IN THE SUPREME COURT OF NEW ZEALAND SC 141/2016

BETWEEN NEW HEALTH NEW ZEALAND INCORPORATED
Appellant

AND SOUTH TARANAKI DISTRICT COUNCIL
First Respondent
ATTORNEY-GENERAL (For and on behalf of the Minister of Health)
Second Respondent

Hearing:	16-17 November 2017
Coram:	Elias CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	M T Scholtens QC, L M Hansen and T Mijatov for the Appellant D J S Laing and H P Harwood for the First Respondent A M Powell and S K Jameson for the Second Respondent

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CIVIL APPEAL

MS SCHOLTENS QC:

May it please the Court, I appear with my learned friends Ms Hansen and Mr Mijatov for the appellant.

ELIAS CJ:

Thank you, Ms Scholtens.

MR LAING:

Laing and Harwood for the first respondent.

ELIAS CJ:

Thank you, Mr Laing.

MR POWELL:

E te Kōti Mana Nui, tēnā koutou. Ko Powell ahau, kei kōnei māua ko Ms Jameson mō te Karauna. May it please the Court, Powell and Ms Jameson for the Attorney-General.

ELIAS CJ:

Thank you, Mr Powell. Yes, Ms Scholtens.

MS SCHOLTENS QC:

Your Honours, I propose to address the Court on the first four issues that are covered in the written submissions of the appellant, and they relate to the South Taranaki District Council proceedings, include the New Zealand Bill of Rights Act 1990 issues and whether fluoridation is authorised by legislation. My learned junior, Ms Hansen, with the Court's leave, will cover issues five and six, which relate to the two proceedings about whether fluoridation chemicals are medicines for the purposes of the Medicines Act 1981 and the validity of regulations made in respect of that point.

I'd like to begin with some very brief remarks by way of introduction and summary. The fluoridation of community water supplies is for the purpose of treating and preventing the disease of dental caries, tooth decay. It is a health measure, and it's not one that is applied across New Zealand, it's left to the

discretion of the local authority, and currently about 48% of New Zealand's water supply is fluoridated. The chemicals that are added to the water are hydrofluorosilicic acid (HFA) and sodium silicofluoride (SSF); they are the by-products of superphosphate production. They are not the same as medicines-grade fluoride, which is used in fluoride tablets, it's not the same as fluoride in fluoride toothpaste, it's not the same as fluoride that naturally occurs in water, generally at low concentrations, that's calcium fluoride, they are industrial-grade chemicals and may contain contaminants, including mercury, arsenic and lead, and that's not controversial.

The issues in this case are, first, whether the adding of fluoride or these substances to the drinking water engages section 11 of the Bill of Rights Act, which provides of course that everyone has the right to refuse to undergo medical treatment. The appellant will argue that fluoridation is the adding of a substance to drinking water for a therapeutical medical purpose and with a medical effect and qualifies as medical treatment, and that was of course not accepted by the Appeal Court.

Now the fact that it is a public health measure intended to benefit a community of people is a matter for consideration when, we say, deliberating on the whether the right, whether the limit on the right is justified under section 5 and not when you are defining the scope of the right at the first stage.

Now the other primary issue is whether fluoridation is authorised by the current law. The Court of Appeal considered it was, effectively because in 1965 the Privy Council found fluoridation was then authorised, we say based on an historical provision that is no longer a part of the law and an outdated understanding of the nature of the chemicals used in the process. The Court of Appeal found that because fluoridation was authorised then it is assumed to continue to be authorised via the general powers given to local authorities, the Parliament would have intended that. The appellant submits there's no express authorisation and nor can fluoridation be authorised by necessary implication on the analysis of the law and, further, it is not a limit on the section 11 right which can be said to be prescribed by law, in fact it should be clearly authorised by the legislation and not by some side wind.

ELIAS CJ:

Do you mean by that an administrative determination, by "side wind"?

MS SCHOLTENS QC:

No, effectively the Court of Appeal found that it could be implied by looking at both the '65 Privy Council decision, *Attorney-General v Lower Hutt City* [1965] NZLR 116, the very general powers in the Local Government Act 2002, and a provision that came in in 2008 in the Health Act 1956 that refers to fluoride – and we'll come to that because that requires some close attention – and found that through those various things plus the drinking water standards you could see that it was authorised by necessary implication.

ELIAS CJ:

Sorry, I was just querying your "side wind" reference, I wasn't sure what that was to. It doesn't matter, carry on.

MS SCHOLTENS QC:

Perhaps it's not a fair description of what we would say is a very complex range of provisions that you have to go to in order to find the limit on the right.

When it comes to the section 5 justification test, the appellant submits the burden is on the Crown to demonstrate or the Council to demonstrate that fluoridation is the appropriate proportionate and justified limit of the right for the purpose of preventing and treating dental caries. We say that while obviously the burden is on them, given the recognised authority and two of the international reviews of all the research in this area, the York review and the Cochrane review, it cannot be uncontroversially said that this measure is both safe and effective. We say the jury is still out on that.

If I could turn now to the first issue…

GLAZEBROOK J:

Probably the same issue is in the side wind, you'll come when presumably you're discussing that to say why you say it has to be uncontroversially said

and why that's necessary in terms of the test, but I'm assuming you'll come to that when you're discussing, this is just an overview?

MS SCHOLTENS QC:
Yes, I will.

So the first issue begins in the written submissions on page 3 at paragraph 10, and when considering the application of section 11 the Court of Appeal at paragraphs 71 to 98 of their decision when they dealt with this issue they engaged in an interpretative exercise which, we submit, had the effect of improperly narrowing the section 11 right. Now in part the written submissions refer to the methodology issue, but there is an overlap between that and the public health issues, but so I'm really focusing on the approach at this stage that the Court of Appeal adopted. So they emphasised the importance of not over-shooting at paragraph 76 of the judgment, and quoting from *R v Big M Drug Mart Limited* [1985] 1 SCR 29, and held at paragraph 87 that section 11 does not apply to public health interventions, and in getting to that point their limiting was by, and I quote, "Linguistic, philosophic and historical means," so that's what they said they were doing and they took that description from the *Big M Drug Mart* case at paragraph 76 of the decision, the foot of the quote on that page. And it found that the interpretation was necessary, the interpretation that it doesn't apply to public health interventions, for three essential reasons: at paragraph 88, it would be a significant strain on the language, especially the word "undergo" or "undergoing", rather the Court saw it as relating to something done to a patient in a therapeutic setting, so that's para 88 of the decision. And then at para 89, the second point, they refer to the Bill of Rights *White Paper*, "Could be seen as consistent with the common law relating to consent," being circumstances where people could be treated against their will. And at paras 90 and 91 on the same point, that there was, "No heritage of case law or recognised human rights norms to suggest legislature intended to extend the right in this case".

ELIAS CJ:
They don't get the consistency with the common law relating to assault and battery, which I guess is what's referred to in 89 from the *White Paper*, do they?

MS SCHOLTENS QC:
No, they don't.

ELIAS CJ:
That's a much more general statement in the *White Paper*.

MS SCHOLTENS QC:
Yes, I think they draw an inference.

ELIAS CJ:
Yes, but that's the Court of Appeal's take on it.

MS SCHOLTENS QC:
Yes, it is.

And then their third point was the concern, at paragraph 92, that it would lead to a conflict between rights of the individual and those of the population at large and that this would conflict with the statutory obligations on the State to promote the health of citizens generally. So they were concerned that an individual would effectively have veto power if public health interventions were subject to section 11, and accordingly it found that the health measures were not intended to attract section 11 rights.

The error of methodology submissions are at the written submissions, para 35 to 38, which is just what we refer to the way the Court has approached this. The appellant submits that the Court erred in considering that it must ensure the right is not so widely drawn as to interfere with the rights of others, that's at paragraph 82 of the Court of Appeal's decision. Then the Crown submits that it's appropriate to read down the section 11 right at the outset, rather than leaving it to the proportionality test in section 5, and it refers to academic

opinion being divided as to whether to balance rights when scoping the right at the initial stage or later at the justification stage and cite some case law which it says supports the former approach.

The appellant submits that the first point is to note that section 11 contains no internal qualifiers which might necessitate electing between a number of different interpretations and the scope of the right. So, for example, in the *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 case which my friends refer to, "The right to be free from unreasonable search and seizure." That interpretive obligation doesn't mean that the right was not given limited scope, there, we submit, is no reason on the face of the wording of section 11 that would justify it being read in a limiting way or narrowing its scope, and we submit that the Court of Appeal's decision in the *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 clearly supports that approach and that that decision is correct, dealing with the case about section 19 discrimination, and which of course can lend itself to quite difficult questions of scope of the right.

