry and assessed after the event.[42] In *Hunter*, the Supreme Court of Canada emphasised that the concern of s 8 was with "impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective".[43] In *R v Collins*, it held that the Crown must first establish that search is authorised by law before it can be considered reasonable in other respects.[44] In New Zealand, Cooke P pointed out in *R v Jefferies* that a suggestion in the context of the Bill of Rights that police officers may act reasonably outside the law "is to sow dangerous seeds".[45] Implication of powers to search was described by Sopinka J in the Supreme Court of Canada as an "Orwellian vision of police authority".[46] Rather, authority of law for the search must be found elsewhere.

[20] Because of the principle of legality, intrusive search is not properly to be treated as implicit in general statutory policing powers. As Hardie Boys J explained in relation to the police in *Jefferies*, "in our constitutional model police powers are conferred expressly and specifically":[47]

> There is no conferment of general authority. A police officer stands in no different position from any other citizen, save in so far as powers or authorities are conferred on him by particular enactment. There is no power of entry onto property, of search or seizure, except as conferred by statute.

Casey J in the same case expressed himself as being "unwilling to see the extension of implied police power into this area unless it is done by the legislature after due consideration".[48]

---

40 *Hunter* at 156.
41 Ibid, at 156–157.
42 As Dickson J highlighted in *Hunter* at 160, post facto approval of searches by retroactive inquiry would be "seriously at odds with the purpose of s 8. That purpose is ... to protect individuals from unjustified state intrusions upon their privacy [and] requires a means of *preventing* unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place".
43 Ibid, at 157.
44 *R v Collins* [1987] 1 SCR 265 at 278.
45 *R v Jefferies* [1994] 1 NZLR 290 (CA) at 296.
46 *R v Evans* [1996] 1 SCR 8 at [20].
47 *R v Jefferies* at 313.
48 Ibid.

[21] *Jefferies* was concerned with whether the police had lawful authority to stop and search a vehicle. Private citizens have no such authority and the interference would be an actionable wrong. The finding in *Jefferies* that the police had no implied authority[49] meant that they, too, were subject to the general prohibition. Similarly, in the present case, the invalidity of the warrants and the absence of any other lawful authority for the police to be on the land made them trespassers. The evidence collected through the trespass was "improperly obtained" and subject to the requirements for admission contained in s 30. On this point all members of the Court are in agreement.

[22] In *Jefferies* it was unnecessary for the Court to consider whether specific authority is required of police conduct which would not constitute an actionable wrong if undertaken by a private citizen. In the present case, I do not think it can properly be assumed that covert surveillance, if it intrudes on personal freedom, is not an actionable wrong if undertaken by a private citizen. In *Hosking v Runting* a majority of the Court of Appeal was prepared to recognise that invasion of privacy is a tort.[50] Such protection is consistent with the protection of the human right of privacy required by the European Court of Human Rights in *Von Hannover v Germany*.[51] The matter has not been argued here and it would be wrong to express even a provisional view. If the assumption of lawfulness if surveillance is undertaken by a private citizen is incorrect, the principle referred to by Hardie Boys J in *Jefferies* would be of direct application because the police can have no implied authority to act inconsistently with the law that attaches to everyone else.

[23] Whether or not the assumption that individuals are not prohibited by law from undertaking covert surveillance of others is correct, however, I consider that the police cannot undertake such surveillance lawfully in the absence of specific authority of law. The statements in *Jefferies* are in my view ultimately derived from a wider principle of the common law which withholds from State agents the liberties preserved for individual citizens.

---

49 The majority judges in *Jefferies* in that respect were right in my view to reject the suggestion of the President at 298 that the police officer's appointment under the Police Act 1958 provided the necessary authority for the police intervention in that case.

50 *Hosking v Runting* [2005] 1 NZLR 1 (CA) per Gault P, Blanchard and Tipping JJ (Keith and Anderson JJ dissenting).

51 *Von Hannover v Germany* (2005) 40 EHRR 1 (ECHR).

The common law does not permit officials the freedom of action of individual citizens

[24] Public officials do not have freedom to act in any way they choose unless prohibited by law, as individual citizens do. The common law position in New Zealand and in the United Kingdom is that, except in matters within the prerogative or as is purely incidental to the exercise of statutory or prerogative powers, the executive and its servants must point to lawful authority for all actions undertaken. That constitutional principle of legality applies to the police surveillance undertaken here.

[25] The general common law principles applicable are those described in *De Smith's Judicial Review*:[52]

> While government must be able to carry out incidental functions that are not in conflict with its statutory powers, it is wrong to equate the principle pertaining to private individuals – that they may do everything which is not specifically forbidden – with the powers of public officials, where the opposite is true. Any action they take must be justified by a law which "defines its purpose and justifies its existence".

[26] The final quote is taken from *R v Somerset City Council, ex parte Fewings*.[53] There, Laws J held that the principles which govern the relationship between public bodies and private persons are "wholly different":[54]

> For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that action to be taken must be justified by positive law.

The statement of principle in *Fewings* was expressly affirmed on appeal by Sir Thomas Bingham MR.[55]

[27] In New Zealand the general principle that public authorities, unlike citizens (who may do whatever is not prohibited), may do only what they are authorised to

---

52 Harry Woolf, Jeffrey Jowell and Andrew Le Sueur (eds) *De Smith's Judicial Review* (6th ed, Sweet & Maxwell, London, 2007) at [5-025].

53 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB) at 524 per Laws J.

54 Ibid.

55 *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 (CA) at 1042.

do by some rule of law or statute was applied by Smith J in *Herbert v Allsopp*[56] and Woodhouse J in *Transport Ministry v Payn*.[57] The principle they applied is not of recent origin. It may be traced to the *Proclamations' Case*.[58] It is part of the rule of law expounded by Dicey.[59] The principle is, as successive editions of *Halsbury's Laws of England* recognised, a necessary condition for the liberties of the subject. Thus, the third and fourth editions of *Halsbury* referred to the liberties of the subject being derived from two principles: that the subject is free to do anything not prohibited by law or which infringes the legal rights of others; "whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law (including the royal prerogative) or statute."[60]

[28] The lack of equivalence between the subject and public authorities is a necessary condition of the liberties of the subject: "[w]here public authorities are not authorised to interfere with the subject, he has liberties".[61] Equivalent liberty for public authorities would destroy individual liberty.

[29] There is New Zealand authority to contrary effect. In *R v Fraser*[62] and *R v Gardiner* the Court of Appeal took the view that unless police actions in undertaking video surveillance are prohibited by statute or otherwise constitute an actionable wrong such as trespass, they are lawful at common law.

[30] In *Fraser* the point was barely discussed, the Court simply saying:[63]

> Nor do we accept [that] proceeding without such a warrant was unlawful. Other than s 21 of the Bill of Rights Act, counsel were not able to point to any statutory or common law prohibition against observing or recording on videotape the open area surrounding a residential property and plainly there is none.

---

56 *Herbert v Allsopp* [1941] NZLR 370 (SC) at 374.

57 *Transport Ministry v Payn* [1977] 2 NZLR 50 (CA) at 62, citing RFV Heuston *Essays in Constitutional Law* (2nd ed, Stevens & Sons, London, 1964) at 34.

58 *Proclamations' Case* (1611) 12 Co Rep 74, 77 ER 1352. See also *Entick v Carrington* (1765) 19 St Tr 1029.

59 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan & Co Ltd, London, 1959) at 202.

60 *Halsbury's Laws of England* (4th ed, 1974) vol 8 Constitutional Law at [828]; (3rd ed, 1954) vol 7 Constitutional Law at [416].

61 Ibid.

62 *R v Fraser* [1997] 2 NZLR 442 (CA).

63 Ibid, at 452.

[31] In *Gardiner*, the search was more intrusive than in *Fraser* because it entailed telescopic capacity and captured some activity through the window of a dwelling.[64] The Court of Appeal was referred to the Canadian Supreme Court decision in *Hunter* and a decision of the European Court of Human Rights, *Malone v United Kingdom*,[65] in support of the argument that filmed surveillance was unlawful without legislative authority. The Court did not refer to *Hunter* in its reasons. Nor was there reference to *Herbert v Allsopp* or *Transport Ministry v Payn* or other authority. The Court considered that the decision of the European Court of Human Rights was not on point because of differences in the expression of the international law obligations under both art 8 of the European Convention on Human Rights and art 17 of the International Covenant on Civil and Political Rights, and the wording of s 21 of the New Zealand Bill of Rights Act. It preferred to apply the United Kingdom High Court decision of Sir Robert Megarry V-C in *Malone v Metropolitan Police Commissioner*.[66] Although the Court allowed "[t]hat does not mean *Malone*[67] and the International Covenant have no influence on the question of the reasonableness of conduct falling within s 21 of the Bill of Rights", it considered it "a much longer step to argue that either this country's ratification of the Covenant or the enactment of a Bill of Rights which does not adopt the same relevant language has rendered video surveillance (otherwise ungoverned by domestic law) unlawful":[68]

> Such a radical change to the common law is not to have been taken to have occurred except by direct expression. It is to be noted that, at an earlier stage of the *Malone* litigation, *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] 2 All ER 620, Megarry J, speaking of telephone tapping in the UK, said that it could lawfully be done in terms of domestic law because, at that time there was nothing to make it unlawful. This is the position for video surveillance (without sound recording) in New Zealand. If New Zealand's domestic law does not represent an adequate response to the International Covenant, that is a matter for legislative attention.

[32] I am unable to agree with the reasoning of the Court of Appeal in *Gardiner* and would not apply it or *Fraser*. I consider that *Malone v Metropolitan Police Commissioner*, the United Kingdom decision with which the European Court of Human Rights disagreed, should not have been followed in New Zealand. The

---

64 In *Fraser*, the filming was into a garden space able to be seen from off the property without enhancement.

65 *Malone* v *United Kingdom* (1984) 7 EHRR 14 (ECHR).

66 *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (Ch).

67 Referring to the decision of the European Court of Human Rights.

68 *R v Gardiner* at 134.

general proposition there expressed by Megarry V-C,[69] although cited with apparent approval by the 1996 reissue of the fourth edition of *Halsbury*'s *Laws of England*,[70] has been much criticised.[71] More importantly, I consider that it is contrary to the common law principle essential to individual freedom, already discussed.

Authority of law for State powers of search is required by the New Zealand Bill of Rights Act

[33] Quite apart from the position at common law before enactment of the New Zealand Bill of Rights Act, I do not think the approach in *Malone v Metropolitan Police Commissioner* (a case which preceded enactment of the Human Rights Act 1998 (UK)) can survive enactment of the New Zealand Bill of Rights Act.

[34] The wording of s 21 does not bear the distinction drawn in *Gardiner* between it and art 17 of the International Covenant on Civil and Political Rights and art 8 of the European Convention on Human Rights.[72] There is no material difference on the point in issue – the need for authority of enacted law – between s 21 and the international obligations. Article 8 of the European Convention permits "no interference [with the right to respect for private and family life] except such as is in accordance with the law and is necessary in a democratic society" and for identified purposes which include "the prevention of disorder or crime". Article 17 protects against "arbitrary or unlawful interference with ... privacy" and provides that "[e]veryone has the right to the protection of the law against such interference or attacks". The obligation of protection of law and the requirement of lawful authority for interference are equivalent to the protection in the European Convention against interference except in accordance with the law. And the General Comment of the

---

69 *Malone v Metropolitan Police Commissioner* at 367. Megarry V-C held that telephone tapping could be carried out by police because "it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful".

70 *Halsbury's Laws of England* (4th ed, reissue, 1996) vol 8(2) Constitutional Law and Human Rights at [6] in fn 3, with the caveat that some actions of the executive not prohibited in England may nonetheless be contrary to the European Convention on Human Rights.

71 See Anthony Lester and Matthew Weait "The Use of Ministerial Powers Without Parliamentary Authority: The Ram Doctrine" [2003] PL 415 at 421–422; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 627; John Lambert "Notes of Cases" [1980] MLR 59 at 65 and Vaughan Bevan "Is Anybody There?" [1980] PL 431 at 436–444.

72 *R v Gardiner* at 134.

United Nations Human Rights Committee so treats it in making it clear that it regards statutory authority necessary before interference could comply with art 17.[73]

[35] Section 21 does not in its terms contain the reference to "unlawful" interference. The rights are expressed to be without limitation. But, like s 8 of the Canadian Charter on which it was based, s 21 must be read together with the general limitation provision contained in s 5 of the New Zealand Bill of Rights Act. By it, "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[74] The reference to "prescribed by law" is equivalent to the requirements of protection against "unlawful" interference under art 17 of the International Covenant on Civil and Political Rights (as is explained by the General Comment) and the protection against "interference ... except such as is in accordance with the law and is necessary in a democratic society" under art 8 of the European Convention. This equivalence in language means that the reasoning of the European Court of Human Rights in *Malone* could not be brushed aside, as it was in *Gardiner.*

[36] Section 21 is properly interpreted to require authority of law for State intrusion upon personal freedom. Such interpretation is necessary to give effect to New Zealand's international obligations under art 17,[75] and is therefore to be preferred, especially when the legislation in question is enacted to implement those obligations.[76]

[37] Contrary to the view expressed in *Gardiner,* I consider that the enactment of the New Zealand Bill of Rights Act did indeed effect radical change to New Zealand law. That is as the White Paper that preceded it envisaged.[77] And New Zealand case

---

73 United Nations Human Rights Committee *CCPR General Comment No 16* at [8].

74 Compare Canadian Charter of Rights and Freedoms RSC 1985 App II, No 44, s 1.

75 In a similar vein see Hardie Boys J in *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's case*] at 699.

76 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 57, citing *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289. More recently, see *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104. As Cooke P observed in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266, the argument that international instruments may be ignored is "unattractive" as it implies that New Zealand's adherence to those instruments is "at least partly window-dressing".

77 "A Bill of Rights for New Zealand: A White Paper" at 5.

law has recognised its transformative effect.[78] Indeed, the New Zealand courts would fail in their obligations under ss 3 and 6 of the New Zealand Bill of Rights Act if they do not ensure that the common law is consistent with the Bill of Rights Act. I consider that the policies and principles of the Bill of Rights Act compel the courts to insist on lawful authority for interference with personal freedom through police surveillance.

Legislative authority is necessary for surveillance

[38] Parliament has provided many statutory powers of entry, search, and seizure, including for the interception of conversations. It has not however provided any authority for secret surveillance of the type undertaken here, despite having had the absence of such powers drawn to its attention by the Court of Appeal[79] and the Law Commission.[80] I consider that the police act unlawfully if they do not have specific statutory authority for intruding upon personal freedom. That conclusion is compelled in my view both by the common law and by the terms of the New Zealand Bill of Rights Act. It also meets rule of law values of certainty and predictability.[81]

[39] Citing the United Nations General Comment, the Law Commission in its report *Search and Surveillance Powers* acknowledged that it is an aspect of the rule of law that "search and seizure should only take place if a law provides a basis for it".[82] It proposed objectively based legislative powers, "clearly expressed" (so that citizen and law enforcement officers understand the extent of the authority to search), judicial authorisation ("preferably in advance of the powers being exercised"), and reasonable exercise of the authority conferred.[83] Echoing the language of the Supreme Court of Canada in *Hunter*, the Law Commission considered that such measures aimed "to prevent unreasonable searches and seizures occurring in the first place and ensuring that both before and after intrusive search

---

78 *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156 per Cooke P.
79 *R v Gardiner* at 134 and 136.
80 Law Commission *Search and Surveillance Powers* at [11.9].
81 See further my reasons in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [38]–[39].
82 Law Commission *Search and Surveillance Powers* at [2.22].
83 Ibid, at [2.23].

and seizure powers are exercised they are subject to a transparent and accountable form of public review".[84]

[40] Five further considerations, in part overlapping, support the view that express legislative authority is necessary for surveillance by the police or other public officials.

[41] First, the obligation undertaken with art 17 of the International Covenant on Civil and Political Rights is to the protection of law. The legislature, which must observe the Bill of Rights Act in its acts under s 3(a) of the Act, must provide both protection and any limits. Section 5 of the Bill of Rights Act, which permits reasonable limits on rights where "demonstrably justified in a free and democratic society", requires any such limits to be "prescribed by law". The same term has been held by the European Court of Human Rights to require prescription by enactments accessible to citizens and formulated with precision (so that people know where they stand in law).[85] The international obligations and the statutory policy of the Bill of Rights Act therefore point to a need for legislative authority both to secure fundamental rights and to authorise actions that impact upon them. Parliament ought therefore to be the source of authority for intrusion upon the freedom secured by s 21.

[42] Secondly, Parliament is better placed than the courts to undertake the s 5 assessment. As La Forest J pointed out in *R v Evans* in the Supreme Court of Canada, while it can be accepted that the police may have difficulty in investigating and prosecuting crime without the authority to undertake surveillance, "[i]f the issue is sufficiently serious, it is for Parliament to amend the law":[86]

> Parliament is in a better position to obtain evidence supporting the need for a change and to assess the extent to which the change may affect householders who are not guilty of any crime. Judges are not in a position to receive such evidence, and they deal with specific cases that ordinarily involve people who have broken the law, a fact that does not encourage the broader perspective that should be brought to the issue.

---

84 Ibid. See *Hunter* at 160 per Dickson J.

85 See, for example, *Steel v United Kingdom* (1998) 28 EHRR 603 (ECHR) at [54] and *Hashman v United Kingdom* (1999) 30 EHRR 241 (Grand Chamber, ECHR) at [31].

86 *R v Evans* [1996] 1 SCR 8 at [4].

[43] Thirdly, statutory authority is the best indication of objective community expectations in relation to freedom from State intrusion and legislation will be authoritative on the question. That was a point made by Casey J in *Jefferies*.[87] Conversely, if Parliament has not provided authority for particular surveillance, that suggests that the intrusion is not in accordance with community expectations. Identification in legislation of the purposes for which powers are conferred is also important in scrutiny for legality. Statutes provide the measures by which courts can assess when power is abused. If the scope of police powers is left as wide as the freedom available to the individual, public law accountabilities are undermined.

[44] Fourthly, leaving limits on s 21 to be identified not by statute, but in application after the event by judges in actual cases, raises the danger of ex post facto rationalisation recognised by Dickson J in *Hunter*. As he suggested, it would be unacceptably destructive of human rights if the reasonableness of search turned only on ex post facto consideration of "the governmental interest in carrying out a given search".[88] The purpose of protecting individuals from unjustified intrusions on their privacy requires statutory authority for authorisation in advance to prevent unjustified searches before they happen.[89]

[45] Finally, after enactment of the New Zealand Bill of Rights Act it is not appropriate for the judges, who are bound by the Act, to validate legislatively unauthorised State intrusion on rights and freedoms. Section 30 of the Evidence Act confers authority on judges to decide that evidence obtained through unlawful search may nevertheless be admitted if its exclusion would be disproportionate to the impropriety. But judges have no dispensing power to validate police action which intrudes upon fundamental rights. Parliament must confer authorisation on the police by legislation if covert filmed surveillance is to be authorised, consistently with s 5.

---

87 *R v Jefferies* at 312 per Casey J.

88 *Hunter* at 160. See also La Forest J's observations to similar effect in *R v Wong* [1990] 3 SCR 36 at 50, citing *Hunter,* warning against ex post facto reasoning which "adopt[ed] a system of subsequent validation for searches".

89 In the case of *Hunter*, the statute in question, the Combines Investigation Act RSC 1970 c C-23, did provide for prior authorisation of search however its provisions failed to specify appropriate standards for the issuance of warrants and were therefore inconsistent with the Charter.

The surveillance was unlawful because not authorised by legislation

[46] The views that the common law allows the police freedom in the absence of prohibitions of law and that the scope of their powers may properly be determined by the courts in the application of s 21 are contrary to important policies of the law. These are seen in long-standing constitutional principle, rule of law considerations, art 17 of the International Covenant and the text and purpose of ss 5 and 21 of the New Zealand Bill of Rights Act. Intrusion on personal freedom through State surveillance must be authorised by legislation. Court recognition of a police freedom to act if not constrained by statute puts the matter the wrong way around and would subvert the scheme of rights and freedoms in the Bill of Rights and the security promised by s 21.[90]

[47] There is in New Zealand no statutory authority which authorises covert filming as a police investigatory technique. The warrants obtained by the police under s 198 of the Summary Proceedings Act (and supplied in draft by the police to the Court) did not in their terms purport to seek authority to carry out such filming, although the affidavit evidence supplied to the issuing judicial officer indicated that the police intended to undertake secret filming. Indeed, the police officer in charge of the inquiry gave evidence in the High Court pre-trial proceedings that his understanding was that s 198 did not provide authority for the filming. I would therefore hold that, irrespective of trespass arising out of the invalidity of the s 198 warrants, the covert filmed surveillance was unlawful.