ELIAS CJ:
Another unqualified right?

MS SCHOLTENS QC:
The section 19 right?

ELIAS CJ:
Yes.

MS SCHOLTENS QC:
Well, it's unqualified, but yes there are many, there are no qualifiers, that's right. But, no, it's unqualified, but the nature of discrimination itself can –

ELIAS CJ:
Is contestable.

MS SCHOLTENS QC:

Yes, thank you.

ELLEN FRANCE J:

Just a minor thing. In terms of the reference to *Atkinson*, could you at some point just give me the paragraph numbers?

MS SCHOLTENS QC:

Yes, I would like to actually take the Court to that judgment if that's of assistance. It is at the appellant's authorities tab 27. So of course that was a case about discrimination in the context of budget and funding decisions made in the broad public interest, so there is a similarity with that sort of decision, as here, and in that case the Court was very clear that issues of competing rights were to be considered under section 5. So, first quote, page 1064 of the authorities, at paragraph 117. So, "We consider that purpose is best achieved by an approach in which matters of justification are dealt with at the section 5 stage, rather than the section 19(1) stage."

ELIAS CJ:

The interpretation stage?

MS SCHOLTENS QC:

And it relates discussed above. Then page 1066, paragraph 127, there's a reference to, the Ministry also says, "The Canadian approach best reflects the appropriate inter-relationship between section 19(1) and section 5. Ms Gwyn draws support from *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) for the proposition that more work needs to be done at the section 19 rather than the section 5 stage. The Ministry says we should maintain that approach because it ensures that the Government is not required to justify measures which do not engage the interests that the Human Rights Act 1993 and Bill of Rights are designed to protect. However, cases decided after *Quilter* on the right to freedom of expression, suggest that the right will be defined broadly and the justification for the limits will then be dealt with under section 5. More importantly *Quilter* preceded the enactment of Part 1A. For these reasons we do not consider we are bound to apply *Quilter*."

Then 106(7), paragraph, or the next paragraph, 128, "We consider the statutory purpose is best met by an approach in which matters of justification are dealt with at the section 5 stage. As Dr Butler submits, it is preferable to focus on having a structured and reasoned approach and so avoid decision-making based on instinct rather than analysis." And we do submit, Your Honours, that it is easy to fall into the decision-making based on instinct in relation to the section 11 right as well.

ELLEN FRANCE J:
So you're really saying that competing rights, let's assume there are competing rights here, that they must be a matter of justification?

MS SCHOLTENS QC:
Yes.

ELLEN FRANCE J:
I mean the reason I ask was I didn't recall the issue in *Atkinson* was so much about competing rights, and the stage of the inquiry that they were to be dealt with, as opposed to matters of justification more generally. You're really saying –

GLAZEBROOK J:
It was addressing the scope wasn't it, the argument in *Atkinson*, it was saying that you don't, that you reduce the scope of the discrimination at the definition stage, from memory?

MS SCHOLTENS QC:
Yes. And here the Court of Appeal has, we say, reduced the scope.

GLAZEBROOK J:
You're saying the same thing, they're trying to reduce the scope?

MS SCHOLTENS QC:

Yes, because they consider that other rights are affected. This is a public health measure, it involves broad public rights, rights of others, rights of the community, and accordingly it's not appropriate to apply section 11 in these situations. Whereas we say you can deal with those conflicting rights at the section 5 stage, and that's where they should be dealt with. That's where Government ought to justify its measures that inflict, that impose, that limit Bill of Rights rights for the greater good.

And I won't take Your Honours to – but another paragraph, 132, in that *Atkinson* decision refers to "justification creep", where matters shift from the scope analysis to the justification analysis, or back.

ELIAS CJ:

Well, it's erosion of the scope of the right, you say, happens if that that's – but in New Zealand we seem obsessed about methodology, as if it provides the answers. I'm not so sure that it does really. I mean, I don't need convincing, but I would have thought that in this sort of context you need to be grappling with *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 –

MS SCHOLTENS QC:

Sorry, Ma'am, with…

ELIAS CJ:

Hansen.

MS SCHOLTENS QC:

Hansen, right, yes.

ELIAS CJ:

Because that's the same sort of argument.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

And I'm surprised that really in the discussion about the Canadian material we're back with the cases in the '80s when there's – anyway, there are other cases that are cited in the argument that you'll comes to.

MS SCHOLTENS QC:

So whether it's a matter of methodology or just approach in this case, we would say that the Court has limited the scope because, in a way that has implications for the section 11 right and for reasons which are more logically dealt with in section 5.

ELIAS CJ:

Well, if you don't have an internal modifier that's the case. Yes, I see.

MS SCHOLTENS QC:

Yes, thank you, Ma'am.

WILLIAM YOUNG J:

Just pause there. So by "an internal modifier" you mean something like an unreasonable search?

MS SCHOLTENS QC:

Yes, something, sort of a much more subjective term like "unreasonable".

ELIAS CJ:

Relative term.

MS SCHOLTENS QC:

So if I can turn to the section 11 right itself, and of course it perhaps goes without saying that the right must be looked at first primarily not from the State's perspective but from that of the individual. The *White Paper* is found at tab 8 of the appellant's bundle, that's the second volume, and of course there's not much in the *White Paper* on what became 11.

ELIAS CJ:

Sorry, what tab is it?

MS SCHOLTENS QC:

Tab 8, Your Honour, I'm sorry. So it sits at the top of page 461 as the third limb in the three limbs that are part of the right to justice – the right against torture and cruel treatment. And you'll see that it has no equivalent in the International Covenant on Civil and Political Rights nor any other human rights instruments, so it's something that New Zealand did off its own bat. It enacts a general principle and it says of course, you know, everyone has the right to refuse to undergo medical treatment, that right is of course subject to article 3, section 5. But it's anticipated this would permit persons to be treated against their will only where this is necessary to protect the health and safety of other persons, so..

WILLIAM YOUNG J:

There's nothing in there to suggest anything other than the usual therapeutic setting was in mind.

MS SCHOLTENS QC:

Yes.

WILLIAM YOUNG J:

I mean, there's nothing that suggests that fluoride was in mind.

MS SCHOLTENS QC:

No, I'm sure.

ELIAS CJ:

And indeed in the submissions there's reference to the fact that the *White Paper* took into account a submission that had been made that this provision would allow the argument about fluoride, is that right, but there was no, it didn't respond to it? Have I misread that in the submissions?

MS SCHOLTENS QC:

That doesn't ring any bells for me.

ELIAS CJ:

All right, I'm sorry, I might have got that wrong. I'll try and find it.

MS SCHOLTENS QC:

Somebody will, I'm sure, correct that if – but it doesn't ring any bells for me. When Your Honour Justice Young talks about the usual therapeutic relationship, I'm not sure whether you're thinking along the same lines as the Court of Appeal, in terms of –

WILLIAM YOUNG J:

I am rather.

MS SCHOLTENS QC:

– of the doctor/patient type –

WILLIAM YOUNG J:

Psychologist/patient, psychiatrist/patient, dentist/patient, surgeon/patient.

MS SCHOLTENS QC:

Yes, well, I'd submit that it's difficult to read it as limited in that way because it talks about treatment, being treated against their will, and the thing – what water fluoridation is, it is a process that only happens to, because of the understood therapeutic effect.

WILLIAM YOUNG J:

I understand that. I understand that, as a matter of ordinary English usage, it's perfectly appropriate to describe fluoridation as medication, so I understand that.

MS SCHOLTENS QC:

But the relationship –

WILLIAM YOUNG J:

But I'm not sure it's the sort of medication that the framers of the New Zealand Bill of Rights Act had in mind.

MS SCHOLTENS QC:

Well I think, I mean, one of the matters that, perhaps the Court can take notice of, is the fact, is the timing of all of this, which of course was just after the Cartwright Report was issued. These issues were obviously front and centre of what people were thinking at that stage and if, and of course that was a public health measure, effectively, that went wrong and received the publicity that it did.

ELIAS CJ:

I suppose you could say that 10.167, by saying it would certainly include those relationships.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Is not purporting to be, you know, –

MS SCHOLTENS QC:

Exclusive.

ELIAS CJ:

– exclusive of other forms of treatment.

GLAZEBROOK J:

Although you could read that as saying it's related to treatment not –

ELIAS CJ:

Yes it might be treatment but it's not necessarily in the surgical, psychiatric, dental, psychological and similar forms.

GLAZEBROOK J:

Well you could say this is dental treatment though.

ELIAS CJ:

Yes I suppose so.

GLAZEBROOK J:

So it could be read it actually is as saying well it does include that wide –

ELIAS CJ:

Yes. It's not in a relationship with the dentist.

GLAZEBROOK J:

That's right, yes. But it's looking, it's focusing on the treatment rather than who provides it could be the argument that was made.

MS SCHOLTENS QC:

Yes and we do, we do make that argument and say that 10.167 does demonstrate that, a direction to read this provision in a very broad way, "medical" is used in a comprehensive sense. Well, "comprehensive" is supposed to mean everything. And it would –

WILLIAM YOUNG J:

Can I just ask this, and I don't know the exact position, although it's no doubt somewhere in the papers, would the compulsory requirement for salt to be iodised be a medical treatment?

MS SCHOLTENS QC:

Not in the way it happens at the moment because you have a choice.

WILLIAM YOUNG J:

Oh, yes, I know, I'm saying the compulsory requirement, as there is in some countries, that all…

MS SCHOLTENS QC:

Then it may well be, if it's put in the salt for a therapeutic purpose. I mean we have experts that are arguing about these issues in the evidence before Your Honour, about whether it's a medicine or a therapeutic product or a, I can't remember all the words but if salt was, if you couldn't, if it was for a therapeutic purpose and it had some sort of medical effect, and you had no choice then we'd say section 11 is engaged. But section 11, we don't say

section 11 is engaged in respect of iodised salt or folic acid or pasteurised milk or any of those other things that the Court of Appeal mentioned, because we have a choice. You do not have to have, you've got to buy those products and you have a choice, iodised, not iodised. Folic acid, not folic acid. It's not, doesn't engage the right. This is the only –

WILLIAM YOUNG J:
Is it possible to avoid eating iodised salt?

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
So what if you buy bread, can you buy bread that's been made with not iodised.

GLAZEBROOK J:
They don't put iodine in bread salt as I understand. It's always non-iodised. That's what I've been told, I have no idea whether it's true or not but that's what I've been told.

MS SCHOLTENS QC:
Yes I think that's right as the consumer becomes more educated about these things their choice becomes broader.

GLAZEBROOK J:
Well I assume it's because they get it cheaper and then shove it in rather than because they are actually worried about consent and medical treatment I suspect.

MS SCHOLTENS QC:
I don't know, it's probably more expensive but I don't know.

ELIAS CJ:
Yes, almost certainly.

MS SCHOLTENS QC:

Yes, and in fact that's part of the difficulty about this case is because it's hard to point to any other situation now that might engage section 11 but if you're talking about and public health measures are excluded then it's relatively easy to consider situations which might occur for less appropriate reasons, for example, putting, well putting a sedative in the water supply of a rest home or a prison or a contraceptive in the water supply of a school, these would presumably not engage the section 11 right on the Court of Appeal's interpretation.

And given that the Bill of Rights Act is all about public rights, not doctor, not what happens to me when I go visit my doctor, that's not covered by the Bill of Rights, it's only public rights. If you don't include –

WILLIAM YOUNG J:

Just pause there. Sorry, so going back, I'm just looking at something on Google, it says that by law bread baked must be baked with iodised salt unless it is unleavened or organic.

MS SCHOLTENS QC:

Well organic bread is –

WILLIAM YOUNG J:

"Agree" means if you're determined you don't have to do it.

GLAZEBROOK J:

Maybe they just put that in but earlier it certainly wasn't the case.

WILLIAM YOUNG J:

So it may all be questions of degree because over if you're determined you don't have to drink fluoridated water.

MS SCHOLTENS QC:

Yes, they – sorry, what did Your Honour just say?

WILLIAM YOUNG J:

Well if you're determined you don't have to drink fluoridated water.

MS SCHOLTENS QC:

We have got findings of fact in both the High Court and the Court of Appeal that that in this case at least there's no option.

WILLIAM YOUNG J:

Why, because you can't buy filters or they are too much money?

MS SCHOLTENS QC:

Well there is no realistic option to people to avoid fluoridated water and of course fluoridated water is used in so many things it's much harder to avoid but we aren't in a situation where there is a choice.

ELIAS CJ:

Sorry, when –

WILLIAM YOUNG J:

Sorry, could it matter if you supply water to an affluent area or a not very affluent area?

MS SCHOLTENS QC:

I don't know.

GLAZEBROOK J:

Well maybe at the justification time you could say, well, it's actually easy to avoid if you have money and this is an affluent area that has money so that might possibly at the justification stage.

MS SCHOLTENS QC:

Yes, I agree, that's the way we ought to be looking at it and things like whether the authority –

ELIAS CJ:

It would be a very odd argument though because it would mean that you'd be imposing a cost so it's a very odd public law result.

MS SCHOLTENS QC:

Yes perhaps more appropriate things are whether –

ELIAS CJ:

There are high incident of dental disease as unfortunately tracks poorer areas.

MS SCHOLTENS QC:

Yes, well those sorts of things would be relevant. Whether an alternative form of water supply is made available as in some areas, I understand Lower Hutt has a number of points where people can go to get unfluoridated water.

ELIAS CJ:

But that's all at application stage and your submissions at the moment are directed at the definition?

MS SCHOLTENS QC:

Yes, that's right, and I'm saying those things shouldn't be taken into account to definition.

ELIAS CJ:

Be brought into the definition.

MS SCHOLTENS QC:

Yes, whereas the Court of Appeal did.

ELIAS CJ:

Well there’s a lot of authority that supports the Court of Appeal approach that you'll have to address.

MS SCHOLTENS QC:

In terms of defining the scope?

ELIAS CJ:

Well, the fact that we have a Bill of Rights that is said to be a statement of reasonable rights even if there aren't internal qualifiers, I mean that is the preponderant authority in New Zealand I would have thought.

MS SCHOLTENS QC:

Right.

GLAZEBROOK J:

I would have thought the opposite actually, especially after *Atkinson*.

ELIAS CJ:

Well you've got to contend with *Hansen,* well, anyway.

MS SCHOLTENS QC:

Well, it is –

GLAZEBROOK J:

I would have thought *Hansen* actually does support the other proposition myself but.

MS SCHOLTENS QC:

As I understand it, the academics who disagree about this also say that they don't think the Courts will want to come down one way or another on how you, how careful you have to go through this scoping exercise because of the need for, you know, being mindful of the underlying rights and the appropriateness in society, et cetera. But I suppose my submission is that this was, that first of all the methodology, I say, after *Atkinson* or following *Atkinson* would point to leaving these things to the section 5 stage but alternatively then in this case the Court dealt with matters in relation to scope that they ought to have left until later because in doing so they have narrowed the right –

ELIAS CJ:

The right.

MS SCHOLTENS QC:

– in a way that it is no longer meaningful.

WILLIAM YOUNG J:

Well, it is quite meaningful, it just doesn't catch your, it doesn't catch fluoridation. I mean it's very meaningful in a therapeutic relationship.

MS SCHOLTENS QC:

But is that –

WILLIAM YOUNG J:

It's very meaningful as to whether a prisoner who wants to starve himself to death can be fed, so it's still meaningful.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

But isn't your point rather that if you can get around it by saying it's a public health measure and it's not an individual measure then it narrows the scope unreasonably effectively.

MS SCHOLTENS QC:

Yes, that's a much better way of putting it, yes.

GLAZEBROOK J:

And I mean you don't need to say that you always look at it one way or the other because it will depend, there will be some rights that have qualifiers in them, they'll be some that don't have qualifiers in them but that you could look at and say well absolutely clearly they weren't intended to cover X or Y just because in our society they can't possibly be intended to do so.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:
But it will depend very much on what you're talking about in your submission is just to say a public health measure would leave it open to any old public health measure, let's put antibiotics in because we're a bit worried about eggsexcept or –

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
Or Valium.

MS SCHOLTENS QC:
Yes.

GLAZEBROOK J:
That's a nasty part that you can think of.

ELIAS CJ:
I don't know, antibiotics might be pretty nasty too.

GLAZEBROOK J:
Well, as it turns out.

MS SCHOLTENS QC:
Yes, well, of course it's these sorts of measures that have been used, you know, in the past in ways that, you know, we couldn't contemplate at the moment but this is the point of these rights surely to protect the individual.