Unlawful search is unreasonable search

[48] In *Jefferies*, Hardie Boys J was in my view right to draw attention to the connection between his conclusion there that search without lawful authority is not necessarily unreasonable search and the former prima facie approach that evidence obtained in breach of rights was to be excluded.[91] With the statutory abolition of the prima facie rule of exclusion and its replacement with a rule that evidence

---

90 See further at [13] above.

91 *R v Jefferies* at 314–315. His position on the relationship between unlawfulness and unreasonableness was shared with Richardson J at 304, Gault J at 315 and Thomas J at 319–321.

improperly obtained is excluded only if exclusion is proportionate to the impropriety, there is no longer such link.

[49] I consider that with enactment of s 30 of the Evidence Act the more principled approach taken by McKay J in *Jefferies* ought now to be preferred to the prima facie approach that unlawful search was unreasonable taken in the same case by Cooke P and Casey J.[92] With the adoption of s 30, considerations such as whether the unlawfulness is technical or inadvertent[93] are better taken into account in the balancing under s 30.

[50] The view that unlawful search is unreasonable is consistent with that taken in Canada.[94] I would hold that an unlawful search is unreasonable, because, as McKay J recognised, it cannot be reasonable for law enforcement officers to act unlawfully.[95] To accept that such conduct is reasonable is to arrive back at the position, inconsistent with the authorities as described in [19] above, that the reasonableness of police conduct in a particular case determines breach of s 21 as a stand-alone test.

[51] The line as to what constitutes unreasonable search by State actors bound by the Bill of Rights Act is accordingly properly drawn at the extent of lawful powers conferred for investigative purposes by statute. There may be additional unreasonableness in the manner of investigation under lawful authority, so that lawfulness is not exhaustive of unreasonable search and seizure. But where the legislature has not provided authority for intrusion, in application of the limits on reasonable expectations of privacy permitted by s 5 of the New Zealand Bill of Rights Act, then I consider secret surveillance will be unreasonable search, in breach of s 21.

---

92 Compare McKay J at 316 with Cooke P at 296 and Casey J at 312.

93 Casey J in *R v Jefferies* at 312 considered that situations of "emergency" or where "the illegality arose through some procedural defect or technical omission" would factor into whether prima facie unreasonableness was displaced. Cooke P at 296 offered the view that only "[h]ighly exceptional circumstances" would justify treating unlawful action as reasonable. Compare, more recently, the discussion in *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 in which William Young P and Glazebrook J were inclined to equate unlawfulness with unreasonableness with the exception of "minor or technical breach" at [21].

94 See, for example, *R v Collins* [1987] 1 SCR 265 at 278; *R v Kokesch* [1990] 3 SCR 3 at 18; and *R v Law* 2002 SCC 10, [2002] 1 SCR 227 at [29].

95 *R v Jefferies* at 316 per McKay J.

Section 30 of the Evidence Act

[52] The evidence in issue was improperly obtained on two bases. First, when the s 198 warrants were invalid, the police entry on to Tuhoe-owned lands was trespass. Secondly, because in respect of the covert filmed surveillance there was no lawful authority for the filming. As unlawful, it was unreasonable search in breach of s 21 of the Bill of Rights Act. The admissibility of the evidence therefore must be determined in application of s 30 of the Evidence Act.

[53] The meaning of s 30 of the Evidence Act is to be ascertained in accordance with its text and the purposes of the Act, as s 5(1) of the Interpretation Act 1999 requires. The purposes of the Evidence Act include securing the "just determination of proceedings by ... rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990".[96] In addition to the general rules for interpretation provided in the Interpretation Act, s 6 of the New Zealand Bill of Rights Act provides that "[w]herever 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".

[54] The "[f]undamental principle" of the Evidence Act is that all relevant evidence (that which has a tendency to prove or disprove anything of consequence to the determination of the proceeding) is admissible.[97] That principle does not apply however where evidence is inadmissible or excluded under the Evidence Act or any other Act. Section 30 provides a rule of exclusion in criminal proceedings for evidence obtained "in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies".[98]

[55] The general rule is that "[t]he Judge *must* exclude any improperly obtained evidence [proffered by the prosecution] if, in accordance with subsection (2), the

---

96 Section 6(b). This paragraph referring to the New Zealand Bill of Rights Act was inserted into the Evidence Act by the Select Committee, which "consider[ed] it important to recognise the fundamental importance of that Act in the purpose section of the bill": Evidence Bill 2005 (256–2) (select committee report) at 2.

97 Section 7(1).

98 Section 30(5)(a).

Judge determines that its exclusion is proportionate to the impropriety".[99] Section 30(2) prescribes the methodology for determining whether exclusion is proportionate to the impropriety:

> (2) The Judge must—
>
> (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
>
> (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

[56] In subs (3) a number of matters are identified to which the court "may, among any other matters, have regard" "[f]or the purposes of subsection (2)". Before considering the matters relevant in the present case, some comment on the structure of s 30 is required because of the light it sheds on the meaning of the section.

[57] First, as has already been mentioned, the general rule is one of exclusion once impropriety is found if the judge determines such exclusion is "proportionate to the impropriety". The judge has no discretion to decline to exclude the evidence once the threshold of proportionality is reached. And proportionality of exclusion is contextually assessed against the particular impropriety. Section 30 applies to all evidence "improperly obtained" (through breach of an enactment or rule of law).[100] It would be wrong to treat the assessment of proportionality as being the same in all cases of impropriety.

[58] Secondly, in deciding whether exclusion is proportionate to the impropriety the judge must undertake a "balancing process" in which appropriate weight must be given to the impropriety but proper account must "also" be taken of "the need for an effective and credible system of justice".[101] This formula does not require a balance to be struck *between* "appropriate weight to the impropriety" *and* "the need for an

---

[99] Section 30(4) (emphasis added).
[100] Section 30(5)(a).
[101] Section 30(2)(b).

effective and credible system of justice". It is a reminder, foreshadowed in earlier Canadian and New Zealand case law,[102] that whether exclusion of evidence is appropriate to remedy breach of any enactment or rule of law is a contextual assessment which necessitates a broader inquiry than ascertainment of the fact that the evidence has been improperly obtained. This reform settles differences of view in relation to the exclusion of evidence obtained in breach of s 21 of the New Zealand Bill of Rights Act.[103] What s 30(2)(b) provides is that whether exclusion is "proportionate to the impropriety" is measured against the end of "an effective and credible system of justice". "[A]ppropriate weight" must be given to the impropriety but the standard for exclusion is the end specified. This expression implements the major reform by making it clear there is no longer a presumptive rule of exclusion.[104]

[59] The third point to be made is that the "balancing" required ensures that the reasoning of the court is transparent. What is called for is conscientious disclosure of the full reasons for decision. The section recognises that contextual assessment of proportionality is multi-faceted and entails consideration of factors that may be difficult to compare. A court applying s 30 must explain how the factors relied on bear on a determination that exclusion is proportionate to the impropriety. I do not think this Court should be more prescriptive about how the task is to be carried out in any case than to emphasise the need for explanation, especially in relation to the commonly-recurring (but non-mandatory and non-exhaustive) criteria in s 30(3). I would not encourage the view that courts must go through the formula of referring to each of these criteria in every case.

[60] The fourth point to be made about the structure of s 30 is that "the need for an effective and credible system of justice" is not a consideration that points only to admissibility (as is suggested by the erroneous view that s 30(2)(b) requires a balance to be struck *between* the impropriety *and* "the need for an effective and credible system of justice"). The Canadian Charter of Rights and Freedoms provides that evidence obtained in breach of s 8 must be excluded "if it is established that,

---

102 See, for example, *R v Collins* [1987] 1 SCR 265 at [29] and *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) at 411–412.

103 For example, as expressed in *R v Jefferies*.

104 As there was prior to the Court of Appeal's decision in *R v Shaheed* [2002] 2 NZLR 377 (CA).

having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".[105] This provision, though differently worded, is comparable to the s 30(2) measure of "the need for an effective and credible system of justice". Under both provisions, maintenance of "the integrity of, and public confidence in, the justice system" over the long term is the focus.[106]

[61] Suggestions in the Courts below that an effective and credible system of justice requires that the accused have their charges "resolved through a proper trial process"[107] begs the question of what is "proper trial process" in an effective and credible system of justice. Public confidence in the effectiveness and credibility of the "system of justice" suggests a wider concern than with the outcome in a particular case.

[62] In New Zealand, an effective and credible system of justice is one that gives substantive effect to human rights and the rule of law. Whenever rights protected in the New Zealand Bill of Rights Act are breached, the s 30 balancing process must take into account the human rights breach. The Evidence Act itself stresses the importance of the rights affirmed in the New Zealand Bill of Rights Act.[108] Such rights are enacted as fundamental values of the legal system.

[63] The principle of the rule of law that breach of rights must be remedied is also essential to any effective and credible system of justice. And remedy must be tailored to the breach of rights if it is to be effective.[109] For that reason (as well as the consideration referred to by other members of the Court that the appearance of paying for breaches of rights is hardly consistent with the integrity of the system of justice) monetary compensation will seldom be a remedy tailored to breach of s 21 of the New Zealand Bill of Rights Act where unreasonable search has resulted in evidence sought to be admitted in a court proceeding.

---

105 Canadian Charter of Rights and Freedoms RSC 1985 App II, No 44, s 24(2).

106 *R v Grant* 2009 SCC 32, [2009] 2 SCR 353 at [68]. See also *R v Harrison* 2009 SCC 34, [2009] 2 SCR 494 at [36].

107 As Winkelmann J suggests in *Bailey – Admissibility* at [104].

108 See [53] above. As well, s 30(3)(a) expressly recognises the importance of rights breached as a factor to which the court may have regard in the balancing process.

109 See, for example, *R v Te Kira* [1993] 3 NZLR 257 (CA) at 283–284 per Thomas J and *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA) at 427–428 per Richardson J.

[64] Finally, as the structure of s 30 makes clear, the considerations identified in s 30(3) "[f]or the purposes of subsection (2)" are not mandatory considerations, nor do they purport to be exhaustive. They are a sensible checklist for consideration as applicable in the circumstances of a particular case. Each consideration will not be relevant in all cases. Nor will each relevant consideration be of equivalent weight in all cases. Relevance and weight will be contextual.

[65] In balancing the range of considerations, as s 30 requires, some factors mentioned in s 30(3) may be significant only in combination with others, rather than as stand-alone factors. That is I think particularly likely with respect to the consideration identified in para (d): "the seriousness of the offence with which the defendant is charged". It cannot be the case that this factor always prompts admission of the evidence obtained in breach of the New Zealand Bill of Rights Act where offending is serious. That would be to treat human rights, which are expressed as universal, as withdrawn from those charged with serious offending.[110] Rather, the seriousness of offending is likely to be of importance in combination with factors such as the deliberateness of the impropriety or the knowledge of alternative investigatory techniques available not involving breach of rights. It may pull towards disproportionality or proportionality in exclusion, depending on the context.

[66] Where a human right has been breached (a circumstance that is to be taken into account under s 30(3)(a)), that circumstance in context may overwhelm another consideration, such as the nature and quality of the improperly obtained evidence. A Bill of Rights Act consistent interpretation of s 30 (such as is required alike by s 6(b) of the Evidence Act and s 6 of the Bill of Rights Act) does not permit s 30 to be used to deny fundamental rights, but to ensure that the remedy of withholding evidence obtained through breach is proportionate through a process which ensures that disparate factors are openly identified for relevance and contextually assessed.

---

[110] See further *S v Coetzee* 1997 (3) SA 527 (CC) at [220] per Sachs J.

Application of s 30

[67] In the application of s 30 to the present case, I consider there is a distinction to be made between the evidence obtained on physical inspection through trespass and the evidence obtained through covert filming of the appellants. I also come to a different conclusion on the question of the proportionality of excluding the Reid Road vehicle surveillance from the conclusion I come to in relation to the other surveillance.

[68] Four considerations identified in s 30(3) apply to the three types of evidence and can be conveniently dealt with first. They are the seriousness of the offences with which the appellants are charged, the alternative remedies available to exclusion of the evidence, and the questions of danger and urgency referred to in paras (g) and (h) (which I consider together).

[69] I accept that the offences are serious. The s 98A Crimes Act offences may be more serious than the Arms Act charges, but I do not think that circumstance warrants different treatment under s 30 of those who face Arms Act charges only. All charges are of serious crimes. Section 30 is a general provision, which will fall to be applied to a wide range of offending, ranging from relatively trivial offences under the Summary Proceedings Act to the most serious offences contained in the Crimes Act. I do not think para (d) calls for close assessment once a threshold of seriousness is passed. These charges involved potential for harm, use of weapons, and (in relation to the s 98A charges) concerted criminal activity. They carry maximum sentences of imprisonment of four years (in the case of the Arms Act offences) and five years (in the case of the s 98A offences). All are properly treated as serious.

[70] In common with other members of the Court, I consider that there is no effective remedy for the impropriety other than exclusion of evidence. That must be a significant consideration in assessing whether exclusion is disproportionate to the impropriety. The principle that breaches of rights should be remedied is fundamental to any effective and credible system of justice, and is a principal plank of ours. Moreover, judicial admission of evidence tainted by breach of fundamental

rights and freedoms is additional stain on the effectiveness and credibility of our system of justice and inconsistent with the principles of the New Zealand Bill of Rights Act.

[71] While the potential risk to police and public was something about which the police in the present case were properly concerned, it is clear that at least by April 2007 the police knew that any risk was not imminent. Their surveillance was extended principally it seems for evidential purposes and in order to gain a better understanding of what was proposed by and who comprised the group. I do not criticise these policing judgments, but they do mean that considerations of danger and urgency are not as significant in the s 30 weighing as other features of the case.

(i) The covert surveillance

[72] The breach of s 21 entailed in the covert surveillance undertaken without lawful authority must be regarded as extremely serious when assessed against the rights breached. Covert surveillance is a substantial breach of the right to be let alone. As is the case with interception of private communications, it is undermining of the values of dignity and personal freedom which underlie s 21.

[73] I regard it as a significantly exacerbating factor that the film surveillance was undertaken deliberately without legal authority, in the knowledge that there was no lawful investigatory technique available to be used. In common with the other criteria identified in s 30(3), para (e) is neutrally expressed in terms of its effect: "whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used". In cases where breach of s 21 consists of unreasonableness in the manner of search, para (e) may pull either way, depending on the context (as for example, where knowledge that there were other investigatory techniques indicates oppressive behaviour, or where, despite such knowledge, there are circumstances of urgency under para (h) or danger under para (g)). In cases where evidence could have been obtained without breach of rights, that circumstance too may pull either way depending on such further circumstances as whether the failure to obtain the evidence lawfully is because of inadvertence or is deliberate, whether the effect of not proceeding lawfully is

technical or substantial breach, and the urgency of the case. When a human right is deliberately interfered with without lawful authority, knowledge that no authority could have been obtained will almost always favour a finding of proportionality in exclusion. Admission of evidence so obtained compounds the breach of s 21 and art 17 and, through evasion of the requirement of lawful authority, is inconsistent with the rule of law. I consider therefore that the fact that the police knew that there was no other investigatory technique lawfully available to be used can only be a factor pointing to the proportionality of exclusion of the evidence, when the police knew that their surveillance was unlawful. In circumstances where the police officer in charge of the inquiry knew that there was no authority to be obtained for such filmed surveillance, the deliberate unlawfulness of the police conduct in the covert filming, maintained over many entries and over a period of some 10 months, is destructive of an effective and credible system of justice.

[74] It is true that the fact of filming was not concealed from the judicial officer who dealt with all s 198 warrant applications. Indeed, the affidavits supporting the warrant applications referred to the filming. And the warrants themselves (which were supplied to the judge in draft by the police) purported to authorise the retrieval of film from the hidden cameras, while not authorising the placement of the cameras. Although on the appeal it was suggested for the Crown that this apparent candour and attempt to obtain "judicial oversight" was a circumstance in favour of admission of the evidence, I do not see that such implication of the judge in activity beyond the lawful authority of the police is other than a troubling feature of the case.

[75] The s 198 warrants were obtained in advance (the reason for their invalidity) because a principal purpose was to provide opportunity to set up the surveillance cameras to film the expected exercises,[111] since things left behind following the exercises could have been the subject of unexceptional s 198 warrants. I do not think it is proper to infer bad faith on the part of the police on the available evidence. The knowledge of lack of lawful authority meant, however, that the impropriety was deliberate. It was persevered in for many months, long after it had become obvious that the violent seizure of land the police feared was not in immediate prospect, and

[111] Detective Sergeant Pascoe identified two reasons for entering the land: the installation cameras and retrieval of film and, as "a secondary purpose" for the most part, the undertaking of scene examination after the camps were held.

despite the fact that any immediate risk from the exercises could have been met by the arrest of those taking part. Again, I mean no criticism of the policing judgment to try to gain further information. But the breaches of s 21 were not merely technical or inconsequential procedural errors but "flagrant violation of right",[112] deliberately undertaken. The breach of human rights entailed the covert filming of individuals who did not appreciate that they were observed and who were not displaying their behaviour for public observation. Because I take the view that the police filming was unlawful, I consider that rule of law considerations are also engaged.

[76] The evidence obtained by the filmed surveillance was not obtained by conscripting the accused against himself. But I do not regard it as being in the same category as the spent cartridge shells and other items left behind following the exercises. It is material that requires interpretation. Its admission risks compounding the breach of rights if it effectively requires the accused to give evidence to explain it.

[77] In result, the different emphasis I would place upon the breach of s 21, my view that the police acted unlawfully in the knowledge that they had no authority to undertake covert surveillance, the absence of any other effective remedy (offending the important principle that breach of rights must be remedied), and rule of law considerations lead me to conclude that the exclusion of the surveillance film evidence is proportionate. I differ from those members of the Court who would conclude that the exclusion of this evidence is disproportionate not only because of the different view I take as to the unlawfulness of police conduct but because I disagree that the lack of availability of other investigative techniques is a consideration in favour of admission of the evidence. I regard knowledge of lack of lawful authority as a seriously exacerbating circumstance. For the reasons given, I consider that it is wrong to treat police conduct, though unlawful, as reasonable. Such approach is contrary to the rule of law and the scheme and policies of the New Zealand Bill of Rights Act, which are properly applied in s 30. With the conclusion that the exclusion of the evidence is proportionate, s 30(4) requires it to be excluded.

---

[112] *R v Jefferies* at 315 per Hardie Boys J.

(ii) The Reid Road surveillance of vehicle movements

[78] I agree with the conclusion of Blanchard J that the filming of vehicle movements on Reid Road should not be excluded as evidence. I reach that view however on the basis that the recordings constituted a search. For the reasons given at [10]–[13] and as is consistent with the Canadian authorities, covert surveillance of others is search within the purposive and broad scope it is appropriate to apply to s 21. I consider that the search was unreasonable both because obtained through trespass and without lawful authority. The evidence was therefore improperly obtained in breach of s 21 of the New Zealand Bill of Rights Act. But I am of the view that the intrusion on the right and the nature of the impropriety were less serious than that entailed in the covert filming of the activities on Tuhoe lands and would admit the evidence in application of s 30.

[79] In weighing whether exclusion of the Reid Road vehicle surveillance is disproportionate, the seriousness of the intrusion on rights must be judged against the policies of the enactment or rule of law breached. In the case of s 21 of the New Zealand Bill of Rights Act, that policy is security from unreasonable intrusion by the State upon personal freedom. I am of the view that the expectation of privacy in respect of information about which cars pass along a public road is not high. The position might have been otherwise if more intrusive information than the fact of passage had been obtained, but that does not arise for consideration here.

[80] Nor is there the same ambiguity in interpretation of the evidence obtained as in the case of the observations of the activities on the land. The information is apparently reliable as to the passage of the vehicles.