Referred to the importance of the underlying values in Butler and Butler. If I can perhaps just, rather than going to the extract, volume 4, tab 40, they talk about this group of four rights in 8, 9, 10 and 11 as it's clear they are directed at securing bodily integrity. And then at 11.6.1 they imply that the rights are very important because their roots in historic atrocities that lead to the birth of

the rights in the first place, namely, State-ordered experiments and compulsory medical treatment.

And 11.7.1 they say that together the four rights, "Underscore the fact that the Bill of Rights Act does (at least to some degree) recognise the right to dignity, autonomy and security of the person. Any interpretation of sections 10 and 11 thus needs to reflect the right to dignity and security of the person." And what I draw from that is that the fact that these four rights are grouped together, self-evidently they are very important rights. To remove the public health nature and to remove protection when public health measures are being taken would seem to be to inappropriately narrow the scope of the right.

In dealing with the public health measure argument of the findings of the Court, in the written submissions at paragraphs 11 to 18, to deal with these…

ELIAS CJ:
Sorry, what paragraph?

MS SCHOLTENS QC:
Written submissions paragraphs 11 to 18. Effectively I submit that this point is really either irrelevant or definitely not, certainly not determinative, because public health measures come in all shapes and sizes, and I've given some examples there, and some of which will engage rights that are protected by BORA, some which involve balancing conflicting rights and some which don't engage any rights. But I do emphasise that it is important that BORA relates to the exercise of public functions, and so when you're looking at therapeutic relationships of course many public functions may not involve direct one-on-one relationships, but that shouldn't take them outside of the scope of section 11.

One of the appellant's experts, Dr Menkes, whose evidence is I think the second affidavit in volume 2, at page 7 – I'll just summarise the import of what he says. He talks about some interventions can cross over from individuals, multiple specific contacts or whole populations, and immunisation, antibiotics to control infectious diseases, can be any of those three things. They can be

administered by doctors, they can be directed by doctors, or doctors can have very little to do with it.

ELIAS CJ:

So you're on to the medical treatment dimension are you, of the argument?

MS SCHOLTENS QC:

I am still under the public health measures, Your Honour.

GLAZEBROOK J:

Can I just get where you said that was, that affidavit?

MS SCHOLTENS QC:

Volume 2.

GLAZEBROOK J:

Volume 2 of the case on appeal?

MS SCHOLTENS QC:

Of the case on appeal. Sorry, I have an old reference. And it's at paragraph 7.

GLAZEBROOK J:

Paragraph 7, is that tab 2 maybe?

MS SCHOLTENS QC:

Tab 3 of volume – volume 3, tab 3, it's the second affidavit.

GLAZEBROOK J:

Of volume 3, tab 3.

MS SCHOLTENS QC:

Yes. Now I'm on to medical treatment, the definitions –

GLAZEBROOK J:

I don't seem to have a tab 3 actually

MS SCHOLTENS QC:

– which begins at paragraph 19. So in paragraph 19 through to 25 –

ELIAS CJ:

Sorry, would you just pause…

GLAZEBROOK J:

No, I have found it now, it was hidden quite carefully.

ELIAS CJ:

That's good. Thank you.

MS SCHOLTENS QC:

The written submission makes a number of points about definitions. At paragraph 23 reference is made to *Mosby's Dictionary of Medicine,* and while there's quite a long definition of medical treatment, which is in the footnote 14, it's submitted that the way that emphasises that medical treatment has two essential features is the definition that we would adopt. So medical treatment has a medical purpose here to treat and prevent tooth decay and a medical method, in here the use of a pharmacologically active substance.

Reference is made at 21.3 to the broad scope of the legislation relating to the practice of medicine in dentistry, including public health dentistry and community dentistry, including promoting oral health, and these are practices which involve public health measure which may or may not involve direct therapeutic relationships.

ELIAS CJ:

I'm just wondering what you draw from the fact that fluoride tablets are defined as medicine?

MS SCHOLTENS QC:

Yes, well, we say there's no distinction between fluoride in the drinking water and fluoride in a tablet form.

ELIAS CJ:

Well, except it's a different chemical…

MS SCHOLTENS QC:

Except it's defined, well, it's…

ELIAS CJ:

Well, the way it's put together is different.

MS SCHOLTENS QC:

It's medicines grade fluoride, it's still fluoride, it's still got the fluoride ions in it that have the pharmacological effect. We say there's no difference between tablets. Tablet –

ELIAS CJ:

So that if one is treated as a medicine your argument is that similarly the substance that is used to deliver fluoride in water is also a medicine?

MS SCHOLTENS QC:

Yes, yes, and the method of treatment shouldn't make any difference.

ELIAS CJ:

Except I suppose the definition in the Medicines Act 1981 is specific to the composition of the tablets, is it? I haven't looked at the Medicines Act.

MS SCHOLTENS QC:

Under the Medicines Act – and this is a point that my learned friend will address you on…

ELIAS CJ:

I see, that's fine.

MS SCHOLTENS QC:

But you do have fluoride as a medicine, a general medicine, and fluoride tablets are prescription medicines – not prescription, sorry.

ELLEN FRANCE J:
But just in terms of…

ELIAS CJ:
Not.

ELLEN FRANCE J:
Their chemical composition is not the same as the HFA and the other, the SSF?

MS SCHOLTENS QC:
SSF, no.

ELLEN FRANCE J:
It's only when those tablets, sorry, when those substances, are added to the water that you get something that's the same, is that right?

MS SCHOLTENS QC:
You have fluoride ions – this is a very basic understanding – but fluoride ions in each substances, like you have fluoride ions in fluoride toothpaste, and it's just that the ions that come with the chemicals SSF and HFA also come with –

ELLEN FRANCE J:
Other chemicals.

MS SCHOLTENS QC:
Yes, other chemicals which aren't so good. But of course, you know, everyone knows that and understands that and so they are regulated, but you won't find any arsenic in your fluoride tablet because it's a different grade, regulated differently, although again that's an issue that we say shouldn't be the case.

ELIAS CJ:
And Ms Hansen's going to address that?

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
Yes, thank you.

MS SCHOLTENS QC:
I do come to Your Honour's points, I'm just at this point not quite sure when, but that you were asking just before.

So "undergoing" was another word that the Court of Appeal emphasised and said it was inapt in the situation in this case, and that's dealt with – I'm sorry I'm jumping a bit – over the submissions at 43 and 44. So the Court of Appeal's view was that it was inapt to describe a person drinking fluoridated as "undergoing medical treatment", and it's submitted that the individual is undergoing is treatment and prevention of dental caries whenever they ingest the fluoridated water, they're not undergoing the drinking of the water. So should they just wish to be rehydrated with wholesome water they'd still be undergoing a treatment and prevention intervention and, of course, even if they had false teeth and cannot be treated with the fluoridated water that they drink, they're still subject to that medical treatment, they're still undergoing it.

WILLIAM YOUNG J:
What do you say about the comparison with the wording of marked sections 9 and 10, which talk about being subjected to?

MS SCHOLTENS QC:
I think, I say that it supports the argument that section 11 is to be read in a broad way because subject to, and I'm not sure that there's a lot in it, but medical treatment is not something that we're necessarily subject to. We would normally accept it and embrace it. The Bill of Rights Act is only concerned with ensuring that we have the ability to refuse, to refuse it.

O'REGAN J:
But that does imply a sort of one-on-one interaction between the proposed treater and the proposed treatee doesn't it?

MS SCHOLTENS QC:
I don't think any more than subjected to does Your Honour. I think "subjected to" relates more to the nature of the thing that the person is subject to, so torture or experimentation, rather than medical treatment, which is perhaps much more benign.

ELIAS CJ:
It just means, doesn't it, that the person is the subject of it, can't be invested with more significance than that.

MS SCHOLTENS QC:
I hadn't invested it with any more significance, Your Honour.

The next point that the Court of Appeal spoke about was the direct, or indirect nature of medical treatment, and this is dealt with in the written submissions, at paragraphs 26 to 34. And again we submit it's not reasonable or rational to limit medical treatment interventions to only those with an intimate doctor/patient relationship or where there is direct interference with bodily integrity and personal autonomy.

We say if you take a purposive approach to section 11, both the protection, under section 11, and the purpose of adding fluoride to drinking water is relevant. Section 11, the right to refuse to undergo any medical treatment, even though that treatment is beneficial and even though the decision's objectively medically unwise, and the emphasis on the right to determine for ourselves what we do or do not do with our own bodies. And then, to reiterate, the purpose of adding fluoride to drinking water to treat and prevent disease. It's added to produce a physiological effect for a therapeutic purpose, and that purpose is the same as that of a doctor or a dentist or a pharmacist prescribing or providing fluoride tablets to a patient, so the purpose, yeah, which the parties would agree constitutes medical treatment

and thus engages the section 11 right, if there's a public element to it. So we submit that the protection cannot properly be, cannot properly depend on the mode of delivery, ie, by a doctor, by injection, by tablet, or by drinking water supply. If the treatment is designed to end up in the body, and does so, it is treatment regardless of how it gets there. So our emphasis is on the treatment. You get the same treatment if you take the tablet as you do if you drink the water.