[81] Although the film was "improperly obtained" by reason of trespass and lack of authority to undertake surveillance, I would admit it as evidence under s 30. The s 30 Evidence Act balancing in respect of the film was not as destructive of the values underlying the s 21 right to be free of unreasonable search as the hidden surveillance of activities conducted by individuals out of the public view. And while the police acknowledged that their surveillance of the activities was without authority, it is not clear that they appreciated that authority was required for filming

the vehicle movements along a public road. Their deliberate trespass in order to set up the camera and retrieve the film (no s 198 warrant having been applied for) is a factor in favour of exclusion. But I do not think it overcomes the slightness of the intrusion upon personal freedom and the nature and quality of the evidence obtained. I consider that exclusion of the evidence would be disproportionate.

(iii) The evidence obtained on physical search following the exercises

[82] Although I would exclude all the covert surveillance films (save those relating to the Reid Road vehicle movements), I would admit, in application of s 30, the evidence obtained from site inspections, despite its having been obtained through trespass (because the s 198 warrants were invalid). In considering that the evidence should be admitted, I differ from Blanchard J who would exclude it except in relation to the s 98A appellants.

[83] The circumstance that the s 198 warrants were invalid was not apparently understood by the police and indeed was not authoritatively established before the decision of this Court. The nature of the impropriety is therefore different in quality from the impropriety in respect of the covert surveillance, for which the police acknowledged that there was no lawful authority.

[84] I regard the breaches in relation to the physical searches following the exercises as more technical than the surveillance undertaken without the possibility of any statutory justification. The searches could have been lawfully undertaken pursuant to warrants under s 198 of the Summary Proceedings Act if the warrants had been applied for on reasonable grounds after the exercises were held (as is the case with respect to the June warrant and potentially that obtained in September). In such circumstances, the police breach may be seen as turning on timing in respect of the material left on the land. The circumstance that evidence could have been obtained without Bill of Rights breach seems to me one in favour of its admission, particularly as the violation was technical and inadvertent. The position might have been different if it could be concluded that the police acted in bad faith or in deliberate disregard of lawful authority.

[85] Further, the evidence obtained from the physical inspections was real evidence, not subject to the ambiguities of the film taken from the surveillance cameras of the activities of those observed. The physical material was left behind and there to be found.[113] This consideration too prompts its admission.

[86] For these reasons, I conclude that the film evidence in relation to the secret surveillance must be excluded with the exception of the film relating to vehicle movements on Reid Road. I would admit the Reid Road film and the real evidence obtained from the physical inspection of the sites (including the film evidence of location of items and of the scene as inspected) on the basis that its exclusion would be disproportionate to the impropriety entailed in obtaining it.

Result

[87] The Court is unanimous that, with the exception of the entry on the Rangitihi land in June and possibly September, all the disputed evidence was improperly obtained by trespass. In respect of the searches purportedly carried out under s 198 warrant, that result follows from the invalidity of the s 198 warrants. In concluding that the search warrants were invalid, the Court disagrees with the approach taken in the Court of Appeal and prefers that taken by Winkelmann J in the High Court.

[88] In respect of the warrantless search undertaken in the Whetu Road area, the Court is unanimous that there was no implied licence for entry, contrary to the view taken in the Court of Appeal. That evidence together with the Reid Road film of vehicle movements (in respect of which the Court of Appeal accepted the police to have been in trespass) is accepted by the Court to have been improperly obtained.

[89] Disposal of the appeal therefore turns principally on the application of s 30 of the Evidence Act. In applying s 30 to the two categories of appellant (those facing both Arms Act and s 98A Crimes Act charges and those facing Arms Act charges only) and to the three different categories of disputed evidence (the film (video) surveillance of the exercises, the evidence obtained on physical search of the land, and the Reid Road vehicle film surveillance), the Court is divided in result, except as

---

[113] *R v Evans* at [29] per Sopinka J.

to the admissibility of the Reid Road film. The outcome of the appeals, reflected in the formal orders of the Court, may be summarised as follows:

(a) By majority (Blanchard, McGrath and Gault JJ), all the disputed evidence is admissible against those appellants charged under both s 98A of the Crimes Act and s 45(1)(b) of the Arms Act. The appeals of those appellants are dismissed.

(b) Unanimously, the footage of vehicles on Reid Road and the evidence gathered by police in person on the Rangitihi land in June is admissible against all appellants.

(c) By majority (Elias CJ, McGrath and Gault JJ), all evidence other than film surveillance evidence is admissible against the appellants charged only under the Arms Act.

(d) By majority (Elias CJ, Blanchard and Tipping JJ), the film surveillance evidence is inadmissible against the appellants charged only under the Arms Act. The appeals of the appellants charged only under the Arms Act are therefore allowed in part.

BLANCHARD J

Table of Contents **Para No**

Introduction

[90] The eleven appellants are accused of unlawful possession of firearms and other weapons contrary to s 45(1)(b) of the Arms Act 1983 and four of them, Mr Tame Iti, Mr Kemara, Mr Signer and Ms Bailey, of participation in an organised criminal group contrary to s 98A of the Crimes Act 1961.

[91] The offending alleged against the accused involves their participation in a series of quasi-military training camps on lands which are owned by various trusts associated with the Tuhoe iwi. These pre-trial appeals concern the admissibility against each of the appellants of evidence obtained by means of covert surveillance (in person by police officers and by use of surveillance cameras), as well as by physical searches, of certain land. The argument in this Court was primarily concentrated on the admissibility of the video surveillance footage.

[92] Over a period of more than 18 months police were investigating suspected terrorist activities and arms offending in forested land around Ruatoki in the Urewera Ranges. In the course of their investigations and for a period of nearly a year, they successively applied for and were issued under s 198 of the Summary Proceedings Act 1957 with a number of search warrants. The validity of those warrants is challenged on various grounds. It is accepted by the Crown, however, that even if they were valid they did not and could not authorise the installation of surveillance cameras. The police say that nevertheless the actions they took in relation to the surveillance cameras were justified. It is also said for the appellants that the searches carried out were unreasonable and thus in breach of s 21 of the New Zealand Bill of Rights Act 1990. Finally, if the evidence is held to have been improperly obtained, it is contended for the appellants that its exclusion at the forthcoming trial would be proportionate to the police impropriety and that it must therefore be excluded under s 30(4) of the Evidence Act 2006.

Factual background

[93] The police operation began when information was received suggesting that Mr Tame Iti and other persons appeared to be engaged in military training exercises

wearing camouflage clothing and using semi-automatic weapons. The police obtained warrants in May, July, September and October 2006 enabling them to intercept text messages between those believed to be involved. As a result of information obtained by this means, and from a warrant issued in October 2006 giving access to call data, the police were of the view that a training camp had occurred in September and that a further camp was planned for November. They did not, however, know the precise location of the intended camp.

[94] Therefore, on 15 November 2006 the police sought and obtained a s 198 warrant for a large area of land around Ruatoki (but, as with some of the subsequent warrants, excluding dwellings and other buildings). The offence to which the warrant was expressed to be directed was unlawful possession of arms. It stated that there were reasonable grounds to believe that there were on the lands "spent firearm shell casings, discarded ammunition packaging and personal items of clothing discarded by the trainees".

[95] Police officers entered the land encompassed by the warrant on 16-19 November and set up observation posts. They heard a large number of shots being fired. In view of the volume of the gun fire they withdrew from the area without carrying out a search of the campsite. But they re-entered in December (within the period of the warrant) and did search and take photographs of the scene of the training, having established the location, on the Paekoa Track, during the November entries.

[96] In January 2007, in anticipation of another training camp, a further warrant was obtained (the first of those with which this appeal is concerned).[114] As was the case with subsequent warrants, the application was worded in a way that appeared to seek authority for the police to install motion-activated stationary surveillance cameras (this time on the track and on Paekoa Road) as well as to carry out a search for physical evidence. In contrast, the warrant itself on each occasion said nothing about installation of cameras but did authorise a search for, inter alia, "surveillance footage showing the vehicles that drive into the area, images of those attending,

[114] No challenge was made on this appeal in relation to the November 2006 warrant.

including what they are wearing and what type and quantity of weapons they are in possession of".

[97] Three stationary cameras were installed on the Paekoa Track on 10 January and removed on 23 January. Police also maintained listening posts during part of that time and searched for evidence relating to the training camp when they retrieved the cameras with the video footage.

[98] The same pattern of police behaviour was repeated when warrants were obtained in relation to further anticipated training camps on 21 February, 5 April, 15 June, 13 August, 7 September and 4 October 2007, but the areas which the police were authorised to enter changed from time to time as information gathered by various means (including warrants under ss 312CA–312CD of the Crimes Act, with which this appeal is not concerned) led the police to conclude that the intended training site had shifted. Each successive warrant application included updated information about camps which had occurred and were believed to be planned.

[99] In the January to April warrants the offences for which evidence was to be gathered were specified as seditious conspiracy, conspiracy to supply firearms, unlawful possession of firearms and conspiracy to use firearms in the commission of a crime. From the June warrant onwards the reference to seditious conspiracy was replaced with participating in a terrorist group.

[100] Camps were held in January, April, June, August, September and October. No evidence was gathered against any of the appellants under the February warrant as the camp planned for March 2007 was cancelled at the last moment. The camp in April did not take place at the Paekoa Track area where the police anticipated it would, but at Rangitihi. So no observations or investigations were made of the April campsite and no evidence was gathered relating to that camp. The same happened in August when the camp occurred at Whetu Road rather than at Rangitihi.

[101] Evidence of the firing of weapons and some use of Molotov cocktails was gathered concerning these camps by the use of the eyes and ears of police officers who had entered the land, examination of campsites and video surveillance footage.

On some occasions the pinpointing of the location of the campsite was in whole or in part achieved by police walking over an area specified in a s 198 warrant.

[102] All entries appear to have occurred within the one-month period authorised by each warrant but on one occasion, when the March camp was cancelled, police left video surveillance cameras in place until after the next camp in April and thus the cameras were on the land for a period not within a warrant.

[103] In connection with the camp in August 2007, a video surveillance camera was installed on Tuhoe-owned land alongside Reid Road, which had to be used by any vehicle travelling to and from the Rangitihi area.

[104] The areas covered by the warrants were generally forested land although there were some buildings. The area at Whetu Road where the August, September and October camps took place was on the banks of the Whakatane River and was described by the High Court Judge as a mixed area of bush and white gravel. There was a carpark used by members of the public, who were able to enter the land without objection being raised by the owners.

[105] The police operation was terminated on 15 October 2007 after the October camp at Whetu Road. A quantity of items such as spent cartridge cases was then seized.

[106] (Suppressed)

[107] While the police level of concern about the objective of the group, namely that it was a serious matter which would probably involve violence, continued throughout the whole period during which warrants were executed, it is apparent that by the time of the April camp police no longer believed that any action by the group, other than carrying out training exercises, was imminent.

Section 198

[108] Section 198 of the Summary Proceedings Act 1957 is as follows:

198 Search warrants

(1) Any District Court Judge or Justice or Community Magistrate, or any Registrar (not being a constable), who, on an application in writing made on oath, is satisfied that there is reasonable ground for believing that there is in any building, aircraft, ship, carriage, vehicle, box, receptacle, premises, or place—

(a) any thing upon or in respect of which any offence punishable by imprisonment has been or is suspected of having been committed; or

(b) any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or

(c) any thing which there is reasonable ground to believe is intended to be used for the purpose of committing any such offence—

may issue a search warrant in the prescribed form.

(1A) Despite subsection (1), no search warrant may be issued under this section in respect of an offence against a provision of the Films, Videos, and Publications Classification Act 1993.

(2) Every search warrant shall be directed either to any constable by name or generally to every constable. Any search warrant may be executed by any constable.

(3) Every search warrant to search any building, aircraft, ship, carriage, vehicle, premises, or place shall authorise any constable at any time or times within 1 month from the date thereof to enter and search the building, aircraft, ship, carriage, vehicle, premises, or place with such assistants as may be necessary, and, if necessary, to use force for making entry, whether by breaking open doors or otherwise; and shall authorise any constable to break open any box or receptacle therein or thereon, by force if necessary.

(4) Every search warrant to search any box or receptacle shall authorise any constable to break open the box or receptacle, by force if necessary.

(5) Every search warrant shall authorise any constable to seize any thing referred to in subsection (1).

(6) In any case where it seems proper to him to do so, the District Court Judge, Justice, Community Magistrate, or Registrar may issue a search warrant on an application made on oath orally, but in that event he shall make a note in writing of the grounds of the application.

(7) Every search warrant may be executed at any time by day or by night.

(8) It is the duty of every one executing any search warrant to have it with him and to produce it if required to do so.

The first High Court judgment

[109] In her first judgment Winkelmann J considered challenges to the propriety of the way in which the police had collected the evidence.[115]

[110] The Judge took the view that s 198 did not confer jurisdiction to issue a purely prospective warrant. The judicial officer to whom the application is made must be satisfied that there *is* present one of the category of things listed in subs (1). A warrant cannot, she said, be issued on the ground that it is anticipated that things *will* be coming on to the search site. They must be there at the date of the issue of the warrant.[116]

[111] Having determined that there was ample material to satisfy the judicial officer in relation to the offending, the Judge said that there was also sufficient evidence and material relating to "things" falling within s 198(1)(a) or (b) on the land to provide reasonable evidence in relation to the November 2006 warrant. At least one camp had occurred in the area in September so that it could reasonably be anticipated that evidence relating to that camp would be located in the search area.[117] But in relation to some of the later warrants, the police had failed to mention in their applications that they had already searched the site of the previous camp. The obvious inference was that the evidence from that camp had already been collected. The warrants in question should not have been issued because, contrary to the impression the judicial officer would likely have had, there was no reasonable ground for belief that the things (from the immediately previous camp) were on the search site at the date of the issue of the next warrant. This applied to the January, February and April warrants which were consequently invalid.[118] So were the August and October warrants, in respect of which the fact of a search following the preceding camps had been disclosed.[119] The April camp had not taken place where

---

115 *R v Bailey* HC Auckland CRI-2007-085-7842, 7 October 2009 [*Bailey – Propriety*].
116 At [47].
117 At [52]–[53].
118 At [55].
119 At [60].

the police expected it, but in the Rangitihi area, which had therefore not been searched. Thus the June warrant application for a search of the Rangitihi area was made on adequate grounds. The September 2007 application for authority to search at Whetu Road likewise disclosed that a search of that area in August had been a reconnaissance only. So there was sufficient material to satisfy the judicial officer that "things" would be present on that site. But that warrant was invalid for the Rangitihi site to which it also extended.[120]

[112] The upshot was that only the November 2006, June 2007 and September 2007 (Whetu Road) warrants were valid.

[113] Winkelmann J then considered and rejected arguments that the warrants were invalid because of material non-disclosures by the police (failure to mention in the applications that the warrants could not authorise video surveillance) or because there had been an ulterior motivation (to create the opportunity for in-person and video surveillance). The Judge said that the warrants had not authorised video surveillance and the judicial officer would have been aware of that.[121] The purpose of the November 2006 warrant was to undertake a search, to determine where the camps were being held and to search that site for evidence. There had been two purposes of the later warrants: a dominant purpose of placing before the judicial officer through the application process (and hence obtaining judicial oversight to the extent possible) the intention to undertake covert surveillance, including filming of the site, and a second purpose of collecting evidence from camps. All were legitimate law enforcement purposes and all were disclosed.[122]

[114] The Judge also held that a s 198 warrant could, inter alia, authorise the seizure of items which happened to have come on to the land after the date of issue of the warrant.[123]

[115] Winkelmann J then considered whether the covert surveillance activities were authorised by the s 198 warrants. She held that the use of the motion-activated

---

120 At [58]–[59].
121 At [65]–[67].
122 At [74]–[75].
123 At [87]–[88], citing *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 (CA) at 186 per Cooke P.

surveillance cameras was not. Section 198 envisaged in-person execution of search warrants, as shown by subs (8) which imposes a duty on everyone executing any search warrant to have it with him and produce it if required to do so.[124] But in-person surveillance undertaken to locate camp sites and facilitate searching them was clearly incidental to the execution of the warrants. Winkelmann J said also that the gathering of observational evidence (including the taking of photographs and video filming of the scene) during execution of a warrant was plainly within its scope. It could not, however, be the purpose for which a warrant might be issued.[125] She considered that the collection of video footage from surveillance cameras was authorised. It was a "thing" on the land. But it would be tainted by illegality if the presence of the cameras was a trespass or the filming was an unreasonable search.[126]

[116] A further issue was whether the police had an implied licence to be present on the lands for the purposes of their investigations. Because the Whetu Road area was generally open to the public, the Judge found that the police had a licence to be on that land for covert in-person surveillance and general investigation. But the licence did not extend to setting up and leaving surveillance cameras on site. Members of the public were permitted to use the Paekoa Track, but the land was subject to a lease to a forestry company and there was an expectation that consent would be sought from the lessee and any permitted use was for recreational purposes only. There was no evidence of the public being permitted to use the Rangitihi area and the land adjoining Reid Road. Hence there was no implied licence for police entry for investigative purposes except at Whetu Road.[127]

[117] Turning to whether the searches were unreasonable in terms of s 21 of the Bill of Rights Act, Winkelmann J noted that in *R v Williams* the Court of Appeal had said that it is only where a person's privacy had been invaded that his or her rights under s 21 could have been breached.[128] But those on premises with the permission of the owner/occupier were to be taken as having a reasonable expectation of privacy. In light of this, she then considered the covert surveillance of each area. In

---

124 At [99]–[100].
125 At [102]–[103].
126 At [106].
127 At [125]–[126].
128 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [48].

relation to the Paekoa Track area, she concluded that there could be no reasonable expectation of privacy on the part of the present appellants. The ability of Tuhoe, the public and Department of Conservation workers to be present on the land was subject to the control of the lessee. The appellants had no reason to expect that the police would not be there. They themselves should not have been there without the lessee's consent.[129] Nor was there a reasonable expectation of privacy at Whetu Road where the land was widely used by the public. In respect of Reid Road, the filming was of the public road. This too was not a s 21 search.[130]

[118] But those who attended camps in the Rangitihi area would have had a reasonable expectation of privacy. They all either had whakapapa links to that Tuhoe-owned land or were there by invitation of Mr Tame Iti, who had mana whenua. Both in-person and stationary camera surveillance on that land was therefore a search for the purposes of s 21 and, if not authorised by search warrant, was unreasonable.[131]

[119] As to ground searches, the Judge took the view that, to the extent that scene searches at the Paekoa Track and Rangitihi were not authorised by warrant, they were unlawful and unreasonable. But the Whetu Road land, although privately owned, was "used as public land" by both Tuhoe and non-Tuhoe. Therefore, to the extent that the site examination was without warrant, it was not a search for the purposes of s 21.[132]

The second High Court judgment

[120] In her second judgment Winkelmann J addressed the admissibility of the evidence under s 30 of the Evidence Act: whether it must be excluded because that is proportionate to the impropriety of the police officers in collecting it.[133] Section 30 is as follows:

> **30 Improperly obtained evidence**

---

129 At [156]–[159].
130 At [166]–[167].
131 At [161]–[165].
132 At [170]–[171].
133 *R v Bailey* HC Auckland CRI-2007-085-7842, 15 December 2009 [*Bailey – Admissibility*].

(1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—

(a) the defendant or, if applicable, a co-defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or

(b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.

(2) The Judge must—

(a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and

(b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

(3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:

(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:

(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

(b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or

(c) unfairly.

(6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

[121] The Crown conceded that there was a causal connection between the improprieties associated with particular camps and the collection of the evidence connected to that camp. It submitted, however, that the s 30 discretion applied only to a breach of a right under the Bill of Rights Act. Winkelmann J had no difficulty in rejecting that argument on the basis of the definition of improperly obtained evidence in subs (5). She said that evidence obtained in consequence of a trespass and from equipment placed on the land by police was obtained "in consequence of a breach of any ... rule of law" by a person to whom s 3 of the Bill of Rights Act applied, that is to say a breach of a rule of law by police.[134]

[122] Winkelmann J said that the application of her findings led to the conclusion that, as relevant to the present appellants, evidence had been improperly obtained as follows:[135]

(a) Auditory surveillance and footage from the January camp;

...

(c) Footage of the June (Rangitihi) camp; and

(d) Footage from the September and October camps.

---

134 At [39].
135 At [41].

[123] The Judge began her analysis by considering, in relation to each area, the importance of the rights breached by the impropriety and the seriousness of the intrusion on them (s 30(3)(a)). The auditory surveillance and footage from the January camp at the Paekoa Track followed entry under an unlawful warrant. Even if lawful, the warrant could not have authorised entry for setting up the stationary cameras or their presence on the land. The Judge referred to her finding concerning the lessee's control of the land and the appellants' lack of any right to be there, but she accepted the continuing connection with it of those of them with mana whenua. She further accepted that they would feel aggrieved by police entry, particularly given the history of Crown relations with Tuhoe.[136]

[124] The Judge said that the trespass in connection with the June camp at Rangitihi was in a different category. The police were validly on the land under warrants but that did not authorise the stationary cameras. Although the present appellant, Mr Teepa, was a beneficial owner of the land, those with whakapapa connections also had a licence to be there. The others were there at Mr Tame Iti's invitation and so they too were entitled to be there. The use of the stationary cameras was an unreasonable search. The seriousness of that breach of rights was lessened by the fact that the filming took place in open space. The existence of interception warrants authorising the use of audio equipment did not mitigate the seriousness of the intrusion in relation to the unauthorised visual surveillance.[137]

[125] The police had been validly at Whetu Road in September and October[138] but the use of the stationary cameras was again a trespass. However, there was no unreasonable search because the camp attendees had no reasonable expectation of privacy at that location.[139]

[126] In considering s 30(3)(b), Winkelmann J said that the early warrants were invalid because the police did not disclose the fact of previous searches. She was of the opinion that the omission of information from warrant applications was not deliberate. The warrants could not have authorised the stationary cameras. The

---

136 At [44]–[47].
137 At [49]–[52].
138 Under a valid warrant in September and implied licence in both months: see [112] and [116] above.
139 At [53]–[54].

absence of available surveillance powers had been the subject of comment in a Law Commission Report and was being addressed by a Bill before Parliament.[140] Only on one occasion did the filming amount to an unreasonable search. The Judge weighed the fact that the stationary camera surveillance had been done over a period of 10 months and that the cameras were on private land. However, she also weighed that the police understood they were investigating a serious crime and were justifiably concerned for public safety. Initially at least, it had seemed that an armed attack was imminent. Communications obtained through interception warrants revealed only part of what the group was up to. Without evidence of what occurred at the training camps, the appellants were unlikely to be convicted of any offence that adequately reflected the criminality of their conduct.[141]

[127] There were no investigative alternatives. Infiltrating the group with undercover police was dangerous and at short notice not easily accomplished. It was reasonable not to seek permission from the Tuhoe land owners, for in such a close-knit community the covert operation would not have remained covert for long.[142]

[128] These considerations mitigated how seriously the police improprieties were to be viewed, at least in the initial months of the operation. Police behaviour was not to be characterised as bad faith. The statutory framework for search and seizure was complex. The police believed they were investigating serious Arms Act offences and preparations for extremely serious violent offending. Yet they could not lawfully use the only realistic investigative technique open to them.[143]

[129] The impropriety did not affect the quality of the evidence. The Judge said that it was accepted by the appellants that the camera footage was of considerable significance.[144] She noted the maximum penalty for each Arms Act offence of four years and for the s 98A offence of five years. She said that those charged with Arms Act offences were charged with offences that involved, if proved, unlawful possession of firearms in circumstances that created a risk to public safety. For those charged under s 98A, the offending alleged was even more serious. Winkelmann J

---

140 At [57]–[61].
141 At [64]–[65].
142 At [66].
143 At [67]–[69].
144 At [73] and [76].

said that she identified a very considerable public interest in seeing all of these charges resolved through a proper trial process.[145] The police conduct in the case could not be categorised as flagrant misconduct. If they had failed to act to investigate properly what was being planned, and who was involved, they would have been open to public criticism:[146]

> That criticism would have been justified because in the first several months of the operation the information suggested that a planned event would take place in the near future, and would involve civil disruption, and at least risk of injury and death. Moreover the police did obtain or attempt to obtain whatever legal authority, and whatever judicial oversight was available to them.

[130] Having weighed all these considerations the Judge concluded that the public interest in a prosecution and disposition through fair trial process of the charges was so significant that the evidence should not be excluded. Exclusion was not necessary to give proper weight to the impropriety as it affected the appellants' rights and interests. Nor was it the appropriate response if an effective and credible system of justice was to be maintained.[147]

[131] Winkelmann J therefore determined that all the evidence was admissible.

The Court of Appeal judgment

[132] The Court of Appeal[148] disagreed with Winkelmann J that the anticipatory character of some of the warrants rendered them invalid. It said that s 198(1) should not be read literally. There was no good policy reason why anticipatory warrants should not be able to be granted. Furthermore, contrary to the assumption made by the Judge, police had not when searching camp sites seized all items of evidential interest, because that would have risked alerting those engaged in the training camps to the police interest. So when warrants were issued evidential material was still in

---

145 At [104].
146 At [107]
147 At [108].
148 *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499 per William Young P, Glazebrook and Ellen France JJ.

situ. Therefore, even on a literal approach to the use of the present tense in s 198(1), there was a jurisdictional basis for issuing the warrants.[149]

[133] Addressing the argument that the police had a collateral purpose in obtaining the warrants, and proceeding for the moment on the assumption that they could not authorise surveillance, the Court accepted that, from the point of view of the police, surveillance evidence was of far greater significance than anything likely to be found at the sites of the training camps. But the Court made a distinction between why the police went on to the land and why they sought search warrants. They certainly had reasons for going on to the land which went beyond a desire to conduct physical searches of camp sites. But, of the activities which they did intend to conduct, it was these physical searches which most obviously required warrants. It was not tenable to regard relevant police actions as being in the nature of a "ruse". Further, when executing the warrants they obtained police were perfectly entitled to use their eyes and ears for law enforcement purposes. Such purposes were not illegitimately collateral.[150]

[134] The Court also observed that it was not usual police practice to seek search warrants for operations in open country. It was not clear to them that any authority was required for such operations to be lawful in the open country around Ruatoki. Police had sought to obtain the greatest possible statutory authority for what they proposed to do and had always dealt with the issuing officers with candour as to the investigative methods they intended to employ. There was no basis for impeaching the validity of the search warrants themselves on the ground that they were merely a mechanism for providing cover for the collateral purpose of carrying out surveillance. The Court of Appeal therefore held that all of the search warrants were valid.[151]

[135] It then proceeded to consider the extent to which the warrants could authorise surveillance operations. The Court referred to the observation in *R v Grayson and Taylor* that s 198:[152]

---

149 At [22]–[23].
150 At [24]–[25] and [29].
151 At [30]–[32].
152 *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) at 408.

> ... expressly contemplates multiple entries and searches. The circumstances may call for surveillance, planning and entries, searches and seizures, each extending over several days. The requirement is that all the authorised steps be completed within one month of the issue of the warrant.

Bearing that in mind, the Court said that surveillance and associated entries on to privately owned land were authorised by a search warrant if they were intended to facilitate a later authorised search (perhaps by locating the appropriate area). It saw the actions of police in November 2006 as being within this principle. The operation conducted at that time was fairly incidental to the execution of the warrant, which occurred in December when the site of the camp was searched.[153]

[136] The Court said that there was much more scope for argument as to whether the later search warrants authorised the surveillance operations. Winkelmann J's view that they did not had not really been challenged in the Court by the Crown. But the Court nevertheless expressed the view that the relevant operations were in fact authorised. The focus in s 198(1) on a tangible "thing" could not be ignored, but providing police operations were fairly referable to tangible "things" of evidential significance which were or would be (within one month of the granting of the warrant) in situ, the Court considered that they could be justified under a search warrant. In respect of each of the warrants, the further material that would come to be on the land included surveillance camera footage. As well, the warrants authorised the seizure of any material evidence located on site irrespective of whether there were reasonable grounds to believe it to have been there when the warrants were granted. Police were not confined to a single visit under each warrant. They were entitled to go on to the land to look (for instance to ascertain the location of "things"), to return later to search and to return to seize or photograph what was physically on the site. Police could in lawful execution of a warrant go on to the property to collect as much information as possible about the evidential material. That included finding out who was associated with it. That in substance was the purpose of the surveillance operations. The Court also said that if police could look personally there seemed to be no logical reason why they could not carry out the same sort of surveillance through surveillance cameras.[154]

---

153 At [33]–[35].
154 At [36]–[41].

[137] On the basis of the Court's approach, the only police actions which were carried out otherwise than as authorised by warrant were the placing of the camera beside Reid Road and the Whetu Road walkover. The Court considered whether police surveillance operations were properly characterised as searches for the purposes of s 21 of the Bill of Rights Act. Each of the areas had "open country character".[155] The Court agreed with Winkelmann J that whether police actions were searches for the purposes of s 21 very much depended on whether the actions of the police were in breach of the appellants' reasonable expectations of privacy. However the Court said that it acted on the assumption that s 21 was engaged where police investigations of a kind which could be regarded as a search took place on private property. On this approach, reasonable expectations of privacy would be primarily relevant "as to significance of breach and remedy".[156]

[138] Turning to the question of whether police activities could be justified by an implied licence to enter land, the Court said that the fact that it might not be practicable for an owner of property to prevent trespass did not, in itself, create an implied licence. Where land was used by its owner for commercial purposes which might be adversely affected by public access, the courts were most unlikely to recognise that members of the public had an implied licence to go over it.[157] The Court agreed with Winkelmann J's conclusions that police did not have an implied licence to go on to the land in the Paekoa Track and Rangitihi areas. They did have such a licence in relation to Whetu Road, but not for the setting up of surveillance cameras.[158] However, the Court had previously held that the setting up of the surveillance cameras was authorised by warrant.

[139] So far as the setting up of the camera beside Reid Road was concerned, the Court was content to proceed on the basis that the placement of the camera involved a trespass and that the footage was accordingly improperly obtained. However, the essential police activity involved filming what was happening on the public road. The Court did not accept that this amounted to a search. The precise location of the

---

155 At [45].
156 At [49].
157 At [53].
158 At [57].

observer or camera was irrelevant. Its location and the associated assumed trespass was not sufficient to transform into a search what would otherwise not be a search.[159]

[140] The Court therefore held that all the evidence, other than the footage obtained from the Reid Road stationary camera, was lawfully obtained. The Reid Road footage had been obtained as a result of activities by the police which were not in breach of s 21 as they did not involve a search. However, being derived from trespassory activity by persons within s 3 of the Bill of Rights Act, the Reid Road footage was nonetheless "improperly obtained" for the purposes of s 30 of the Evidence Act. On the Court of Appeal's approach to the case, the s 30 balancing exercise was of limited significance in the context of the case as a whole.[160] But because there was scope for debate as to a number of aspects of the case, the Court proceeded to discuss the s 30 balancing exercise in a way which went beyond the Reid Road camera footage.

[141] The Court made particular reference to the significance of the unhappy history between Tuhoe and the Crown, giving a brief recitation.[161] It said that Winkelmann J had been obviously aware of the distress which the police actions had caused but said that, although this was an important consideration, it was not necessarily of controlling importance. It thought that the Judge was entitled to place less weight on impropriety based only on trespass than on impropriety involving an unreasonable search and seizure.[162] The Court said that, even if it had concluded that the powers conferred by the search warrants were not as extensive as it had found, it would, in conformity with the approach taken by the High Court Judge, have held that all the evidence was admissible. It was unrealistic to approach the case on the basis that the police could properly have sat on their hands while a group of people with apparently violent intentions carried out military training exercises so as to enhance their ability to engage in violence. Other investigative techniques were insufficient for the police to be sure that they had a complete grasp of the plans of those running the group. In the absence of surveillance in the areas where the training was taking place, the police were not able to monitor what was going on

---

159 At [69].
160 At [76].
161 At [84].
162 At [86].

and, as well, were not able to obtain evidence of what, on the face of it, was offending which carried the potential for considerable loss of life. In those circumstances, the police sought to obtain the maximum statutory authority for what they intended to do and they disclosed their intentions to the issuing officers.[163] To the extent that there was any breach of reasonable expectations of privacy, those expectations were limited. The significance of any police impropriety was heavily mitigated by the exigencies of the situation they faced. All the evidence was of high significance. From the point of view of the appellants, there were no practical remedies for what had happened, other than exclusion of evidence. That that was so, however, was largely a reflection of the reality that their personal rights had not been significantly interfered with.[164]

[142] Accordingly the appeal was dismissed.

Lawfulness of warrants

[143] The s 198 search warrants are said on behalf of the appellants to have provided no lawful basis for the police activity on the Tuhoe lands because:

(a) there was no power conferred by s 198 for a warrant to be issued to enable a search to be conducted for things which were not reasonably believed to be on the subject land at the time when the warrant was issued; that is, the warrants were (impermissibly) anticipatory in nature; and

(b) the police had an ulterior and predominant (collateral) purpose in obtaining the warrants, namely to be able to enter upon the lands for the purpose of collecting visual images by means of the stationary video cameras, yet the warrants did not and could not authorise such video surveillance.

Anticipatory warrants

[144] The Supreme Court of the United States pointed out in *United States v Grubbs*,[165] a case concerning a warrant issued for the search of a house in

---

163 At [90]–[91].
164 At [92].
165 *United States v Grubbs* 547 US 90 (2006) at 95.

anticipation of the arrival there of a parcel containing pornography, that all search warrants are in a sense anticipatory because a determination that there is "probable cause" (in this country, a reasonable ground for belief) amounts to a prediction that the item believed to be located on the premises will still be there when the warrant is executed. Anticipatory warrants are therefore, the Court said, "no different in principle from ordinary warrants".[166] They require the issuing judicial officer to determine that it is now probable that the evidence will be on the premises when the warrant is executed. The Court of Appeal was, on this basis, justified in its statement that there is no good policy reason why anticipatory warrants should not be able to be granted in this country.

[145] Nonetheless, that view must confront the literal wording of s 198(1) (that "is" means "is", not "is or will be") read in light of the fact that the New Zealand courts have always taken a conservative approach to questions of statutory authorisation of warrants, in part because the common law has long required full justification of searches of persons or properties and more recently because of the influence of s 21 of the Bill of Rights Act. Instances of a narrow construction being given to a statutory power of search are to be found in the decisions of the Court of Appeal in *Auckland Medical Aid Trust v Taylor*,[167] *Police v Ford*[168] and *Choudry v Attorney-General*.[169] Mr Harrison QC pointed out that s 198 has been left almost completely unchanged since its enactment in 1957, while problems encountered by law enforcement officers in their use of new technology have been addressed by Parliament in other specific legislation. Counsel said that the courts have very properly considered that s 198 should perform its original function without being extended because a novel situation has arisen.

[146] Not without some hesitation, I accept that it should be left to Parliament to provide any authorisation for issuance of a warrant to search for things which will be on specified premises at a future time but are not presently in situ, and that in

---

166 At 96.

167 *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) (need for particularisation of offending).

168 *Police v Ford* [1979] 2 NZLR 1 (CA) (warrant could not authorise use of telephone on premises).

169 *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA) (power to intercept communications under New Zealand Security Intelligence Act 1969 did not authorise covert entry of premises).

s 198(1) "is" should be given its literal meaning. If the present law is unsatisfactory in this respect it would be possible to change it, as the Law Commission has in fact recommended,[170] in the Search and Surveillance Bill which is now before the House.

[147] I should, however, make it clear that rejection of the Crown's argument that s 198 should be taken to authorise anticipatory warrants does not mean that if police executing a properly issued search warrant (that is, issued on the ground that evidence is reasonably believed to be already present) find on the subject premises an item which they might otherwise lawfully seize, they are disabled from seizing it merely because it was not present there at the time when the warrant was issued. I intend to cast no doubt on the view taken in *Rural Timber Ltd v Hughes*[171] that things not on the premises at the time of the warrant can be the subject of search and seizure.

[148] The Courts below have differed over whether the warrants issued in this case were wholly anticipatory. The High Court thought that they were, because all evidence in the form of spent shell casings and the like would have been seized and removed in the immediately prior search. The Court of Appeal said that was factually incorrect. Police naturally left these items in situ to avoid alerting the camp attendees to their presence. Mr Harrison argued, however, that when each subsequent warrant was applied for it was not the intention of the police to search for or seize the items previously left in situ; they had already been located and photographed or documented, so no search was necessary in respect of them, and the police left them there on subsequent entries. I agree. Warrants cannot be justified if neither search nor seizure was intended in respect of such items. The power to enter under s 198 warrants is exercisable only in aid of intended searches or seizures. However, as Winkelmann J found, there had been no prior search of the June campsite at Rangitihi (because the earlier camps were in the Paekoa area). Nor had there been a full search of the campsite at Whetu Road prior to September. Mr Harrison's argument fails in relation to them.

---

170 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 4.21.

171 *Rural Timber Ltd v Hughes* [1989] 3 NZLR 178 (CA) at 186.

Video surveillance

[149] None of the warrants justified the video surveillance. In the first place, and most obviously, the warrants did not purport to authorise that surveillance. Reference to it was included in the applications but was deliberately omitted from the authorisation in the warrants. The reason for mentioning the intention to carry it out appears to have been to alert the judicial officer to what police were doing, but at the same time police appear to have believed, correctly, that s 198 does not give authority for the issuance of a warrant for such a purpose.

[150] The section does not do so because by its very nature video surveillance must be prospective. Any warrant relating to what will be recorded on a videotape is dealing with something that will come into existence in the future. It is not a "thing" reasonably believed to be presently on the land. And, even if a warrant could validly be issued prospectively, the searches conducted by video cameras in this case could not be a search for a "thing". The intention was to capture images of persons on the land. That is not a search for a thing for the purposes of s 198. Nor can I accept the argument that the videotape itself, which the police would themselves place on the land, could fall within the scope even of an anticipatory warrant. Police action in retrieving an object they themselves have placed on land cannot be the subject of a search and seizure unless perhaps that object has then somehow been lost by police and a further warrant has been validly issued to authorise police to look for it. Someone who places an object on land, and so knows where it is, is not searching for it when going to uplift it and is not seizing it when removing it again. It is not being removed from the possession of someone else, which is the essence of a seizure.

Collateral purpose

[151] It was submitted that, even where the warrants might otherwise have been valid, their issuance was on each occasion vitiated by an ulterior or collateral purpose on the part of the police. I take the view, however, that police did honestly seek the warrants for the purpose of authorising entry to enable them to discover where the camps were occurring, personally record what they saw and heard, and afterwards inspect the campsites. That undoubted purpose was a principal purpose

for which the warrants were applied. That being so, the existence of the other purpose of video surveillance does not lead to the conclusion that the police action in obtaining the warrants was dominated by an ulterior purpose. Equally, however, it does not provide any justification for the video surveillance.

[152] The in-person visual and aural surveillance was arguably not a search for a "thing", but the better view is that it was incidental to the intended camp searches – a means of establishing where and when the camps were taking place. The investigation of the campsites, including reconnaissance to locate them and the filming of them by police to record what they found there, was a search for things, even when items discovered were not then seized. Search and seizure can be separate events. One can occur without the other, as, for instance, when police enter under a warrant to seize an item which is visible from a public place and whose whereabouts therefore requires no act of searching. But, as already explained, some of the warrants were invalid even in this respect, as the campsite items being searched for and recorded could only be those coming on to the land during the period of the camp and thus were not present at the time of the issue of the warrant.

Summary

[153] In summary, for these reasons, apart from the June warrant for Rangitihi and the September warrant for Whetu Road, the warrants which the appellants have challenged on this appeal provided no lawful authority for any of the police activities on the land. The June and September warrants permitted entry and the search of camp sites, and the collection of items which the police uplifted. Filming or photographing of what the police found on the land, as a record of the evidence in situ, was within their scope, but, as previously indicated, the warrants did not extend to the surveillance by stationary cameras. The June and September warrants were not invalidated by the police intention to act covertly. As the Law Commission concluded in its *Search and Surveillance Powers* report, covert searches are lawful in New Zealand. Neither existing legislation nor court decisions draw a distinction in terms of the way in which a search warrant is executed:[172]

---

[172] At [6.42].