And then finally the submissions emphasise the use of the word “any” before medical treatment in the White Paper, suggesting that it could include direct or indirect medical treatment.

ELIAS CJ:

I suppose the fact, sorry, I was just thinking what you were saying there about you get the same treatment if you take the pill or drink the water. I suppose that that's the point that you don't get the choice, I mean that's your submission. It would be a, and this may be in the application, it would be a adequate, if it would be an adequate response to supply the pills the difference is in the choice, it's the involuntariness of it.

MS SCHOLTENS QC:

Yes, yes.

ELIAS CJ:

Because it's assumed people won’t bother

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

That's really the reason for it, isn't it, that's the public health reason for it?

MS SCHOLTENS QC:

That will be one of the public health reasons, yes.

GLAZEBROOK J:

And the other way of looking at it possibly is if you say that every child in school, like the school milk that you were forced to drink when we were young, had to take a fluoride pill every morning then effectively again it would be no choice, it would be a public health measure. There would be no doctor/patient relationship there but it would be a, you say then, quite clearly medical treatment and why should it be any different because it happens to be in water that you don't have a choice to avoid.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

Effectively in this particular situation in any event.

MS SCHOLTENS QC:

Yes, and that's precisely it. So direct and indirect, it's a distinction without a distinction.

GLAZEBROOK J:

I'm not, of course, suggesting that the school milk will have a therapeutic, well…

ELIAS CJ:

Well, I'm just wondering whether we could have challenged it.

GLAZEBROOK J:

We were certainly forced to, I certainly remember being forced to drink curdled, warm milk.

MS SCHOLTENS QC:

Yes, no I suffered that too. The next, the point I want to address is the consistent with common law issue that the Court relies on and the Crown too submits that at paragraph 55 a definition of medical treatment should reflect the common law position pre the New Zealand Bill of Rights Act which the

Crown says required a direct relationship. And the Court of Appeal recognised that the section 11 right is an element of the general right to privacy and right to bodily integrity which the common law has long recognised as a fundamental right, and that's at paragraph 71 of the Court's judgments.

And then at 81 of the Court's judgment it found that the authors of the *White Paper* had in mind the interrelated issues of consent to medical treatment or the refusal of such consent but in the therapeutic setting. It found there was nothing to suggest the idea of medical treatment was being entertained in any broader context than the common law already allowed.

We submit that's not a fair reading of the paper, of the *White Paper* and we make three points in response. First, a breach of the common law did not require a direct therapeutic relationship and it's noted that the Crown accepts, at its paragraph 62, that the direct/indirect distinction in relation to battery, for example, it's not logically sustainable and only goes – and goes on to maintain there's a distinction because it says human rights norms require it.

So, I mean you can make analogies with the tort of battery or crime of battery and of course the indirect application of force is, the jury seems to be still out on whether that is or isn't battery, maybe it can in some cases, and there is conflicting Canadian authority on similar but putting the landlord who knew there was toxic level of arsenic in the water supply of his tenants but didn't inform them. The Court there found there was merit in the submission that his conduct amounted to deliberate battery and that can be compared with another judgment which said the landowner's claim failed when he had been poisoned by the local steel works, again through the water system.

So if the right mirrors the common law and vice versa one can expect, presumably, to see some cross-pollination as the jurisprudence develops but in any event it's submitted that this is the wrong approach. Section 11 should not be about the common law. It's about implementing the rights affirmed and protected as legislated by the Bill of Rights Act, and again we say the

common law doesn't really assist, especially when you've got this, you know, concern at the direct/indirect –

ELIAS CJ:

The Court of Appeal doesn't say that it doesn't go beyond the common law, does it? I mean, it just simply invokes *Big M Drug Mart* as indicating you look at the rights in the pre-existing context but it doesn't go further than that, does it?

MS SCHOLTENS QC:

I must say I thought it – I think it –

ELIAS CJ:

I see, it's in 81, is it?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Nothing to suggest that the idea of medical treatment was being entertained in any broad context in the common law already contemplated.

MS SCHOLTENS QC:

Yes, yes, that's it, 81.

GLAZEBROOK J:

Well, did the – were there cases that were looking at public health measures that were – I mean, say compulsory vaccination or anything because –

WILLIAM YOUNG J:

There'd be the *Attorney-General v Lower Hutt City* [1965] NZLR 116 (PC) case.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

Yes, there are.

GLAZEBROOK J:

Well, that's slightly different because that was saying it was authorised under statute. It wasn't –

WILLIAM YOUNG J:

But the common complaint there was that it was medication. That was one of the complaints that they were – and that was one of the issues in the case as to whether it was medication.

ELIAS CJ:

But I'm more interested in this, the context of the rights, and it doesn't seem to me that you could be limited by the common law concepts because other rights are not – well, for example, although there's reference made to dignity and privacy, well, we know that they weren't very well developed before the – they might have been inchoate in the common law but it would be difficult to describe them as common law, pre-Bill of Rights.

MS SCHOLTENS QC:

Yes, yes. Yes. It seems to the appellant that the common law – if it was simply as Your Honour first thought the Court of Appeal were doing then that's fine. That's part of the interpretation of the scope of the right, but the common law is uncertain in the area where we're focused here and it would be wrong to, certainly to be looking some sort of freezing of it or, as at 1990, and as it develops, well, then, you know, there is going to be this sort of crossover, so it just doesn't seem very helpful.

ELLEN FRANCE J:

Sorry, just going back, Ms Scholtens, do you say the distinction between adding iodine to salt and fluoridation is the level of choice?

MS SCHOLTENS QC:

Well, it's not the only distinction but that – that iodine's not relevant here because there's choice.

WILLIAM YOUNG J:

But it would still be medication, wouldn't it, because there would be people taking iodised salt who hadn't made a decision to do so, didn't know they were just because they're buying bread?

MS SCHOLTENS QC:

That's probably so but –

WILLIAM YOUNG J:

So if you're right then the iodisation of bread, of bread via salt, it would be compulsory, would be medical treatment.

MS SCHOLTENS QC:

Well, the evidence is that it's not a medicine and it's not a medical treatment.

WILLIAM YOUNG J:

But it's to prevent goitre.

ELLEN FRANCE J:

But it is added to prevent thyroid, isn't it?

MS SCHOLTENS QC:

Yes it is, yes.

ELLEN FRANCE J:

So it has a therapeutic purpose?

MS SCHOLTENS QC:

Yes, yes. It seems to qualify under our definition but I just…

GLAZEBROOK J:

It's not before us in any event so…

MS SCHOLTENS QC:

It's considered to be a dietary nutrient and Dr Menkes talks about that at volume 2, page 293 of the case.

ELIAS CJ:

I suppose there's also the, or is that, that's pursuant to regulations is it? There's no regulation for –

WILLIAM YOUNG J:

That's the Food Safety Authority requirement and there are similar requirements in Australia, in relation to folic acid, which has not been mandatory in New Zealand. Sorry, what was the page in volume 2?

MS SCHOLTENS QC:

Page 293, Your Honour. So he says that community water fluoridation can be distinguished, "From the practice of fortifying foodstuffs with essential nutrients, such as adding iodine or folic acid to bread, due to the fact that fluoride is not a dietary nutrient. Both fluoride and essential nutrients may be used to prevent disease but, as demonstrated above, the former is used as a medicine in the community water fluoridation whereas the latter are considered dietary supplements. Many essential nutrients, such as folic acid, iodine, iron or zinc can also be used as medicines, depending on the dose and root of administration."

ELLEN FRANCE J:

Yes, I was looking at the High Court judgment, at paragraph 81, page 99. So that's tab 2 of the case on appeal, volume 1?

MS SCHOLTENS QC:

Yes.

E FRANCE J:

And I just really wanted to be clear as to what you say the difference is.

MS SCHOLTENS QC:

For the purposes of this case, choice is the key, that there is a choice. And it seems to me that if these, if there was no choice and iodine was in all salt then you'd have to look at what, what is the substance.

WILLIAM YOUNG J:

What if it's in all bread except unleavened bread and organic bread?

MS SCHOLTENS QC:

Sorry?

WILLIAM YOUNG J:

What if iodised salt was in all bread, save for organic or unleavened bread?

MS SCHOLTENS QC:

Well, again, the reason why it's there, I guess, is, I mean, there seems to be a distinction between a medical purpose and the –

WILLIAM YOUNG J:

A dietary purpose.

MS SCHOLTENS QC:

Pardon?

WILLIAM YOUNG J:

Well, Dr Menkes seems to distinguish between a medical purpose and a dietary purpose, supplying something that's required for the usual physiological processes of the body, which –

GLAZEBROOK J:

Well, it just might be the distinction between selenium, and the folic acid is the same distinction with things that are available in, that are necessary for the balanced diet, whether it's a distinction that is a sensible distinction, if they're effectively being used by, for therapeutic purposes, is not something that's before us.

MS SCHOLTENS QC:
That's right, yes.

GLAZEBROOK J:
And whether, in fact, the bread example, because one assumes you just, you can avoid that by not eating bread but you say practically here you can't avoid it by not drinking water, at least in the communities we're talking about.

MS SCHOLTENS QC:
That's right, yes, you can't avoid it here, yeah.

ELLEN FRANCE J:
But the argument that's been, that has had some success is that it might tell you something about the scope of medical treatment if, in fact, to apply your approach would mean all of these other things are potentially covered, that's the argument that's made, isn't it?

MS SCHOLTENS QC:
Potentially covered, well –

GLAZEBROOK J:
Although you'd say that they'd then be quite easily dealt with under the justification so it's not actually an issue.

MS SCHOLTENS QC:
Well that's right, yes.

WILLIAM YOUNG J:
Can I just come back to this point? Force feeding people is treated regarded as medical treatment, isn't it?

GLAZEBROOK J:
Sorry?

MS SCHOLTENS QC:
Force feeding.

WILLIAM YOUNG J:

Force feeding, someone who is trying to starve themselves to death, isn't that…

MS SCHOLTENS QC:

Yes, I'm just trying to remember which right – there's been a case on that obviously.

WILLIAM YOUNG J:

So there was a case in front of Justice Panckhurst which you said –

MS SCHOLTENS QC:

Yes, that's right.

WILLIAM YOUNG J:

– that the prisoner who wants to starve himself to death can.

MS SCHOLTENS QC:

Yes, yes.

WILLIAM YOUNG J:

Because it's medical treatment but that would be inconsistent with Dr Menkes because the prison authorities weren't hoping to, weren't giving him medication they were simply giving, providing the food that is essential for the normal process of the body.

MS SCHOLTENS QC:

Yes.

WILLIAM YOUNG J:

So his distinction may not be right, if I'm right that, if my recollection is right and it may not be, that that case was decided on the basis of medical treatment or right to refuse it or…

MS SCHOLTENS QC:

I think it was, it was an "all means all" case.

GLAZEBROOK J:

Although that might be wrong, in fact, if your definition of medical treatment is correct, there might be another right that you're interfering –

MS SCHOLTENS QC:

Yes, right to life.

GLAZEBROOK J:

– with, yes, your right to decide whether in have life or not.

MS SCHOLTENS QC:

Yes, I'm just trying to remember whether –

GLAZEBROOK J:

Which does come within the right to life because the right to life is – so your control over your life.

MS SCHOLTENS QC:

Yes, because I think –

GLAZEBROOK J:

Which is why I think the *White Paper* says that you would never be able to override that with the medical treatment, right?

MS SCHOLTENS QC:

Yes.

WILLIAM YOUNG J:

Would rehydration of someone who is dying of dehydration be medical treatment?

MS SCHOLTENS QC:

I don't know.

WILLIAM YOUNG J:

I mean Dr Menkes would presumably say no, it's just a sort of dietary requirement.

MS SCHOLTENS QC:

On our –

ELIAS CJ:

It's like oxygen.

MS SCHOLTENS QC:

Yes on our, the definition that we've put forward about a medical purpose and a medical method, if the person is going to die then I suppose it is a medical purpose and is the method of rehydration a medical –

WILLIAM YOUNG J:

Someone might get goitre if they don't get iodine, would giving them iodine not be, on your approach, medication?

MS SCHOLTENS QC:

Yes, no it would be but you would, should have, you should be able to agree to it.

WILLIAM YOUNG J:

I'm just really responding to Dr Menkes' evidence.

MS SCHOLTENS QC:

Yes, and I think it is a difficult – I don't believe we need to work out whether iodine is a, iodised salt is a medical treatment.

WILLIAM YOUNG J:

I agree it's not before us but it might be reflecting of a community understanding as to what is and what isn't compulsory medical treatment.

MS SCHOLTENS QC:

I think the important point is that it's not, yes, you don't have to take it, you do have a choice and it is an effective choice but I guess too, in terms of medical treatment, the – well, no perhaps I would be going beyond my expertise if I started there.

So the common law –

GLAZEBROOK J:

Actually I suppose under the common law you didn't actually have a right to commit suicide and so in fact that shows that the Bill of Rights has gone further than the common law at least in that capacity.

MS SCHOLTENS QC:

At least in that area, yes.

GLAZEBROOK J:

So you probably could be forced to accept medical treatment in life threatening situations if –

MS SCHOLTENS QC:

Back in 1990.

GLAZEBROOK J:

Mmm.

MS SCHOLTENS QC:

I don't know. We note the Crown does acknowledge in its footnote 49 that there are really exceptions to the common law position that an individual's right shouldn't conflict with the rights of others and it talks about exceptions such as the compulsory inoculation against smallpox which affects the rights of the individual and the rights of the community. So that's a good perhaps example of a common law right that crosses over here, and refusing a caesarian section is another example which obviously rights of both mother and baby. And I think the thinking of the *Re J (an infant)* [1996] 2 NZLR 134

case which was a Court of Appeal case about blood transfusion for a Jehovah's Witness family, the parents' right to manifest their religion versus the infant's right not to be deprived of life. Now that was a Bill of Rights Act case, but I think the Court, the same rights existed as at common law in that situation.

Can I address now the Article 12 relevance which the Court put some store on, and that's in the written submissions at paragraphs 39 to 42, and the Court's finding after discussing this is at paragraph 83, at 83 it discusses this. So in our submissions we contest the Court's finding that the right to a minimum standard of health guaranteed by Article 12 of the International Covenant on Economic, Social and Cultural Rights was engaged in this case in the way that the Court seems to have found. The Crown argues there's a contest between section 11 and Article 12 that a person's right to refuse medical treatment versus the community for the majority of other individuals' rights to a minimum standard of health through receiving fluoridated water. Alternatively it argues the content of the section 11 right itself must be narrowed down by giving it a reading that's consistent with the community's Article 12 right to a minimum standard of health and to receive fluoridated water.

So that, I mean in broad terms if Article 12 is going to read down section 11 then there's going to be very little in the way of, certainly, public health measures that will come within section 11. But it's submitted that it's difficult to see how there can be a contest between a provision of the Bill of Rights Act and with the significance that Act has in our constitutional framework and in an international source of an obligation that is subject to general legislation. And the general legislation itself, the New Zealand Public Health and Disability Act 2000, is of course very broad, as can be seen in the Court's decision. But in any event the right under Article 12 to a minimum standard of health does not give individuals in the community a right to have fluoridated water. If it gave a right to receive protection from and treatment for dental caries then that could be achieved in other ways that don't override or extinguish the applicability of the right. Further, if it did provide a right then the Government seems to have acquiesced in a situation where only 48% of the public is

receiving that treatment, which of itself is discriminatory and contrary to Article 12's obligation to secure equal health outcomes for all.

And in our written submissions we note that, properly interpreted, Article 12 supports the appellant's interpretation of section 11 in that it includes a right to be free from non-consensual medical treatment, and general comment number 14 explains the right and that is set out in paragraph 41 of the written submissions. Nowhere in the general comment is it contemplated that types of measures the State might adopt to discharge its obligations could include compulsory medical treatment without regard to individual freedoms. So indeed you'll see it at paragraph 41 of the article, there is, "The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation," so it recognises.

GLAZEBROOK J:
Well, otherwise it would justify compulsory vaccination.

MS SCHOLTENS QC:
I presume so.

GLAZEBROOK J:
Well, it clearly would, because that protects the whole of the community, if you get up to a certain level of vaccination.

MS SCHOLTENS QC:
Yes, yes.

GLAZEBROOK J:
And I don't think anyone's suggesting that it does allow compulsory vaccination.

MS SCHOLTENS QC:
No.