> A Summary Proceedings Act search warrant authorises multiple entries and searches at any time and does not prohibit the executing officer from carrying out the search covertly to confirm the location of evidence that is believed on reasonable grounds to be on the premises. Nor is the officer obliged to advise the occupier of the search.[173]

[154] There is, however, a question about the September warrant which I am unable to resolve on the evidence presently before the Court. It is the extent to which it may have been granted on the basis of material obtained by the police in August by unlawful entry at Whetu Road and whether there was sufficient other material to justify that warrant. The application for the September warrant makes reference to "intercepted communications" as forming part of the grounds as well as police entries on the land, without detailing the content of these communications.[174] Without that further evidence, this Court is not in a position to rule on whether the information contained in the intercepted communications formed reasonable grounds for the issue of the September warrant.[175]

Lawfulness of entry without warrant

[155] The consequence of the invalidity of a warrant is that, unless justified on some other basis, the entry of the police on to the Tuhoe land pursuant to it was a trespass and therefore their presence and their activities of the kind described above were unlawful. The only suggested justification was that the police had an implied licence to enter because the lands were open to members of the public, such as trampers and hunters, and in some cases were also regularly entered by Department of Conservation staff.

[156] As noted above, Winkelmann J found that the police had no implied licence to be on the Paekoa Track, Rangitihi or Reid Road areas but that they did have an

---

173 But the persons executing the warrant must have it with them and produce it to anyone who comes across them and requires them to do so: s 198(8).

174 Material from the interceptions which this Court has not seen was apparently known to the judicial officer who issued the s 198 warrant in September.

175 There was also some discussion in the lower courts about whether the 16 May "reconnaissance" conducted by police on the Rangitihi land was lawful (Detective Sergeant Pascoe apparently conceded at first in giving evidence in the High Court that it was not, but later explained that it was conducted pursuant to an interception warrant) and accordingly whether there were sufficient grounds for the issue of the June warrant. Like the courts below, I am satisfied on the evidence before me that there was sufficient evidence for the June warrant to be validly issued (see *Bailey – Propriety* at [58] and *Hunt* at [65]).

implied licence to enter the Whetu Road area which encompassed covert in-person surveillance and general investigation. That licence did not, however, allow the installation and use of the video surveillance cameras. When the police did that, they exceeded their licence and were trespassing. Members of the public were allowed on the Paekoa Track for recreational purposes, but only with the consent of the lessee of the area. That licence did not extend to covert surveillance or to search. The Court of Appeal reached the same conclusions.

[157] I agree with these conclusions save in relation to Whetu Road. The evidence reveals that Tuhoe permitted people to access this area for recreational purposes but there is nothing to suggest that they were prepared to countenance unwarranted entry by the police for investigatory purposes. The case differs from *Tararo v R*[176] because we are here concerned with a different kind of implied licence. *Tararo* involved a licence implied by law under which it is permissible for anyone, including police officers, to enter land for the purpose of communicating with the owner or occupier. Provided that purpose genuinely exists, the motivation for the entry, for example that criminal activity is under investigation, is not relevant to the lawfulness of the entry.[177]

[158] The licence in this case is, however, of a different character. The police were not entering in order to communicate with any owner or occupier. Far from it: they did not wish owners or occupiers to know they were on the land. Any licence to enter therefore had to be one which had been expressly granted by an owner or occupier having power to make such a grant (which obviously is not asserted), or it must have been apparent from the conduct of the owner or occupier on past occasions or when the entry was made that the entry was permitted. Plainly there was no express licence and, although Tuhoe appear to have been allowing entry by members of the public for recreational purposes, there is nothing to suggest that they had ever, or would ever, tolerate entry by police for the purpose of investigating crime. The entries at Whetu Road cannot be justified on the basis of any implied licence.

---

176 *Tararo v R* [2010] NZSC 157.
177 At [3] and [14].

[159] The police entries on Tuhoe lands were therefore unlawful where they occurred without a valid warrant.

Breach of s 21 of the Bill of Rights Act

[160] I now proceed to consider whether the police actions were in breach of s 21 of the Bill of Rights Act, which reads:

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

A search is an examination of a person or property and a seizure is a taking of what is discovered.[178]

[161] In the White Paper which preceded the Act and contained a draft of it, the purpose was said to be to apply the protection against unreasonable search or seizure not only to acts of physical trespass but to any circumstances where state intrusion on an individual's privacy was unjustified. It was intended to extend to forms of surveillance.[179] In his important judgment in *R v Jefferies* Richardson J remarked that the test of unreasonableness requires consideration of the values underlying the right and a balancing of the relevant values and public interests involved.[180] The Supreme Court of Canada had said in *Hunter v Southam Inc*[181] that an assessment must be made:[182]

> ... as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

After quoting that passage, Richardson J identified that the guaranteed right under s 21 reflects an amalgam of values: property, personal freedom, privacy and

---

178 *R v Jefferies* [1994] 1 NZLR 290 (CA) at 300.
179 "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.152].
180 *R v Jefferies* [1994] 1 NZLR 290 (CA) at 301.
181 *Hunter v Southam Inc* [1984] 2 SCR 145.
182 At 159–160.

dignity.[183] As with the equivalent provisions in the United States and Canada, the touchstone of the section is the protection of reasonable expectations of privacy.[184] The affirmation of a protection against unreasonable search or seizure is not, however, a guarantee of a "reasonable" expectation of privacy.[185] On the other hand, nor is it a source of power for the state. Section 21 does not empower the state to make reasonable searches.[186] The lawfulness of a search must be established elsewhere, either by the existence of a valid warrant or by the invocation of a statutory provision empowering search without warrant, such as s 18(2) of the Misuse of Drugs Act 1975, or by pointing to an express or implied licence justifying what was done.

---

183 In *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) at 407 the Court of Appeal said:

> The guarantee under s 21 to be free from unreasonable search and seizure reflects an amalgam of values. A search of premises is an invasion of property rights and an intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity. Any search is a significant invasion of individual freedom. How significant it is will depend on the circumstances. There may be other values and interests, including law enforcement considerations, which weigh in the particular case.

184 *R v Fraser* [1997] 2 NZLR 442 (CA) at 449.

185 *Jefferies* at 302.

186 *Jefferies* at 301.

[162] Under s 21 a court must engage in a two-step process. It must ask:

(a) Was what occurred a search or a seizure?

(b) If so, was that search or seizure unreasonable?

If these questions are affirmatively answered, there has been a breach of s 21. It is unnecessary to carry out a further analysis under s 5 of the Bill of Rights Act. If the search was unreasonable it cannot be justified under s 5.[187]

What is a search under s 21?

[163] The Court of Appeal in *R v Fraser*[188] left open whether the reasonable expectation of privacy is a test for what constitutes search or whether it is applied, once it has been established there was a search, to test its reasonableness. I am of the view that it influences both stages. I would affirm the statement of the Supreme Court of Canada in *R v Wise*:[189]

> If the police activity invades a reasonable expectation of privacy, then the activity is a search.

An expectation of privacy will not be reasonable unless, first, the person complaining of the breach of s 21 did subjectively have such an expectation at the time of the police activity and, secondly, that expectation was one that society is prepared to recognise as reasonable.[190] In *Grayson and Taylor* the Court of Appeal said that privacy values underlying the s 21 guarantee are those held by the community at large:[191]

> They are not merely the subjective expectations of privacy which a particular owner or occupier may have and may demonstrate by signs or barricades.

[164] The word "search" appears in both s 198 of the Summary Proceedings Act and s 21, but in the latter it has a much more extensive meaning. In s 198 it is, as we have seen, limited to a search for "things". There is no such limitation in s 21, where

---

187 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [33].
188 *R v Fraser* [1997] 2 NZLR 442 (CA).
189 *R v Wise* [1992] 1 SCR 527 at 533.
190 *Katz v United States* 389 US 347 (1967) at 361.
191 *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) at 407.

it has the broader meaning which McGrath J referred to in *R v Ngan*[192] as having the underlying idea of "an examination or investigation for the purpose of obtaining evidence".[193] But he would also have included "situations where the state undertakes examinations and investigative activities of a kind that significantly intrude physically on private zones albeit for purposes other than gathering evidence".[194] He had earlier pointed out that the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise, is concerned with protecting a particular aspect of individual privacy and property rights against state intrusions although no general guarantee of privacy was intended or given by the Bill of Rights Act.[195] In *R v Fraser* the Court of Appeal said that there is a general connotation of investigation or scrutiny in order to expose or uncover, going beyond or penetrating some degree of concealment.[196] Under the broader meaning a search can be for something tangible or intangible. It need not involve any trespassory conduct; frequently, electronic surveillance will not do so.

[165] The classic situations of a physical entry into and inspection of the interior of a building, an enclosed space or a vehicle obviously involve a search. So does any physical examination of a person, the taking of bodily samples or an internal examination of an item of personal property like a bag or a wallet, wherever it takes place.

[166] A search can be conducted personally by a law enforcement officer or by means of technology. In some cases both may occur, as where a police officer enters a building and takes photographs or makes a video recording.

[167] Video surveillance may constitute a search, depending upon the place which is the subject of the surveillance. If the surveillance is of a public place, it should generally not be regarded as a search (or a seizure, by capture of the image) because,

---

192 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48.
193 At [106].
194 At [110].
195 At [104].
196 At 449. Concealment means hidden from view but there does not have to be a deliberate hiding of something.

objectively, it will not involve any state intrusion into privacy.[197] People in the community do not expect to be free from the observation of others, including law enforcement officers, in open public spaces such as a roadway or other community-owned land like a park, nor would any such expectation be objectively reasonable. The position may not be the same, however, if the video surveillance of the public space involves the use of equipment which captures images not able to be seen by the naked eye, such as the use of infra-red imaging.

[168] It should make no difference to whether a surveillance is a search or seizure that the filming of the public place was done from private land or that filming of any kind is done covertly. The important matter is whether the subject of the surveillance was a place within public view. That would include areas of land, such as the front garden of a house, which are open to viewing from the street or another public place; that is, where the privacy of the occupiers is not protected by, say, a wall, fence or hedge.[198] Certainly, however, if, in order to see into or carry out surveillance of such a private space, it were necessary to climb up on a fence or place a camera up a power pole, for example, that action is likely to constitute a search. Even more so would the action of filming by a camera taken on to the property and used to record things unable to be filmed from a public area unless there was an express or implicit invitation to enter and do so, or a right of entry as in *Tararo*.[199]

[169] We were referred by Mr Pike to United States case law on the Fourth Amendment to the Constitution, and in particular to the decision of the Supreme Court in *Oliver v United States*[200] which affirmed the "open fields" doctrine, earlier announced in *Hester v United States*,[201] under which "an individual may not legitimately demand privacy [under the Fourth Amendment] for activities conducted

---

197 Concern with how a law enforcement agency may use images so captured in a public place, for example by a CCTV camera, can, if necessary, be controlled by privacy legislation or by the civil law.

198 It is possible that a prolonged video surveillance of even such an open private area might involve such an intrusion that it would amount to a search.

199 Covert participant video surveillance, such as was found to be lawful in *R v Smith* [2000] 3 NZLR 656 (CA), has to date been treated as an exceptional case.

200 *Oliver v United States* 466 US 170 (1984).

201 *Hester v United States* 265 US 57 (1924).

out of doors in fields, except in the area immediately surrounding the home".[202] In *Oliver* the Court said that:[203]

> ... open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas.

The Supreme Court held that the government's intrusion upon an open field was not a "search" in the constitutional sense even though it was a trespass at common law.[204]

[170] Convenient though this doctrine might be for law enforcement agencies, it is not part of New Zealand law, nor would its introduction be consistent with the terms of s 21. The right in the United States is expressed as relating to "houses" and has been interpreted to cover no more than the dwelling and its curtilage. It is derived from the language of the Fourth Amendment which provides:

> 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.

In contrast, s 21 contains a guarantee against an unreasonable search of "property". There is therefore no basis for saying that a search of open country is not a "search" within s 21. This aspect is better dealt with as part of the second step under s 21.

[171] In the present case, all of the police activity was on private land not visible from any public land and constituted searches done in person or by surveillance. The appellants had a reasonable expectation of privacy, though one of limited extent in some cases, and such an expectation in relation to private land would have been recognised by society. The owners had permitted the public access to the Paekoa Track and Whetu Road for recreational purposes but, as found at [158] above, they

---

202 At 178.
203 At 179.
204 At 183.

still had a reasonable expectation of privacy from police investigation on their land. The single exception was the surveillance of Reid Road. That filming was restricted to things which happened (the passing of cars) on the road. It was therefore not a search and s 21 did not apply to it.

Were the searches unreasonable?

[172] If it is found that there was a search or seizure, as I consider occurred in all cases save at Reid Road, the court must proceed to consider whether it was unreasonable, either because it occurred at all or because of the unreasonable manner in which it was carried out. In considering the question of unreasonableness, it is necessary to look at the nature of the place or object which was being searched, the degree of intrusiveness into the privacy of the person or persons affected and the reason why the search was occurring.

[173] Prior to the decision in *R v Shaheed*[205] (and now the enactment of s 30 of the Evidence Act), when the prima facie exclusion rule prevailed, the courts were inclined to be generous (and some would say over-generous) in making findings that particular searches were not unreasonable. That attitude can be attributed to the almost automatic grave consequence of exclusion of the evidence if s 21 were found to be breached. Now that matters have been put by statute on a different basis, the courts should make a finding of breach whenever that is justified by what occurred and leave a consideration of the consequences until they come to consider and apply s 30. It is at that point also that questions of whether the evidence was obtained as a result of any impropriety that has been found, and whether discovery of it would have occurred in any event, will need to be considered.

[174] Normally, a conclusion that there is a breach of s 21 should follow once it is found that the police have acted unlawfully in relation to a search, leaving the consequence of the unreasonableness of the search to be considered under s 30. An exception can be made in cases where the breach is minor or technical or perhaps where the police had a reasonable (although erroneous) belief that they were acting lawfully.

---

[205] *R v Shaheed* [2002] 2 NZLR 377 (CA).

[175] In this case the video surveillance was not authorised by any warrant. Even in the instances when the police had a valid warrant to enter the land concerned, they still had no right to carry out the surveillance and were trespassing when they installed the video cameras. Each breach was substantial in itself and they were repeated frequently over a lengthy period. Even taking the view most favourable to them, the police seem to have been prepared over and over to run the risk of acting in breach of the law. They did not obtain legal advice and should have done so. No doubt they felt obliged to pursue their investigations on the Tuhoe lands and, at the beginning, with some urgency (though not amounting to an emergency) because of their perception of what was occurring and what was being planned, and their inability to progress their investigation in any other way. That is, however, something to be taken into account when the exclusion of the evidence gathered is considered under s 30 of the Evidence Act.

[176] The intrusion into the privacy of the appellants was of a limited extent because of the remote forested nature of the subject land (its open fields character), but, against this, it was only to be expected given the history of the Crown's relationship with the iwi that when Tuhoe learnt what the police had done they would be outraged at the breach of their tikanga, aggravated by the fact that images of what was occurring were intended to be (unlawfully) captured on video.

[177] The question does arise, however, of whether the appellants are entitled to say that their s 21 rights have been breached. I have been much assisted in this aspect of the case by the analysis carried out by Glazebrook J for the Court of Appeal in *Williams*.[206] I agree with her that the Bill of Rights "should not become dominated by formal proprietary notions given the universal nature of the rights it protects". She added:[207]

> ... Section 21 provides protection of the rights of the general public. Privacy interests in premises should thus be assessed objectively without any concentration on property rights, or the activities of the accused.

In this case the appellants were either Tuhoe beneficiaries or the invitees of a Tuhoe beneficiary. They have demonstrated a sufficient connection with the lands to be

---

[206] *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [47] et seq.
[207] At [63].

able to say that their privacy was affected by what the police did. Although the Paekoa land was subject to a lease, so that technically it might be asserted by the lessee that the appellants were trespassers, I do not accept, given the underlying Tuhoe ownership and the character of the land, that the appellants should be so regarded for the purposes of s 21, at least in the absence of any challenge by the lessee to their presence on the land. I therefore make no distinction of their position vis-à-vis the Paekoa land, although it does lessen their claim that their privacy was intruded upon at those camps.

[178] As the police acted unlawfully in entering the Paekoa land in January, the Rangitihi land in September and the Whetu Road land in August and October, I consider that their actions there were in breach of s 21. So were their video surveillances wherever they occurred on the Tuhoe lands, except at Reid Road where there was no search.

[179] On the other hand, the police entered and conducted themselves lawfully on the Rangitihi land under a warrant in June (and may have done so on the Whetu Road land under a warrant in September) in carrying out in-person surveillance, examination of campsites and seizures of shell cases and the like.[208] Those actions would not in my view be unreasonable searches given the lawfulness of the police conduct (if established for the September search) and their belief that very serious violent offending was being planned and the limited expectation of privacy in such areas. If, on the other hand, the September warrant was invalidly issued then the reasoning above would apply.

Exclusion under s 30 of the Evidence Act[209]

[180] To summarise:

(a) We are concerned only with the evidence relating to the January, June, September and October 2007 camps and what was collected from Whetu Road in August. Any evidence relating to

---

[208] See [154].

[209] The text of the section is set out at [120] above.

the November 2006 camp is not challenged on this appeal. No evidence against any of the appellants was gathered relating to the other camps in 2007.

(b) The police presence on the Rangitihi land in June was lawful and not in breach of s 21, and the searches and seizures personally made by police officers, including filming of what they personally observed or found, were not in breach of s 21. Their presence on the Whetu Road land in September may have been lawful, with the same consequences if it was.

(c) The police presence on the Paekoa land in January, on the Rangitihi land in September and on the Whetu Road land in August and October was unlawful and the searches and any seizures, including filming, in respect of those occasions were in breach of s 21.

(d) All usage of stationary video surveillance cameras at any time was unlawful and, except in the case of the recording of images on Reid Road, was an unreasonable search or seizure in breach of s 21.

[181] These conclusions arise from a somewhat different view of the law from that taken by the Courts below, and therefore depart from their conclusions about unlawfulness and breach of s 21. They accordingly require an assessment under s 30 to be made on a different basis.

[182] Section 30(2)(a) requires the Judge first to make a finding on the balance of probabilities of whether the evidence in issue was improperly obtained. In this case it is accepted by the Crown that it was obtained as a result of the police activities which have been described, and it is not suggested that it would have been obtained without those activities. The first question is therefore whether it was "obtained improperly". Subsection (5) provides that evidence is improperly obtained if, as

relevant to this case, it is obtained in consequence of a breach of any enactment or rule of law by a person to whom s 3 of the Bill of Rights Act applies.

[183] The evidence of the January camp on the Paekoa land, the Rangitihi evidence in September (if there was any) and the Whetu Road evidence in August and October, and all the video surveillance footage, was obtained in breach of the rule of the common law which makes trespassing an unlawful act. Furthermore, that evidence was also obtained by means of an unreasonable search or seizure (with the exception of the Reid Road surveillance) and so by breach of an enactment, namely s 21. The police are within s 3 of that Act. So all that evidence was improperly obtained for the purposes of s 30.

[184] However, subject to resolution of the matter referred to at [154], the evidence (excluding the video surveillance evidence) concerning the Whetu Road land in September would be admissible. Because of the doubt raised, I will for present purposes treat it as improperly obtained and consider it under s 30 along with other improperly obtained evidence.

[185] Paragraph (b) of s 30(2) requires the Judge to determine whether or not the exclusion of the improperly obtained evidence is proportionate to the impropriety. That is directed to be done:

> ... by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

That language was borrowed from *Shaheed*[210] and the matters to which the court may among any other matters have regard, as listed in subs (3), also to a large degree reflect what is found in the principal judgment in that case.[211]

[186] Subsection (4) requires the Judge to exclude the evidence if the Judge determines that its exclusion is proportionate to the impropriety. Putting that around the other way, the evidence must be excluded unless exclusion would be a disproportionate response to the impropriety.

---

[210] At [156].
[211] At [147]–[152].

[187] An effective and credible system of justice requires not only that offenders be brought to justice but also that impropriety on the part of the police should not readily be condoned by allowing evidence thereby obtained to be admitted as proof of the offending. It is not just a matter of balancing the impropriety on one side against the need to bring offenders to justice on the other. Both our Court of Appeal in *Shaheed*[212] and the Supreme Court of Canada in *R v Grant*[213] with reference to s 24(2) of the Charter of Rights and Freedoms[214] have emphasised that society's longer-term interests will be better served by ruling out evidence whose admission would bring the system of justice into disrepute. To adapt what the Canadian Court has said, the fact of the breach means that damage has already been done to the administration of justice. The courts must ensure in the application of s 30 that evidence obtained through that breach does not do further damage to the repute of the justice system. Later in the majority judgment in *Grant* the Court said:[215]

> ... while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s 24(2)'s focus ... The short-term public clamour for a conviction in a particular case must not deafen the s 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[188] The Court in *Grant* also recognised the need to take account of society's interests in having an adjudication of the case on its merits by inquiring whether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence:[216]

> This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R v Askov* [1990] 2 SCR 1199 at 1219–1220. Thus the Court suggested in

---

212 At [148].

213 *R v Grant* 2009 SCC 32, [2009] 2 SCR 353 at [68]–[69].