ELIAS CJ:

We've always had compulsory treatment for sexually transmitted diseases and for tuberculosis I think, haven't we? I'm just wondering, it may be that Bill of Rights Act standards have never been applied to those measures.

MS SCHOLTENS QC:

I'm not aware of that Your Honour. I thought –

ELIAS CJ:

Well, we certainly used to. I don't know whether we still do.

MS SCHOLTENS QC:

I do remember the rubella injection when I was 12 but you could refuse to that, you know, there were consent forms that went out, and that was a long time ago. But I'm not aware of anything that's – except, of course, for those matters that are authorised under the Health Act where there are –

ELIAS CJ:

Yes, that's what I'm thinking of.

GLAZEBROOK J:

Yes, that's where the tuberculosis was authorised under that.

MS SCHOLTENS QC:

There are a number of significant, compulsory treatment matters that – and they are footnoted and referred to in the submissions somewhere. I couldn't take you to them at the moment.

GLAZEBROOK J:

Whether it's still authorised under it, but it certainly was I know, but I think it was under a specific provision.

ELIAS CJ:

I'm just puzzling a little bit about the partiality of this measure. The enabling dimension, if only 48% have the treatment, whether that's difficult, in itself, to

reconcile with section 11, because you'd think that, oh well, it's not treatment I suppose on the respondent's submission.

MS SCHOLTENS QC:

Yes, no, that's what they say, it's not treatment. The 48% is effectively a, the communities that are the subject of fluoridation, they're the ones that have no effective choice.

ELIAS CJ:

Yes, no, I understand.

MS SCHOLTENS QC:

But yes the 48 –

ELIAS CJ:

But what I mean is you would think that if it is treatment, because there is a compelling public health reason for it, that it would be ubiquitous and not something that was left to local determination.

MS SCHOLTENS QC:

Yes, that's right, indeed.

GLAZEBROOK J:

But then if it's not why leave it to local determination?

ELIAS CJ:

If it's not?

GLAZEBROOK J:

Well, if there's no reason for it you don't leave it to local – I'm not sure it makes much difference whether it's medical treatment because if it's, if there's no reason for it why leave it open at all? If there is a reason for it, well, you might say why not make it for everybody but…

ELIAS CJ:

One would think that it substantially undermines the reasonableness, subject to arguments about specific populations being more at risk, that it substantially undermines the reasonableness of an application of…

GLAZEBROOK J:

I see, I see.

MS SCHOLTENS QC:

Yes, well when you got to that section 5 stage you might –

ELIAS CJ:

Yes, and we're not at that, sorry, I shouldn't of –

MS SCHOLTENS QC:

No that's all right but –

ELIAS CJ:

– it was just your reference to 48 % got me thinking.

MS SCHOLTENS QC:

And you might find at that stage –

ELIAS CJ:

Well I think that is one of your points that you make isn't it at that stage. So –

GLAZEBROOK J:

Although the counter to that I think is that that these specific populations do have a specific issue with tooth decay that is more serious than the –

MS SCHOLTENS QC:

Yes, before this, yes, before this Court, yes Sir, yes Ma'am.

So before I turn to the second issue and finish with this Bill of Rights Act point, can I just deal with the Court's concern at paragraph 86 that any other interpretation would give the individual a veto power and I think that just can't

be right. What it would give if the section 11 right was sufficient broad, was a right to challenge and require justification for the public health measure and it's submitted that this is a good thing. It will increase both the quality and perceived legitimacy of the State's therapeutic public health measure and, of course, it's consistent with human rights law which is all about, at times, trade-offs and balancing.

GLAZEBROOK J:
Well it may be sufficient to give a realistic choice, mightn't it, under your, well it would be sufficient to give a realistic choice under your analysis. So it wouldn't necessarily undermine the public health if you had a realistic choice given to you to avoid the fluoridated water.

MS SCHOLTENS QC:
Yes, yes. And then that of course, some issues such as the availability of alternate water and whether that was a realistic choice might be the matters that were dealt with in section 5.

GLAZEBROOK J:
But it does stop a veto if that is actually sufficient, doesn't it? The veto argument would go in that case.

MS SCHOLTENS QC:
Yes. So it seems on the Court of Appeal's approach they are looking at something that has only got two, there's a sort of a binary position. You've either got a human rights law that gives individuals a veto power over the State's therapeutic public health measures or you've got a human rights law that puts a responsibility on the State to undertake public health measures in accordance with Article 12 that the State has no human rights ground and obligation to justify to individuals. And what we say is we're saying, no, neither of those things are appropriate. Human rights law that legitimises the State's role in undertaking therapeutic public health measures while, through sections 11 and 5, giving individuals the right to challenge and the State the obligation to respond and justify the measure. And so we will come to the matter of justification.

I want to go first to the, to look at the authority to add fluoride to the drinking water supply.

ELIAS CJ:
So is that a convenient time to take the adjournment?

MS SCHOLTENS QC:
It is.

ELIAS CJ:
All right, thank you. We'll take 15 minutes.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.45 AM

ELIAS CJ:
Yes, thank you, Ms Scholtens.

MS SCHOLTENS QC:
And turning to issue 2, the authority to add fluoride to the drinking water supply. This begins at page 10, paragraph 48, of the written submissions.

The Court's principal conclusions are summarised by the Court at paragraphs 58 and 59 of the judgment and where they give four key reasons for finding that authority to fluoridate the water is necessarily implied. So first the *Lower Hutt City* case which established lawful authority to fluoridate in 1965 under section 240. Secondly, that authority continued and while the relevant statutory provision changed the Court found that Parliament must be taken to have been aware of the *Lower Hutt City* case and in requiring local authorities to continue to provide water services must have authorised the continuation of fluoride, and then the third point was they –

ELIAS CJ:

Ms Scholtens, we have read the submissions and the Court of Appeal judgment so you can really just develop your argument, I think.

MS SCHOLTENS QC:

Move on. Thank you, Your Honour.

ELIAS CJ:

I'm just a little concerned about time.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

We interrupted you a lot this morning.

MS SCHOLTENS QC:

No, that's fine, and a fairly made point.

So can I begin with the *Lower Hutt City* case which the Court of Appeal discusses at paragraphs 18 to 25 of the decision, and it summarises, the Court summarises the appellant's arguments at paragraph 24. It says we made four arguments and it accurately reflects the first three, but as addressed in the written submissions at paragraph 52 we submit that the Privy Council's understanding, which is reflected by the quote at paragraph 22 of the Court of Appeal's decision, was based on a wrong factual premise, so the section 240 that they are dealing with was summarised at paragraph 18, or noted at paragraph 18, and there they focused on the supply of pure water and gave that a fair, large, liberal construction, and focused on the fact that, near the middle of the quote, "Because the supply of water was already pure there is no power to add to its constituents merely to provide medicated pure water." Sorry, that's the…

GLAZEBROOK J:

Sorry, I'm not sure where you are.

MS SCHOLTENS QC:

I'm on paragraph 22 of the Court of Appeal judgment, Your Honour.

GLAZEBROOK J:

Yes.

MS SCHOLTENS QC:

And the quote from the *Lower Hutt City* case, and I should really start where it says, "Their Lordships," so it's just in the first paragraph, about six lines down. "Their Lordships think this is an unnecessarily restrictive construction to hold because the supply of water is already pure that there is no power to add to its constituents merely to provide medicated pure water, ie, water to which an addition is made solely for the health of the consumers. The water of Lower Hutt is no doubt pure in its natural state but it is very deficient of one of the natural constituents normally to be found in water in most parts of the world. The addition of fluoride adds no impurity and the water remains not only water but pure water and it becomes greatly improved and still natural water containing no foreign elements." So we say, well, that was a mistake in understanding of or of science, of water fluoridation which, of course, doesn't add sodium chloride to the water it adds the HFA and SSF.

WILLIAM YOUNG J:

Does it really matter but what's important is that there are fluoride ions in the water, does it matter whether it's sodium fluoride that's added or the substances that are added here?

MS SCHOLTENS QC:

Well, I think the fact was that the Court said it added no impurity to the water but it does. That impurity is managed but it still adds it.

WILLIAM YOUNG J:

But it is in fact adding the fluoride ions which are what is the purpose and which are in a sense missing because there is calcium, naturally occurring calcium fluoride in the area.

MS SCHOLTENS QC:

It's the fluoride, it's the ions in the fluoride chemical that have the therapeutic benefit.

WILLIAM YOUNG J:

But you'd be, I mean is it not practical, there must be a reason why calcium flouoride isn't added, is that because it's not as soluble or for some other reason?