214 See Canadian Charter of Rights and Freedoms RSC 1985 App II, No 44, s 24(2), which says that:

> Where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

215 At [84].

216 At [79] (original emphasis).

> *Collins*[217] that a judge on a s 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence.

[189] It is because of the tension between these societal interests that subs (2)(b) speaks of giving "weight" but "tak[ing] proper account" of the need for an effective and credible system of justice. Bearing this in mind, the most straightforward way to proceed is for the judge to identify and evaluate relevant matters which weigh in favour of exclusion and then those which are against that course. Some may potentially go either way. In light of what emerges from that process, the judge should then determine whether, overall, exclusion of the evidence would be proportionate to the impropriety.

[190] I begin, therefore, with matters which may weigh in favour of exclusion. The first is the importance of the right breached by the impropriety and the seriousness of the intrusion on it. The rights breached in this case are the s 21 right not to be subjected to unreasonable search and seizure and the common law right of property owners not to suffer trespassing on their land. The latter right is of reduced significance in the s 30 assessment in some instances because of the existence of the lease of the Paekoa land and the very limited trespass which took place at Reid Road.

[191] The right guaranteed by s 21 is, however, of considerable importance. Indeed, the case for exclusion is always stronger when a breach of the Bill of Rights Act has been found.[218] As Richardson J has said, s 21 reflects the values of property, personal freedom, privacy and dignity.[219] The carrying out of the searches, and in particular the filming, impacted on the privacy of the appellants – their right to go about their lives free from the prying eyes of the state – although their reasonable expectation of privacy would have been much less than if they had been in a building or an enclosed space like a hedged garden or the curtilage of a home. Their dignity too was affected when they were unlawfully spied upon and filmed. This was

---

217 *R v Collins* [1987] 1 SCR 265.

218 In *Shaheed* at [143] the Court of Appeal recognised that a breach of a quasi-constitutional right such as s 21 must be given "appropriate and significant weight".

219 See [161] above.

aggravated to an extent because the police acted in a manner which did not recognise the tikanga of Tuhoe.

[192] If the police actions in question had occurred, in the rural setting, only in relation to the January camp, the trespassing and the intrusion resulting from the breach of s 21 might have been assessed as of moderate seriousness only, even allowing for the fact that the video surveillance extended over some days. When, however, unlawful video surveillance occurred on seven occasions over a period of about 10 months, the breach of the appellants' rights must be regarded as of considerable seriousness and be accorded corresponding weight under s 30(2)(b).

[193] The other matter from s 30(3) which could weigh in favour of exclusion of the evidence is the nature of the impropriety. The police found themselves in a very difficult position, and I will refer shortly to considerations which it is said for the Crown made their actions excusable. They tried to mitigate what they did by making full disclosure of what they were intending to the Judge who issued the warrants. They did not mislead him into granting warrants which they knew to be beyond his powers. They appreciated that he could not issue warrants authorising the use of the stationary cameras and did not include that in the draft warrants.[220] It was also understandable that the police would not appreciate that certain of the warrants were entirely invalid because of their prospective nature. After all, the Court of Appeal, too, saw nothing wrong with this aspect of them. I acquit them of having acted in bad faith in obtaining and executing the warrants.

[194] But the police understood that the warrants did not authorise the video surveillance and that their conduct in relation to the video surveillance might well be legally questionable. Winkelmann J made a finding that "the police continued to use surveillance cameras with the knowledge, at a senior level at least, that they had no lawful authority to do so".[221] Despite being aware that they lacked statutory authority for the surveillance, they proceeded without taking legal advice, which they had plenty of time to obtain. Having failed to get advice, the police cannot rely

---

220 Where police apply for a warrant on valid grounds but also have a collateral law enforcement purpose, it is desirable that they disclose this in the application with an explanation of why they are not seeking the authority of the warrant in relation to that purpose: *R v Williams* at [38].

221 *Bailey – Admissibility* at [68].

on the fact that they were operating in circumstances of legal uncertainty and argue that they should be "cut some slack". Their conduct was reckless in the sense that they took the risk that it might be found to be unlawful.

[195] On the other side, however, and in favour of not excluding the evidence, are a number of factors. (...Suppressed...) There was (...Suppressed...) an apprehension of physical danger, as it is put in subs (3)(g), to those, including the police, who might have to combat it or who might be otherwise drawn into it. Whether this belief on the part of the police had any substance in fact or whether they simply misunderstood the nature of what was happening will be an issue at any trial of the appellants and is something on which this Court now cannot and does not take a position. But there seems to be no question that the police did act throughout in the genuine belief that the conduct of the appellants (or such of them as were taking a leadership role) would pose a very real threat to public safety if their activities were not investigated and stopped. In addition, in relation to the January camp there appeared to be some element of urgency: (...Suppressed...). After April, however, the police came to appreciate that this was not imminent.

[196] The police had no practicable alternative investigatory techniques available to them. Without information about what was occurring on the Tuhoe lands they had no way of assembling evidence of the serious offending which they believed was occurring or planned. They lacked any ability to obtain a warrant for video surveillance, because the law did not provide for it, and understandably believed that they could not approach landowners for consent to enter lest the participants in the camps be alerted, and that in-person surveillance could endanger members of the police when live rounds were being fired.

[197] It is necessary to identify and evaluate the seriousness of the offences with which the appellants are charged.[222] It is noticeable that subs (3)(d) speaks of the

---

[222] The Court of Appeal said in *Shaheed* at [152] that:

> ... Weight is given to the seriousness of the crime not because the infringed right is less valuable to an accused murderer than it would be to, say, an accused burglar, but in recognition of the enhanced public interest in convicting and confining the murderer. In contrast, where the crime with which the accused is charged is comparatively minor, it is unlikely that evidence improperly obtained will be admitted in the face of a more than minor breach of the accused's rights.

offence charged, not of the offending which the police believed they were investigating when the impropriety was committed. Whilst the impropriety of the police conduct can be assessed by reference to the offending or prospective offending the police believed they were investigating, the subsection requires that the seriousness of the offending itself must be assessed by reference to what is actually charged. Because the assessment of seriousness is being made in advance of a trial, it necessarily has to be made by reference to the maximum sentence which could be imposed upon conviction and the court's provisional assessment, based on the material before it, of the penalty which might actually be imposed.[223]

[198] The only offences charged in relation to the majority of the appellants were of unlawful possession of arms. The maximum penalty for each such offence is four years' imprisonment or a fine not exceeding $5,000, or both. Four of the appellants, Mr Tame Iti, Mr Kemara, Mr Signer and Ms Bailey, are charged not only with arms offending in relation to every camp (in fact, with 10 Arms Act charges each) but also with participation in an organised criminal group. As s 98A of the Crimes Act stood at the time, it imposed a term of imprisonment not exceeding five years for everyone who participated (whether as a member or an associate member or a prospective member) in an organised criminal group, knowing it to be so, and also knowing that his or her participation contributed to the occurrence of criminal activity (or being reckless as to that contribution). An organised criminal group was defined in subs (2) of s 98A as a group of three or more people who had as their objective or one of their objectives, so far as relevant to conduct within New Zealand, either obtaining material benefits from the commission of offences that were punishable by imprisonment for four years or more, or the commission of serious violent offences (within the meaning of s 312A(1) of that Act) punishable by imprisonment for 10 years or more.

---

[223] To weigh the seriousness of the offending with regard only to the prescribed maximum penalty could seriously disadvantage a defendant in a case where, on any view of the facts, the defendant's alleged misconduct was relatively minor but the maximum penalty for the offence charged was substantial, for example where a defendant faces a charge of indecent assault (maximum seven years' imprisonment) and only a single touching is alleged. It is also impractical where a defendant faces multiple charges, each of course having its own maximum penalty.

[199] Offending under s 98A was of considerable seriousness even in 2007. That can be seen from the maximum penalty,[224] and from the statement of the objectives of the group, one of which must be proved in order for a conviction. Winkelmann J in the High Court observed that the alleged objective of the group was the commission of serious violent offences under s 98A(2)(c). In *R v Mitford*,[225] the Court of Appeal recognised that an objective of committing serious violent offences will tend to be viewed more seriously than the other potential objective under s 98A(2) of obtaining material benefits.[226] In addition, as already noted, those accused under s 98A also face multiple Arms Act charges. The charged offending is therefore very serious.

[200] In order to be a participant in the criminal group it was not necessary to be a full member of the criminal group. It sufficed if the person charged was a prospective member and shared the requisite objective of the group. That is of significance where the other appellants are not charged under s 98A. It must be taken that, in their cases, evidence does not exist linking them to the alleged organised criminal group even as prospective members and that, accordingly, they cannot be said to have shared its alleged objective, as stated in the warrant applications. That being so, those not charged as well under s 98A face only charges of unlawful possession of the weapons which they are said to have been using at one or more of the training camps (all but one facing multiple charges in relation to separate camps or incidents).[227] Charges under s 45 of that Act are of a serious nature, as reflected in the maximum penalty of four years, but in the scale of things such charges are of no more than moderate seriousness, and certainly less than the charges under s 98A. Even allowing for the fact that there are seven charges faced by one of these appellants, the offending charged does not approach, in number of charges or seriousness, what is charged against the alleged s 98A offenders. It is not alleged that they did more than use some weapons in the training exercises.

---

224 In 2009 the maximum penalty was raised to 10 years but this Court must assess the seriousness of the offence charged by reference to the maximum prescribed at the time of the alleged offending.

225 *R v Mitford* [2005] 1 NZLR 753 (CA).

226 At [61].

227 Of those charged only with Arms Act offending, Mr Rawiri Iti faces seven charges, Mr Hamed five, Ms Paraha four, Ms Morse and Mr Purewa three, Mr Teepa two and Mr Hunt one.

[201] The nature and quality of the evidence, which is mentioned as a consideration in subs (3)(c), tends to favour its admission. The video evidence, to the extent that it may show participation in camps by the appellants, or some of them, can be assumed, in the absence of criticisms on their behalf, to be reliable and probative. It will be the same with the physical evidence in the form of discarded shell cases and the like. There is, again, no foreshadowed challenge to the reliability of the evidence of in-person video surveillance. There is also the important consideration that the evidence forms a central part of the prosecution case. Indeed, we were informed that without it the case might not proceed. The centrality or otherwise of the evidence was referred to as a relevant factor in *Shaheed*[228] and by the Court of Appeal in *Williams*.[229] It is not in the list in subs (3) but of course the subsection says that the court may have regard to the matters expressly listed "among any other matters", so the list is non-exhaustive. And it is simply unrealistic not to take account of the importance of the evidence in the case when assessing whether exclusion will be proportionate to the impropriety and the impact one way or another on the effectiveness and the credibility of the justice system, as the Supreme Court of Canada has recognised.[230]

[202] The only one of the subs (3) matters which has not so far been mentioned is whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the appellants. For the reasons given in *Shaheed*,[231] remedies such as a declaration or monetary damages, or even a reduced sentence if there were a conviction, would be inappropriate for offending of the seriousness which has been charged. It will be rare that, if exclusion were otherwise proportionate to an impropriety, a court could appropriately admit the evidence but compensate the accused for so doing. That would allow the prosecution in effect to "purchase" the admissibility of the tainted evidence.

---

228 At [152].

229 At [141].

230 *R v Grant* at [83] per McLachlin CJ and Charron J:

> ... the exclusion of highly reliable evidence may impact more negatively on the reputation of the administration of justice where the remedy effectively guts the prosecution.

and at [226] per Deschamps J:

> ... whether the evidence in issue is essential or peripheral is highly significant.

Similar remarks were made in *R v Harrison* 2009 SCC 34, [2009] 2 SCR 494 at [34] and [68].

231 At [153]–[154].

[203] On the basis of this evaluation of the relevant considerations, I am brought to the view that, in the case of those appellants who face only the Arms Act charges, which do not involve an allegation of any intention to participate in further offending to achieve the objective attributed to the alleged organised criminal group, exclusion of the improperly obtained evidence is a remedy proportionate to the very serious impropriety of the repeated unlawful activities by the police on the Tuhoe lands, where unreasonable searches and seizures were conducted, and in particular there was recklessness in police undertaking prolonged video surveillance without seeking legal advice about their right to do so. Such is the gravity of the police impropriety that the public perception of an effective and credible system of justice would be undermined if the evidence were to be admitted despite the impropriety where the alleged offending was unlawful possession of weapons which were not used for the commission of any other crime.

[204] It is true that the unlawful use of prospective warrants by police in each relevant instance was likely inadvertent because they appear not to have appreciated that such warrants were not authorised by s 198. The exclusion of evidence under s 30 is, however, intended to vindicate the rights of the accused – including the important right to be free from unreasonable search recognised by s 21 of the Bill of Rights Act – not the punishment of the police. Thus lack of awareness by police of their own misconduct is only one factor in a s 30 assessment. Account must also be taken of the fact that in relation to the obtaining of the physical evidence the breaches of s 21 (and indeed the trespasses) were extensive in duration, repeated and highly intrusive. I would therefore exclude all such evidence obtained through the use of unlawful prospective warrants as against those accused only of the Arms Act offending. I am also influenced in reaching the conclusion that all the unlawfully gathered evidence should be excluded in their cases, thus distinguishing them from those facing the s 98A charge, by the fact that they face a lesser number of Arms Act charges – for most of them substantially less – than those other appellants.[232]

[205] I except from this the evidence obtained by means of the camera alongside Reid Road. That involved trespassing for a small distance only into a private rural property but not a search, and was therefore not in breach of s 21, since the camera

[232] See [198] and fn 227.

recorded only what took place on the public road where there could be no reasonable expectation of privacy. It would be disproportionate to exclude that evidence against any of the appellants.

[206] Notwithstanding the equal seriousness of the breach of the rights of the four appellants who jointly face the charge under s 98A of the Crimes Act as well as Arms Act charges, I consider that such is the cumulative seriousness of those charges that, when coupled with other matters favouring admission of the evidence, exclusion of it against them would not be proportionate. Unlike the other appellants, they are charged with an offence going beyond the criminal offending which they allegedly committed by their use of weapons during the training camps. The charged offending in their cases is alleged to have been done for one of the objectives specified in s 98A(2); that is, allegedly it was done in contemplation of further serious offending. In a case which is said to involve the planning of an armed uprising there must be a very real public interest in having the truth or otherwise of the allegations against those said to have participated in the group objective resolved by trial. If the evidence were to be excluded against these appellants and they were then not to face trial, that public interest would be defeated, with consequent adverse reflection on the effectiveness and credibility of the justice system.

Conclusions

[207] I would dismiss the appeals of Mr Tame Iti, Mr Kemara, Mr Signer and Ms Bailey and rule all the disputed evidence admissible against them.

[208] I would allow the other appeals and rule all of the evidence from the Paekoa land in January, the Rangitihi land in September and Whetu Road in August and October, and all of the video surveillance evidence, inadmissible against the other appellants. However, I would rule the Reid Road footage admissible against the other appellants. I would rule the evidence gathered by police in person on the Rangitihi land in June admissible against them. I would likewise rule the evidence personally gathered on the Whetu Road land in September admissible against those appellants if it can be established that the September warrant could have been validly

issued without reliance upon material obtained by unlawful entry in August – a matter which I cannot presently resolve. If it cannot, then that evidence would be inadmissible against the other appellants.

TIPPING J

Introduction

[209] I gratefully adopt Blanchard J's description of the factual background to these appeals, the decisions below and the issues that require this Court's attention. I am in substantial agreement with his conclusions, save on the question of the balancing exercise required by s 30 of the Evidence Act 2006. In that respect I would exclude as regards all appellants the evidence that Blanchard J would exclude only as regards some of them. In order to explain my reasons, I will traverse some of the ground in respect of which I do not differ from Blanchard J's ultimate conclusions. On some issues I have a different perspective, despite my concurrence with those conclusions. As regards those matters addressed by Blanchard J which I do not mention, I can be taken as agreeing with both his reasons and his conclusions.

Prospective warrants

[210] Section 198 of the Summary Proceedings Act 1957 authorises designated persons to issue a search warrant if satisfied there is reasonable ground for believing that "there is" in any of the stipulated places any qualifying thing. I do not share Blanchard J's hesitation about construing the word "is" as meaning "is", rather than "is or will be".

[211] It would have been easy for Parliament to have used the latter formulation if that were what had been intended. There cannot be any necessary implication that the chosen formulation includes an ability to issue a warrant to search for things that will come into or onto the stipulated place at a future time. What degree of probability of those things coming subsequently onto the land would have to be shown? The posited words "or will be" suggest a very high level of probability, if not a certainty. If Parliament had intended this element of futurity to be included, it

would no doubt have addressed the degree of probability involved by using some such concept as likelihood or probability.

[212] There is a further point. It is arguable whether s 6 of the New Zealand Bill of Rights Act 1990 applies to the construction of the word "is" in s 198. This is because prospective searches per se are not proscribed by s 21, only unreasonable searches. Hence there is no express right to be free from search under a prospective warrant with which an expansive reading of the word "is" would be inconsistent. Be that as it may, account must nevertheless be taken of the conventional common law approach which considers that Parliament does not legislate in a way that impinges on common law rights without that intention being made clear. Any extended meaning of the word "is" in s 198 would, pro tanto, impinge on the common law right of citizens not to be the subject of search by officers of the state without clear legislative authority.[233] For this reason too, I am unwilling to give the word "is" the extended meaning that would be necessary to allow for the issue of prospective warrants.

[213] I regard the idea that warrants are inevitably prospective or anticipatory because the thing which is present at the time of issue must still be in place when the warrant is executed as a consequence that is, by necessary implication, inherent in the use of the present tense in s 198. But, as I have said, there is no necessary implication that the present tense must have been intended to include things which come into the specified place after the warrant has been issued.

[214] I do agree, however, that if a warrant is validly issued in respect of anything already on or in the designated place, those executing it may seize any qualifying thing they find there, irrespective of whether it was there at the time the warrant was issued. I too intend to cast no doubt on that proposition.

---

[233] See *Entick v Carrington* (1765) 19 St Tr 1029.

Police powers

[215] In *R v Fraser*[234] a Full Court of the Court of Appeal was concerned with video surveillance conducted by the police by means of a camera located on private property outside the subject property but having a view of it. The camera was placed with the consent of the owner of the other property. No entry onto the subject property was involved and thus no trespass. The Court did not find it necessary to decide whether what had occurred involved search or seizure, being of the view that the conduct of the police was not unreasonable in all the circumstances. More importantly for present purposes, the Court held that, as a warrant under s 198 of the Summary Proceedings Act could not have been obtained, there was no unlawfulness in the conduct of the police in doing what they did with the consent of the adjoining property owner.

[216] *R v Gardiner*[235] effectively followed *Fraser* in finding that similar surveillance was not unlawful. The approach taken by the Court of Appeal in these two cases was not inconsistent with that taken in *R v Jefferies*.[236] The crucial distinction is that in *Fraser* and *Gardiner* there was nothing unlawful in the setting up of the video camera outside the subject premises. Nor was there anything unlawful in filming the premises by means of that camera in those circumstances. In *Jefferies* the Court was not concerned with anything like that situation; and nothing said in the several judgments was directed to video surveillance, either as conducted in *Fraser* and *Gardiner* or otherwise.

[217] As is evident from *R v Ngan*[237] I consider that the police are entitled to do what any member of the public can lawfully do in the same circumstances. They do not need specific authority to do so. In *Jefferies* there was no basis upon which an ordinary member of the public could lawfully have done what the police officer did when he stopped the vehicle which he thought was fleeing from an armed robbery and searched its boot.

---

234 *R v Fraser* [1997] 2 NZLR 442 (CA).
235 *R v Gardiner* (1997) 15 CRNZ 131 (CA).
236 *R v Jefferies* [1994] 1 NZLR 290 (CA).
237 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [46].

Implied licence

[218] It appears that Tuhoe permitted people to access the Whetu Road area for recreational purposes. It was suggested that the police were therefore not acting unlawfully when they did what any member of the public was permitted to do in entering and walking or jogging over the land. I accept that if the true purpose of the entry by the police officers had been purely recreational, evidence of what they happened to see when on the land would not have been improperly obtained, as they would not have been trespassers.

[219] But if, as seems clearly the case here, the purpose or one of the purposes of the officers in entering the land was to conduct a search within the meaning of s 21, I do not consider that Tuhoe's permission extended as far as permitting entry on that basis. Nor would it be appropriate to imply, as a matter of law, a licence to enter for investigatory purposes. The present case is different from the case of an implied licence to enter private premises in order to communicate with the occupier by knocking on the front door.[238] I would therefore exclude the evidence obtained from the Whetu Road area during the August and October searches, namely scene photographs, cartridge cases, broken bottles and an oven. The Crown has not shown, generally for the reasons to be traversed later,[239] that its exclusion would be disproportionate to the impropriety.

Section 21 of the New Zealand Bill of Rights Act

[220] I agree that the concept of search in s 21 is wider than it is in s 198. For instance, in s 21 the concept is not limited by reference to "things". Under s 21 the word "search", in its ordinary sense of consciously looking for something or somebody, is wide enough to cover watching persons or places by means of technological devices. In simpler times searches were undertaken by use of the human eye. It should make no difference in principle whether watching involves the

---

238 See *Tararo v R* [2010] NZSC 157.

239 I recognise that some of those reasons may not apply as strongly to this evidence, but my view on the overall balance remains the same.

human eye or any form of modern surrogate. The same applies to the ears. Video and audio technology are the same in this respect.

[221] In contrast to the use of eyes and ears, modern technology has the capacity to be more covert, intrusive and sustained. That feature gives rise to questions of reasonableness rather than to whether a search has taken place. The video surveillance which occurred in this case was a search within s 21 and, as Blanchard J has demonstrated, that search was unlawfully undertaken.

[222] I favour an approach which is liberal as to what constitutes a search for the purposes of s 21, with more of the work being done under the section by the unreasonableness criterion. On this basis surveillance in a public place may well constitute a search but its reasonableness would be influenced by the public nature of the target area.

[223] I do not therefore consider that reasonable expectations of privacy are particularly helpful in deciding whether a search within the meaning of s 21 has taken place.[240] I would prefer to keep privacy issues out of the first stage of the inquiry, namely whether there has been a search at all.[241] But if that question is answered in the affirmative, then, clearly, reasonable expectations of privacy, and the level of such expectation as is found, will be relevant to whether the search was unreasonable. I consider a search within s 21 can take place without there necessarily being any breach of a reasonable expectation of privacy.

[224] The line between there being no reasonable expectation of privacy involved and only a slight expectation may sometimes be a fine one. I see no merit in bringing that sort of inquiry into the more objective issue of whether a search has taken place, as opposed to the more value-laden issue of whether a search was unreasonable. As to the Reid Road surveillance, I consider it was a search, but it

---

[240] I acknowledge that this factor is central to the North American jurisprudence, and some jurisprudence in New Zealand, in respect of what constitutes a search; but, in my view, privacy considerations more logically and helpfully inform questions of reasonableness, once a search has been shown to have taken place.

[241] As appears to have been the approach in *Jefferies* at 300 per Richardson J, and in *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) at 406 per the Full Court.

was a not unreasonable search. This is because drivers on a public road have little expectation of privacy in respect of the fact of their doing so.

[225] The general connotation of search in s 21 is concerned with law enforcement. As s 21 is directed primarily to officers of the executive government and not to private individuals, the reality is that in most instances of an allegedly unreasonable search those concerned will be in pursuit of evidence of offending. But I would not limit the concept of search to law enforcement purposes. Cases in which a search within s 21 has a different focus may be few, but the controlling feature should, in my view, be who is involved and what they are doing rather than the purpose for which they are doing it. That factor will obviously be relevant to the unreasonableness issue.

[226] I am unable to accept the proposition that an unlawful search must necessarily be an unreasonable search. That proposition is contrary to the views expressed by Richardson, Casey, Hardie Boys, Gault and Thomas JJ in *Jefferies*. Only McKay J espoused this absolutist position. A breach of s 21 occurs when a search is unreasonable, not when it is unlawful. The touchstone of unreasonableness was deliberately chosen over that of unlawfulness. To adopt the view that an unlawful search must by that very fact be unreasonable is effectively to substitute unlawfulness as the test. If that had been Parliament's purpose, it would no doubt have used the composite phrase "unlawful or unreasonable". Both Richardson and Hardie Boys JJ made similar points in *Jefferies*.[242] A search which is unlawful is likely to be well on the way towards being unreasonable. A party propounding the view that it was nevertheless not unreasonable carries a significant persuasive burden, but that is not to say the burden can never be satisfied.

[227] In the present case the police were conducting searches by means of video surveillance. Their conduct was unlawful. No basis has been shown to find that despite the unlawfulness the searches were nevertheless reasonable or more accurately not unreasonable. The evidence was therefore improperly obtained, both for reasons of trespass and on account of a breach of s 21. It is therefore necessary

---

[242] At 304 and 315 respectively.

to examine the provisions of s 30 of the Evidence Act to determine whether the evidence should nevertheless be admitted at the appellants' forthcoming trial.

Section 30 of the Evidence Act

Introduction

[228] It is helpful to look first at s 30 generally before addressing its individual provisions. The section is concerned with the admissibility of improperly obtained evidence. Evidence is improperly obtained if, among other things, it is obtained in consequence of a breach of any enactment or rule of law by a person to whom s 3 of the New Zealand Bill of Rights Act applies. The court must exclude improperly obtained evidence if, in accordance with subs (2), the judge determines that its exclusion is proportionate to the impropriety. It follows, as Blanchard J has said, that the evidence should be admitted only if its exclusion would be disproportionate to the impropriety. The Crown should be required to establish that proposition if it wishes to have improperly obtained evidence admitted.

[229] The proportionality spoken of is to be assessed by means of a balancing exercise that gives appropriate weight to the impropriety but also takes appropriate account of the need for an effective and credible system of justice. The concept of giving appropriate weight to the impropriety is not, as a concept, of any particular difficulty. There is, however, greater conceptual complexity in interpreting and applying the concept of the need for an effective and credible system of justice. This concept is apparently contrasted with giving appropriate weight to the impropriety by the words "but also". It would, however, be a mistake to take the view that the need for an effective and credible system of justice is solely a counterpoint to the impropriety involved in gaining the evidence. The reference to an effective and credible system of justice involves not only an immediate focus on the instant case but also a longer-term and wider focus on the administration of justice generally.[243]

---

[243] See the reference in *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148] to the longer-term interests of society.

[230] The admission of improperly obtained evidence must always, to a greater or lesser extent, tend to undermine the rule of law. By enacting s 30 Parliament has indicated that in appropriate cases improperly obtained evidence should be admitted, but the longer-term effect of doing so on an effective and credible system of justice must always be considered, as well as what may be seen as the desirability of having the immediate trial take place on the basis of all relevant and reliable evidence, despite its provenance. As the Supreme Court of Canada recently put it in *R v Grant*,[244] the short-term public clamour for a conviction in a particular case must not deafen the judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly when the penal stakes for the accused are high. The seriousness of the offence charged is apt to cut both ways.

Specific factors

[231] I turn then to the factors set out in subs (3) to which, among others, the court may have regard in making the proportionality assessment. They can be addressed and their relevance assessed in the sequence set out in the subsection, or they can be arranged and discussed as falling on one side of the proportionality inquiry or the other. I prefer to address them in the order they are listed. On either basis the ultimate assessment involves striking a balance between the weight of the factors which favour exclusion and the weight of those which favour admission. As already mentioned, the Crown must show that the overall balance favours admission. I will proceed by looking at each feature in isolation of the others and without any reference to the necessary overall balancing exercise which will come later.

Paragraph (a)

[232] Paragraph (a) of subs (3) looks to the importance of the right breached by the impropriety and the seriousness of the intrusion on it. The right to be free from unlawful and unreasonable surveillance by agents of the state is an important, if not

---

[244] *R v Grant* 2009 SCC 32, [2009] 2 SCR 353 at [84].

fundamental, one. In this case the intrusion on it was substantial, of very long duration and breached the expectations of privacy particular to Tuhoe tikanga. Overall this combination of features, standing alone, points with some force towards exclusion of the evidence obtained by breach of the right.

Paragraph (b)

[233] Paragraph (b) looks to the nature of the impropriety and, in particular, to whether it was deliberate, reckless or done in bad faith. I do not consider there is any escape from the view that the police deliberately breached the appellants' rights. Detective Sergeant Pascoe acknowledged that he knew there was no legislative authority to install surveillance cameras. This, no doubt, is why he did not seek a warrant to do so. The Detective Sergeant did not profess to have authority from any other source. He repeatedly insisted that he had sought judicial oversight for the installation of the surveillance cameras. This claim comes from his having included statements in his affidavits, when seeking the warrants, setting out that this is what the police intended to do. It is not clear what purpose the police had in informing the issuing Judge of what they intended to do other than being able to say that they had candidly told a judge of their intentions. But that, frankly, gets them nowhere if it was an attempt to treat the Judge as having, by default, implicitly authorised or approved their conduct.

[234] If the breach was not deliberate it was undoubtedly reckless because, at best, the position in law was decidedly unclear and, in the very difficult and unusual circumstances facing them, the police, extraordinary as it may seem, did not obtain any legal advice. It is difficult to resist the inference that formal legal advice was not sought because the police knew or strongly suspected what the advice would be and that it would make it more difficult for them to proceed as they intended.

[235] In view of the conclusion I have reached, it is not necessary to determine whether this state of affairs amounted to bad faith. It is enough to say that I find it impossible to hold that the police honestly believed that the video surveillance was lawfully undertaken. The various aspects of this feature point powerfully to the exclusion of the improperly obtained evidence.

Paragraph (c)

[236] Paragraph (c) looks to the nature and quality of the improperly obtained evidence. The evidence of the video surveillance is presumptively reliable and there was no suggestion that its content lacks clarity or anything of that kind. Obviously the evidence will give rise to issues of interpretation and inference but, as evidence, the video surveillance footage will undoubtedly have an important bearing on the outcome of the trial. To exclude it would substantially weaken the Crown's case, if not make it impossible for the Crown to proceed, at least with some of the counts in the indictment. This feature may be thought to point towards admitting the evidence. But I must acknowledge some discomfort with the proposition that the more important the evidence is to the Crown's case, the stronger is the case for admitting it. As we shall see Parliament for good reason eschewed the centrality of the evidence to the Crown's case as a factor to be taken into account.

[237] In my view the expression "nature and quality", as descriptive of improperly obtained evidence, is limited to the character of the evidence itself and is not concerned with the importance of the evidence to the Crown's case. That seems to me to be the natural reading of those words in their context.[245] That natural reading is supported by the legislative history. When the Bill which became the Evidence Act was introduced, what is now para (c) read: "the nature and quality of the improperly obtained evidence, in particular whether it is central to the case of the prosecution".[246] The words commencing "in particular" were removed on the recommendation of the Select Committee that considered the Bill.[247] The Committee considered that this reference was inappropriate. This was because of the temptation it would provide for investigating agencies to breach rights in order to obtain evidence, then claim the evidence was all that was available and so should be admitted as central to the prosecution case.[248] To place weight on the importance of evidence to the Crown's case pursuant to para (c)'s reference to "nature and quality" would be to construe those words in a manner which Parliament clearly did not

---

245 It accords with the principal thrust of the discussion in *R v Shaheed* [2002] 2 NZLR 377 (CA) at [151] from which the phrase "nature and quality" was taken.

246 Evidence Bill 2005 (256–1), cl 26(3)(c).

247 Evidence Bill 2005 (256–2) (select committee report) at 4 and 30.

248 See speech of Nandor Tanczos during the Committee of the Whole House debate: (21 November 2006) 635 NZPD 6647.

intend.[249] Nor would it be consistent with Parliament's approach to treat the importance of the evidence to the Crown's case as a factor independent of para (c).

Paragraph (d)

[238] Paragraph (d) looks to the seriousness of the offence with which the defendant is charged. As Blanchard J has explained, the appellants in the present case fall into two groups: those who face charges under the Crimes Act as well as charges under the Arms Act; and those who face charges only under the Arms Act. But the maximum penalties do not differ much. At the relevant time the Crimes Act charges carried a maximum of five years' imprisonment whereas those under the Arms Act carry a maximum penalty of four years' imprisonment. On the face of it the seriousness of the charges as between the two groups differs very little. An issue arises here as to whether in assessing seriousness for the purposes of para (d), the court is confined to the generic seriousness of the charges, as demonstrated by their maximum penalties, or whether the court can and should go behind that generic assessment and examine how seriously the offending should be viewed, as if that were being done for the purpose of imposing sentence. To do that, ahead of trial, on the basis of the Crown's allegations, would be at least potentially a difficult and prejudicial exercise.

[239] Paragraph (d) does not direct attention, as it might have done, to the seriousness of the allegations made against the defendant or to the seriousness of the facts of the particular offence charged. The focus appears to be on the seriousness of the generic offence charged. Both as a matter of language and as a matter of principle, I consider the appropriate measure of seriousness for present purposes is the maximum penalty for the offence charged. I accept that account can and should be taken of the number of charges faced by a defendant as well as of their generic seriousness. But even on this basis there is no sufficient difference between the two groups to justify making any substantive distinction between them, in light of all

[249] In that respect Parliament did not endorse the views expressed in *R v Shaheed* [2002] 2 NZLR 377 (CA) at [152] concerning the centrality of the evidence to the prosecution case.

other relevant factors. At five and four years' imprisonment respectively,[250] the offences charged against the appellants are towards the lower end of moderately serious offending. In this case I view the seriousness of the charge issue, apt as it is to cut both ways,[251] as a neutral factor. Care must be taken not to allow the seriousness of a charge to overwhelm the need for effective vindication of a serious breach of an important right.[252]

[240] In approaching the seriousness issue in the foregoing way, I am conscious of departing from the approach of the Court of Appeal in *R v Williams*.[253] In that case the Court said that, as a guideline, an offence could be considered serious if the sentencing starting point (as per *R v Taueki*[254]) for the relevant accused was likely to be "in the vicinity of" four years' imprisonment "and over". This was to be assessed on the basis of the Crown's case. An offence could also be seen as serious, even if the likely penalty was less, if the offence involved a threat to public safety such as the carrying of a loaded weapon in public.

[241] I have some difficulty with this approach. Paragraph (d) of s 30(3) speaks of the seriousness of the offence charged. In this context seriousness refers to a continuum of degrees of seriousness. I do not consider seriousness somehow starts when the likely penalty is in the vicinity of four years' imprisonment "or more". The question is not whether the offence charged is serious, but rather how serious the offence charged is. Seriousness, in context, is not an absolute concept; it is a comparative one.

[242] In my view all offences punishable by imprisonment should be treated as being of greater or lesser seriousness, depending on the maximum penalty available.[255] That maximum represents Parliament's assessment of the generic seriousness of such offending. As I have said, I do not consider a quasi-sentencing

---

250 To say that those charged under both the Crimes Act and the Arms Act are liable to nine years' imprisonment would be artificial because the Arms Act charges are an integral part of the Crimes Act charges.

251 See [230] above.

252 *R v Harrison* 2009 SCC 34, [2009] 2 SCR 494 at [34].

253 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [135] and [250].

254 *R v Taueki* [2005] 3 NZLR 372 (CA) at [8].

255 I am confining myself here to imprisonable offences for ease of demonstration. An offence not punishable by imprisonment is obviously not as generically serious as one which is.

exercise is appropriate for the purposes of para (d). To undertake it, and on the basis of the Crown's case, is a rather one-sided way of assessing the matter which leaves the accused person vulnerable to aspects of the Crown's case being taken into account when they cannot ultimately be established at trial. To do this could be particularly prejudicial as seriousness is a factor which is often invoked in support of the admission of improperly obtained evidence.

[243] I would prefer the more neutral and more fairly administrable approach of assessing seriousness on a continuum by reference to maximum penalties. On this basis the respective maxima are simply indicators of generic seriousness and have nothing to do with the sentence the accused person is likely to receive if convicted. As the exercise is of assessing comparative seriousness, no greater detail is required. There are, indeed, two comparative elements in play. The first, which is the more direct, is how the charge involved registers as against charges generally. The second is the proportionality of the seriousness of the charge to the impropriety involved.

[244] I am aware of the objection that a focus on generic seriousness through maximum penalties would disadvantage an accused charged with an admittedly minor offence of a generically quite serious kind. It is tempting to hold that an exception should be made to cover this situation. But that would simply tend to lead back into the difficulties that I am endeavouring to avoid. The answer is to recognise and accept this disadvantage but on the basis that generic seriousness, as indicated by maximum penalty, is simply one of the ingredients of the s 30 balancing exercise and, as I have said earlier, is apt to cut both ways. So the ultimate disadvantage is unlikely to be significant.

[245] I should add that not much assistance can be gained on this point from the discussion in *R v Shaheed*.[256] What assistance there is tends to suggest a generic rather than a particular focus: see the reference at [152] to an accused murderer as opposed to an accused burglar and the way the crime involved in *Shaheed* was described at [165].

---

[256] *R v Shaheed* [2002] 2 NZLR 377 (CA).

Paragraph (e)

[246] Paragraph (e) looks to whether there were any other investigatory techniques not involving any breach of rights that were known to be available but were not used. In this case there were none. The police could only get the evidence they sought by video surveillance in breach of the appellants' rights. This feature points towards, but not strongly towards, admission of the evidence. But it is also worth mentioning here, as a relevant factor, but not one strictly within para (e), that the police were lawfully using the technique of intercepting text messages passing between a number of the appellants. The police were thereby able to keep in touch with what some of the protagonists were planning, thinking and saying. The police were not without the means of monitoring what was going on between the appellants.

Paragraph (f)

[247] Paragraph (f) looks to remedies other than exclusion of the evidence which might adequately provide redress to the defendant. The only possible alternative remedy would be monetary compensation. I agree that this would have the appearance of the Crown buying the right to admit the evidence. In any event I do not consider a sum of money would be appropriate, either for compensatory or vindicatory purposes, in the circumstances of this case.

Paragraph (g)

[248] Paragraph (g) looks to whether the impropriety was necessary to avoid apprehended physical danger to the police or others. I do not consider this feature can apply to the police in this case. The impropriety was not for the purpose of avoiding danger to them; the danger was inherent in the police's improper conduct. This is not the kind of situation at which para (g) is aimed, as regards the police.

[249] The position with regard to others is more problematical. The kind of activity about which the police were concerned,.(...Suppressed...), certainly had the potential to cause physical danger to persons other than the police. It was in the

interests of reducing or eliminating that danger for the police to keep as close a watch as possible on what those they were concerned about were doing. But I am bound to say that both at the outset, and the more so as the months went by, the imminence of any apprehended physical danger was not great. It is also worth pointing out for the purpose of this issue, and the urgency issue which comes next, that if the police had real fears for the safety of the public they could, almost from the outset, and certainly after the January camp, have arrested a number of the key participants for unlawful possession of firearms. They obviously did not consider it appropriate to do this. It is not necessary to consider why this was so. The point is that if the danger was imminent and severe, the remedy of arrest was available to bring that danger to an end. Overall, in the light of all aspects of this feature, the safety dimension points towards admission of the evidence, but not strongly so.

Paragraph (h)

[250] Paragraph (h) looks to whether there was any urgency in obtaining the improperly obtained evidence. At the start it might reasonably have appeared to the police that there was a substantial and immediate threat to public safety, at least within the Tuhoe lands. It must, however, have become apparent quite soon that this threat was not one against which urgent action was required. The problem for the police was not so much one of urgency but of having no lawful means of monitoring remotely the activities they were concerned about. The difficulty was one of law. I can readily understand the frustration the police may have felt in that respect but this was not a case of an immediate and serious threat of physical harm to an identified individual or individuals. If it had been, I presume the police would have exercised their powers of arrest. While the police have general responsibilities as regards public safety, they also have an obligation to uphold the rule of law. This means they should not themselves dispense with the law in carrying out their public duties. The case was simply not one of such extreme urgency as might have justified the steps which the police took, unlawful though they were. Overall I do not regard the urgency factor as one which should weigh strongly in favour of admission of the evidence.

Conclusion on s 30

[251] It is now time to bring all these individual points together. Having done so I do not consider the Crown has established that exclusion of the evidence would be disproportionate to the impropriety. While there may well be a short-term case for saying that an effective and credible system of justice requires that the evidence be admitted, there is, in my view, too great a risk of seriously undermining the rule of law to allow the short term to predominate in any decisive way. As I have said earlier, the need for an effective and credible system of justice has the potential to cut both ways. It does so here.

[252] The impropriety in the present case was serious and substantial. It infringed important rights. Crucially, there was a deliberate or, at the very least, a reckless disregard for the boundaries of legal power. The offending, as charged, is on the lower side of moderately serious. There is in the circumstances of this case a need for effective vindication of the breach of rights involved which cannot be achieved short of exclusion of the evidence. In my view the police's legitimate concerns about the activities in question and the initial apparent urgency fall short of outweighing the factors which point towards exclusion of the challenged evidence.

[253] I recognise the effect my conclusion may have on the viability of the Crown's case against the appellants. But that is a price which is implicit within the statutory provision if, on balance, exclusion of the evidence is a proportionate response to the impropriety.

[254] I would therefore exclude all the evidence that Blanchard J would exclude, but I would exclude it as against all appellants and would allow all the appeals accordingly.

McGRATH J

The test for exclusion of evidence

[255] Section 30 of the Evidence Act 2006 lays down a procedure for deciding whether a court should, in a criminal proceeding, admit prosecution evidence that has been improperly obtained. The procedure involves a balancing exercise. It was developed by the Court of Appeal as a basis for determination of whether prosecution evidence obtained in breach of rights protected by the New Zealand Bill of Rights Act 1990 should be admitted.

[256] In *R v Shaheed*[257] the Court of Appeal reviewed the then-applicable rule of prima facie exclusion of such evidence obtained in breach of guaranteed rights. While recognising there were good arguments favouring a rule of exclusion that was expressed in prima facie terms,[258] the leading judgment of the Court said:[259]

> But a balancing test in which, as a starting point, appropriate and significant weight is given to the fact that there has been a breach of a quasi-constitutional right, can accommodate and meet them. Importantly, a prima facie rule does not have the appearance of adequately addressing the interest of the community that those who are guilty of serious crimes should not go unpunished. That societal interest, in which any victim's interest is subsumed, rather than being treated as a separate interest, will not normally outweigh an egregious breach of rights – particularly one which is deliberate or reckless on the part of law enforcement officers. But where the disputed evidence is strongly probative of guilt of a serious crime, that factor too must be given due weight. A system of justice will not command the respect of the community if each and every substantial breach of an accused's rights leads almost inevitably to the exclusion of crucial evidence which is reliable and probative of a serious crime. The vindication will properly be seen as unbalanced and disproportionate to the circumstances of the breach.

[257] It was for these reasons the Court of Appeal substituted for the prima facie exclusion rule a test based on a balancing process for deciding whether evidence obtained in breach of rights should be admitted. The trial judge who was to decide

---

257 *R v Shaheed* [2002] 2 NZLR 377 (CA).

258 In particular the prima facie rule recognised the importance of guaranteed rights, made plain that judicial decisions were to be based on means, not ends, and provided a disincentive for breaches of rights by the police.

259 At [143] per Richardson P, Blanchard and Tipping JJ.

whether such evidence should be excluded was required to make that judgment by means of a balancing process. As now reflected in s 30(2):

> (2) The Judge must—
>
> (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
>
> (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

[258] The need for an effective and credible system of justice under s 30(2), however, is not simply a factor aimed at bringing offenders to justice. While the focus in *Shaheed* was on facilitating the inclusion of reliable and probative evidence of serious crimes in appropriate cases, that emphasis reflected the almost automatic exclusion of evidence, where there had been a breach, under the prima facie exclusion rule.[260] In the context of s 30(2) and its balancing exercise, an effective and credible system of justice must also maintain the rule of law by ensuring that police impropriety when gathering evidence is not readily condoned. It is undoubtedly a consideration that cuts both ways.

[259] *Shaheed* also set out considerations which were often relevant and should be taken into account in the balancing exercise, while other factors might be relevant in particular cases.[261] The identified factors are now reflected in s 30(3):

> (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
>
> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
>
> (c) the nature and quality of the improperly obtained evidence:
>
> (d) the seriousness of the offence with which the defendant is charged:

---

[260] See *Shaheed* at [140] per Richardson P, Blanchard and Tipping JJ.
[261] At [145]–[156].

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

[260] The reasoning in the judgment of Richardson P, Blanchard and Tipping JJ in *Shaheed* generally provides the relevant legislative history that assists in ascertaining the meaning of the language of s 30.[262] The only *Shaheed* factor not specifically mentioned in that section (having been removed by the Select Committee) is whether the disputed evidence is central to the prosecution case.[263] The reason given by the Select Committee for that omission was "we find it difficult to envisage a circumstance where it would be relevant, given the seriousness test in paragraph (d)".[264] As s 30(3) is expressed permissively, however, this incident in the legal history does not preclude consideration of this factor where it is relevant in the balancing exercise.

[261] In undertaking the balancing exercise, it is implicit that the court should reach its decision by a process of structured reasoning rather than as a matter of broad impression. In that way, the weight accorded to competing interests will be fairly measured.

[262] Finally, s 30(4) provides that:

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

---

262 McGrath and Anderson JJ adopted their findings and reasoning for substituting a balancing test to determine admissibility of evidence obtained in breach of rights at [192] and [200]–[201]. Gault J also favoured adoption of a balancing test at [172].

263 At [152].

264 Evidence Bill 2005 (256–2) (select committee report) at 4.

[263] I agree, for the reasons given by Blanchard J, that evidence relating to the January, June, September and October 2007 camps, in particular that derived from automated video camera surveillance, was improperly obtained in terms of s 30(2)(a).[265] Accordingly, the Court must address whether the exclusion of the evidence is proportionate to the impropriety of obtaining it by undertaking the process of balancing the competing values.[266] The considerations listed in s 30(3) should all be examined, taking as a starting point the importance of the rights breached by the impropriety and the seriousness of the intrusion.

Applying the balancing test

[264] Section 30 applies to all improperly obtained evidence that the prosecution wishes to adduce in a criminal proceeding. In this case, the main right said to have been breached is the right to be secure against unreasonable search and seizure. It is protected by s 21 of the Bill of Rights Act. The purpose of s 21 includes protection of privacy interests, as is indicated by the words following "unreasonable search or seizure" in s 21: "whether of the person, property, or correspondence or otherwise".

[265] As Blanchard J points out, the filming of their activities by officers of the state intruded on the privacy of the appellants.[267] Such monitoring was destructive of their privacy and was in breach of their s 21 rights. But the assessment of the seriousness of the intrusion for the purposes of s 30(1)(a) requires consideration of the expectations of privacy of the appellants at the relevant place and time. The filming took place in open spaces where there was a risk that the appellants might be observed by others. Their expectation of privacy was less at the location of the camps than it would have been in a private home or similar location. On the other hand, the number of unlawful acts of surveillance, which were spread over a lengthy period of time, made the intrusion significantly more serious than if it had been a single event. Overall, I accept that the intrusion on the right was a serious one.

---

265 At [149]–[153], [158]–[159] and [175]–[183]. I also agree with Blanchard and Tipping JJ that, while generally an unlawful search will be unreasonable, that will not invariably be the case. See [174] and [226].

266 Evidence Act 2006, s 30(2)(b).

267 At [171].

[266] Turning to the nature of the impropriety, the key facts are that the police entered onto private land without authority, thereby trespassing. They applied for warrants to authorise their searches. They did not seek authority under warrants to use stationary cameras but disclosed to the Judge that they intended to deploy them in the course of searching. They did seek anticipatory warrants which this Court has held were not available.

[267] I do not regard the deliberate nature of the police actions as enhancing the gravity of the improper conduct. It is true that in 1997 the Court of Appeal pointed out that s 198 of the Summary Proceedings Act 1957 was not directed to warrants which authorised video surveillance[268] and that, while there was legislation for use of devices intercepting private communications, that was not the position in relation to video surveillance.[269] The police knew that a search warrant could not authorise video surveillance activity but they did not seek a warrant in those terms. They were also open in applying for warrants as to their intention to deploy video surveillance cameras. In the absence of specific legislation, the officer responsible for management of the investigation said it was decided that this was the best and most reasonable way to proceed. That was understandable given that there was no judicial decision that clearly indicated when video surveillance would be unlawful. In *R v Gardiner* the Court of Appeal pointed out that "[t]here is no mechanism in the law requiring or enabling the authorisation of video surveillance".[270] The law's requirements have been clarified only by this Court's judgment. The conduct of the police in obtaining the warrants is accordingly a neutral factor in the balancing exercise.

[268] A further important factor relevant to the nature of the impropriety is the immediate circumstances giving rise to the video surveillance. (...Suppressed...) The difficult position they were in was well summarised by Winkelmann J, who, having had the advantage of hearing the evidence of those involved, found:[271]

> ... that the police understood that they were investigating a serious crime; one that there was a great public interest in investigating. (...Suppressed...)

---

268 *R v Fraser* [1997] 2 NZLR 442 (CA) at 452 per Gault J for the Court.
269 *R v Gardiner* (1997) 15 CRNZ 131 (CA) at 136 per Blanchard J for the Court.
270 Ibid.
271 *R v Bailey* HC Auckland CRI-2007-085-7842, 15 December 2009 at [65].

> They were justifiably concerned for public safety, (...Suppressed...) . There was urgency to gather sufficient evidence, both to understand the group's intentions, and to collect sufficient evidence to charge them. As I have earlier observed, the most effective way of preventing the respondents carrying out their plans was to arrest and charge them in connection with their offending. The intercepted communications only revealed part of what the group was up to. Without evidence of what occurred at the training camp, the respondents were unlikely to be convicted of any offence that adequately reflected the criminality of their conduct.

[269] While the Court of Appeal took a more expansive approach to the legality of the search warrants, its judgment confirmed that, had it not done so, it would have held that all evidence was admissible in conformity with the approach taken by Winkelmann J. The Court of Appeal said:[272]

> (...Suppressed...)

[270] I agree and would add that, in these circumstances, the police were exercising not only their function of law enforcement, but also that of maintaining public safety. This function, now expressly recognised by statute,[273] has always formed part of the common law duties of the police which include:[274]

> ... the duty to protect life and property and to act where the constable apprehends, on reasonable grounds, danger to life or property ... While there is no obligation on a citizen to take action in situations, a constable has both a moral or legal duty to do so.

[271] The nature and scope of common law duties of the police and the extent to which they may intervene in a way that affects the liberty of citizens was discussed in the reasons for the judgment delivered by this Court in *R v Ngan*.[275] Reference was made to the well-known statement of the English Court of Criminal Appeal in *R v Waterfield*:[276]

> [It is] difficult ... to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful

---

272 *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499 at [91].

273 Under s 9(b) of the Policing Act 2008 the functions of the police include "maintaining public safety".

274 *Laws of New Zealand* Police at [44] (footnotes omitted). The statute has, it seems, not supplanted this common law duty: see s 11 of the Policing Act 2008.

275 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [14], [20]–[22], [46]–[50], [77]–[83] and [93]–[99].

276 *R v Waterfield* [1964] 1 QB 164 (CA) at 170–171, cited in *Ngan* at [14], [48] and [81].

> interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

[272] The same point was made by Speight J in *Police v Amos*,[277] when he said:

> [I]t is beyond argument that the police must interfere to stop or prevent unlawful conduct, actual or apprehended. In addition circumstances may arise where there is a common law duty on a policeman to take steps which would otherwise be unlawful if he has apprehension on reasonable grounds of danger to life or property, *but the limits to which he may go will be measured in relation to the degree of seriousness and the magnitude of the consequences apprehended.* There could be less justification for taking what would be prima facie unlawful interference with private rights for the protection of property than there would be in the case of danger apprehended to persons.

[273] *Ngan* was a case in which the police concern was with danger to property, rather than persons. In that context, the Court's requirement was that the police should not act unreasonably in dealing with property, confining themselves to acting for the purpose of its preservation.[278] In this case, I have accepted that the trespasses and video surveillance were a serious intrusion on the appellants' rights but the magnitude of the potential consequences (...Suppressed...) were also important. While the duty of the police to protect life and property does not alter the character of unlawfully obtained evidence, it must be recognised that the police actions here were largely driven by a justifiable concern for maintaining public safety. Continuing to monitor the situation was important and, as Winkelmann J recognised,[279] when to close the operation and make arrests involved a question of police judgment. Although the urgency of the situation diminished as the investigation proceeded, (...Suppressed...) their concern remained serious throughout. The reasonableness of steps taken in this context of a threat to public safety is a factor that, under s 30(3)(g), weighs in favour of not excluding evidence derived in the course of the surveillance operation.[280]

---

277 *Police v Amos* [1977] 2 NZLR 564 (HC) at 569 (emphasis added).

278 At [22] per Elias CJ, Blanchard and Anderson JJ.

279 See [268] above.

280 As pointed out in *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [123] per William Young P and Glazebrook J.

[274] Also highly relevant to this consideration, and the reasonableness of the police conduct, is that there were no other practicable means of effective investigation and monitoring of the emerging situation.[281] That is important to the need for an effective and credible system of justice, which s 30(2)(b) requires be taken into account. If the public concluded that, in future, when a similar situation arose, the police could not effectively investigate it as a crime and be able to gather admissible evidence, strong doubts would reasonably arise over the effectiveness in particular of the justice system.

[275] In agreement with Blanchard J, I am of the view that there are no remedies other than exclusion available in this case.[282] For these reasons, the factors specified in s 30(3)(e) and (f) in the balancing exercise favour admission of the evidence.

[276] In terms of its quality, the evidence obtained from the video surveillance was, in the absence of any arguments to the contrary, reliable. Real evidence, such as the recordings in question, is less likely to be tainted by the way the evidence is obtained in this respect than confessional evidence.[283] Although not a specific s 30(3) consideration, the centrality of the evidence to the prosecution also goes to its quality and is relevant to the balancing exercise. The evidence is cogent and of probative value as it may reveal the identities and participation of the appellants in the camps, strengthening the case against them and, thus, increasing the public interest in admitting the evidence. The nature and quality of the evidence therefore supports its admission in this case.

[277] As to the seriousness of the offending, I accept that there is a distinction between those also charged with being participants in a criminal group under s 98A of the Crimes Act 1961 and those only charged with Arms Act 1983 offences. Nevertheless, I regard those in both groups as charged with serious offences. In the circumstances of this case, the respective maximum penalties of five years and four years' imprisonment do not provide a complete basis for assessment of seriousness

---

281 Winkelmann J found that intercepted text messages revealed only part of the group's activities. See [268] above.

282 At [202].

283 *Shaheed* at [151] per Richardson P, Blanchard and Tipping JJ; *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [140] per William Young P and Glazebrook J.

for the purposes of s 30(3)(d) of the Evidence Act.[284] Blanchard J regards the s 98A charges as more significant than those brought under the Arms Act because they demonstrate contemplation of further serious offending. He sees a greater public interest in having the truth, or otherwise, of (...Supressed...) and participating in that *group* objective resolved at trial with the assistance of the unlawfully obtained evidence. But cordoning off those charged under s 98A does not recognise the true seriousness of the Arms Act offences, which concern unlawful possession of a range of firearms in circumstances prima facie indicating a considerable risk to public safety. Recognition in this way of the seriousness of the offending does not involve trying to predetermine the appropriate sentence if an accused is convicted. Rather it recognises that in these circumstances and, generally, there is danger in using guns unlawfully.

Conclusion

[278] The investigation by the police involved unlawful acts and a serious intrusion on rights. This, however, was a very unusual case requiring that the police closely and continuously monitor the situation in the course of their investigation. The difficult decisions the police faced as to the manner of their investigation must be addressed in the full context, which includes the limitations of the legislation they were operating under. Through no fault of their own, they were not given, and could not obtain, the specific authority required properly to investigate what the appellants were doing, and the extent of the legal authority they did have was unclear. On the other hand, rights guaranteed by the Bill of Rights Act were involved, which enhanced the gravity of the infringements by the police. It would be unfair to the appellants to fully vindicate the police actions simply because the unlawfulness largely stemmed from a sluggish response elsewhere in government to the courts' concerns over the absence of legislation on the subject of video surveillance.[285] While the principle stated in *Amos* is an important one, as Speight J recognised, there are limits on its application. It is not generally to be resorted to as a rubber stamp for unlawful acts. In all the circumstances, I am not prepared to decide that in this case

---

[284] See *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [135] per William Young P and Glazebrook J.

[285] See *Gardiner* at 136.

the police acted reasonably to the extent that this factor justified their actions as a proper obtaining of the evidence under s 30(2)(a). In circumstances where rights under the Bill of Rights Act are in issue, determination of admissibility under the s 30(3) balancing test is required for that provision to be read consistently with protected rights.

[279] The unavailability of other investigatory techniques, however, itself is a relevant factor to weigh in the balancing exercise. Also important is the risk posed to public safety by the actions of the appellants. It required an urgent response. Of significance also is the reliability and probative value of the evidence. Even though the intrusion on private rights was serious and protracted, particularly in light of the tikanga of Tuhoe, on balance and in light of the considerations above the public interest in an effective and credible justice system under s 30(2) weighs in favour of the admission of all the evidence against the appellants.

[280] Balancing all considerations specified in the Act and mentioned in this judgment, I have reached the conclusion that the importance of the rights of the appellants and seriousness of the intrusion on rights involved in the video surveillance recording and other improperly obtained evidence is outweighed by the countervailing factors identified above. In agreement with the High Court Judge and the Court of Appeal, and applying the principle in *Amos*, I am satisfied that the public interest in the need for an effective and credible system of justice comes down in favour of the prosecution and disposition by fair trial of all charges against all appellants, at which the evidence obtained in breach of rights should be admitted. Accordingly I would dismiss all appeals.

GAULT J

[281] I have read in draft the judgment of Blanchard J and, for the reasons he gives, I agree with his conclusions in relation to the invalidity of the search warrants (while sharing his hesitation concerning the anticipatory authorisations). I agree also with his reasons for determining that the appellants' rights under s 21 of the New Zealand Bill of Rights Act 1990 were breached. It was argued for the appellants that the evidence so obtained should be ruled inadmissible at their trial.

[282] Except for the period during which the "prima facie exclusion" approach was applied, the courts have long exercised discretions to exclude or admit improperly or unlawfully obtained evidence. Now, under s 30 of the Evidence Act 2006, to determine whether evidence improperly obtained should be admitted or excluded there is required a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice. In that process the statute says that "among any other matters" the court may have regard to eight specified factors to determine whether or not the exclusion of the improperly obtained evidence would be proportionate to the impropriety. All of the factors specified in s 30(3) call for value judgments that may well depend on inclinations of particular judges, as will the comparative weighting to be accorded those factors. They are:

> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
>
> (c) the nature and quality of the improperly obtained evidence:
>
> (d) the seriousness of the offence with which the defendant is charged:
>
> (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
>
> (f) whether there are alternative remedies to exclusion of the evidence which can adequately provide redress to the defendant:
>
> (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:
>
> (h) whether there was any urgency in obtaining the improperly obtained evidence.

[283] I have taken into account each of those matters, and have considered the way in which they have been traversed by the other members of the Court. I can state my conclusion briefly. The rights said to have been breached are the rights to be free from trespass on lands to which the appellants or their invitors had tribal links and from unreasonable search of those lands. The circumstances and nature of those breaches of the appellants' rights must be considered in their factual context.

[284] There were instances of entry onto the lands by police without lawful authority. They may have constituted trespass, but the property rights affected would have been those of others, not of the appellants. In any event, as well as unauthorised entries by police, they did enter onto the lands authorised by valid warrants, so I see no greater intrusion upon any property interests the appellants may claim than they were subjected to by the warranted entries.

[285] The extent to which the expectations of privacy of the appellants were breached must be weighed. In particular the importance of the rights to be free from police conduct in excess of authority is not to be diminished. In this case, however, on my assessment, that is heavily outweighed by the significance of the situation as they saw it that police were attempting to deal with. The use of weapons, the threat of serious danger, the nature of the "training" and the period over which it continued all, to my mind, indicate that an effective and credible system of justice should admit the evidence so that it can be heard and assessed as part of a full determination of the charges.

[286] In agreement with McGrath J, I would dismiss all the appeals including those charged only under s 45(1)(b) of the Arms Act 1983.

Solicitors:
Aurere Law, Rotorua for Appellant Teepa
Crown Law Office, Wellington