MS SCHOLTENS QC:

Well I think that's probably a matter for the Crown or the counsel to answer.

WILLIAM YOUNG J:

But you would be equally opposed to it if calcium fluoride was to be added.

MS SCHOLTENS QC:

I don't know that that's so, Your Honour, but I mean one of the real concerns is that this is an industrial by product and that it's not regulated in the way the medicine version of fluoride is.

WILLIAM YOUNG J:

Okay, and I understand that.

MS SCHOLTENS QC:

The medicine version.

WILLIAM YOUNG J:

You would be differently opposed to it probably?

MS SCHOLTENS QC:

That's possibly so. Yes, so we say that that is wrong as a matter of fact.

GLAZEBROOK J:

Does that matter in terms of the argument that against the background of that case Parliament must have authorised it? The fact that there has been a misunderstanding in the case, does that alter that particular argument?

MS SCHOLTENS QC:

It doesn't alter that argument, no. It goes to the fact that what the Privy Council found was pure water can mean fluoridated water because it doesn't add any foreign elements, it stays pure in fact it's even better pure and they thought that the calcium that was being added was the same as the calcium, well it reflects that they think that it's the same as the calcium that present in the water naturally.

ELIAS CJ:

But that error is not material, is it, to the arguments that we are considering?

MS SCHOLTENS QC:

We –

ELIAS CJ:

Which is really I think what Justice Glazebrook was suggesting that this is the datum against which Parliament legislated.

MS SCHOLTENS QC:

Yes, that's right.

ELIAS CJ:

And yes you can still argue that it's a medicine and it's impure or whatever, we're not going to treat what the Privy Council said as the last word on that.

MS SCHOLTENS QC:

No, and that's simply the submission. It is the background but it's given considerable emphasis by the Court of Appeal and by the High Court and when we say, well, you know, as obviously this Court can look at that and determine whether it holds up in today's climate.

GLAZEBROOK J:

Well, you're saying if we're interpreting the current provision we're not bound by the analysis in the Privy Council which we're not in any event and anyway it's a different legislation?

MS SCHOLTENS QC:
Yes, that's right.

ELIAS CJ:
But also the Court of Appeal said that the only reason they refer to it is because it is the background against which Parliament legislated. They accept in 25 that some of the conclusions reached might need reconsideration in the light of the current legislation so can't we move on from *Lower Hutt City* except as that necessary background because it doesn't seem to me that it's hugely stressed.

MS SCHOLTENS QC:
Right. Can I just add something that's not in the written outline and that is that the Canadians – you'll see that in the *Lower Hutt* decision they said, well, they didn't agree with the Canadian Supreme Court decision in *The Municipality of Metropolitan Toronto v The Corporation of the Village of Forest Hill* [1957] SCR 569 case. That's also in your volume of authorities at volume 4, tab 37, and there the Supreme Court of Canada held essentially the argument that we are running, that the appellant runs, which is the local authority had no power to add fluoride solely for a health or medicinal purpose because that was outside of the purposes of the Act. And Justice Cartwright at page 1477 of the volume says, "In pith and substance the by-law relates not to the provision of a water supply but to the compulsory preventative medication of the inhabitants of the area," so that was about the same vintage, slightly before *Lower Hutt*.

GLAZEBROOK J:
Sorry, can you give me where that is?

MS SCHOLTENS QC:
It's in the appellant's volume, bundle of authorities, volume 4, tab 37.

So then at written submissions, page 11, paragraph 54, turning to section 130 of the Local Government Act, and, of course, section 240 that was discussed in the *Lower Hutt City* case is materially different from section 130.

Section 240 authorises the construction of waterworks for the supply of pure water whereas section 130 obliges the maintenance of water services through the provision of core services and network infrastructure.

So that's important, we submit, that the purpose provision, section 130, is one that is plainly to do with infrastructure. It's if the Council was to be authorised to add a therapeutic substance to the water, drinking water, then one would expect to see it somewhere.

ELLEN FRANCE J:
And what do you say about the section 12 of the Local Government Act 2002?

MS SCHOLTENS QC:
Section 12 is – it's the general power of competence. That subsection (3) is subject to this Act and any other enactment and the general law, and so we say that it doesn't give the power to fluoridate. There's a more specific law that governs water supply, which is Part 2 of the Health Act 1956 and Part 7 of the Local Government Act, and they relate to the same matter as water supply, and that's – it's submitted the Court should seek to identify a power to fluoridate from those provisions rather than resorting to the general power of competence. It's also a power that's akin to sort of a regulatory function which would properly require express authorisation, we submit.

ELIAS CJ:
Sorry, it's akin to a regulation maker –

MS SCHOLTENS QC:
Akin – no, a regulatory function, a function that is delegated to the authority for public health purposes, but it's regulatory in that you're requiring it to be regularly monitored, or water supply is required to be regularly monitored and checked, levels of impurities checked. It's a monopolistic activity. It can be characterised as coercive since residents are practically unable to opt out of the scheme and it's – the Council has regulatory enforcement and coercive powers and they're in Part 8 of the Act and in relation to water services in

Subpart 4, but these do not expressly or impliedly, in our submission, authorise water fluoridation.

So the legislation is discussed in the written submissions, paragraphs 54 to 63. Part 7 of the Act can be found under tab 3 of the appellant's authorities and can we just go there briefly. So section 1, if we start at page 151, Part 7 of the Act and just to briefly point out relevant provisions, note that the heading of Part 7, "Specific obligations and restrictions on local authorities," and the outline of the part, section 123, talks about specific obligations and restrictions and, relating to (b), "In relation to the delivery of water services." And then "water services" is defined on the next page, means, "Water supply and wastewater services," and "water supply", "Provision of drinking water to communities by network reticulation to the point of supply of each dwelling house and commercial premises." And so it's submitted that this part of the Act is very much on maintaining the services and infrastructure. Subpart 2, on page 153, "Obligations and restrictions," relating to provision of water services. "Obligation to maintain," at 130. Now this is the provision that the Court of Appeal found, together with the Health Act provision by necessary implication authorised fluoridation. So the obligation to maintain water services, plainly there is a continuing obligation here and at subsection 2, "Must continue to provide water services and maintain its capacity to meet its obligations." Now this, it's not just for continuing services, as subsection 1, paragraph (b) shows. It also applies for any water services that commences after this section.

GLAZEBROOK J:

Just in terms of – is the argument that it's different from an obligation to provide pure water? Because I would have thought that the definition of water supply, say in drinking water, it would be very odd to say that drinking water includes impure water so I'm not sure there's a distinction from the earlier Act.

MS SCHOLTENS QC:

There are, well, drinking water itself is not, I don't believe, defined as such.

GLAZEBROOK J:

Well I'd certainly hope that one would interpret that as being water that's pure and able to be drunk, in the same way as the previous legislation required.

MS SCHOLTENS QC:

The Health Act, the 2008 amendment brought in some very prescriptive requirements to ensure the wholesomeness of the water.

ELLEN FRANCE J:

It is an obligation to continue to provide water supply, which is presumably the water supply that has been previously supplied.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

But also to supply drinking water which must imply that it's not, it's got to be suitable for human consumption.

MS SCHOLTENS QC:

Yes, oh, absolutely, yes.

GLAZEBROOK J:

Which is about the same as saying it has to be pure, isn't it?

MS SCHOLTENS QC:

Well it might be a semantic difference. Our point about pure was that the Privy Council thought that meant no additional impurities.

WILLIAM YOUNG J:

But it must mean no additional material impurities, mustn't it?

MS SCHOLTENS QC:

I don't know, that's not what they said but I mean –

GLAZEBROOK J:

Well chlorination it has – adds something but it also stops there being things in the water that would make it not drinking water.

MS SCHOLTENS QC:

Yes, that's right. Chlorination is done to disinfect the water, it's authorised and it's regulated.

GLAZEBROOK J:

So is it authorised, was it at this stage authorised separately or just a part of the drinking water definition?

MS SCHOLTENS QC:

No. I will take you to the Health Act where all the real provisions that regulate drinking water in terms of safety and quality are in the Health Act. In the Local Government Act they are more to do with infrastructure and security of supply. So what they're saying here is don't stop supplying.

WILLIAM YOUNG J:

Well, say this case concerned the Lower Hutt City Council. Would you say that it was permitted under section 130 to continue to supply fluoridated water?

MS SCHOLTENS QC:

No I'd submit that things are different from back then and we've had the Bill of Rights Act, wasn't enacted but now it is so now –

ELIAS CJ:

You'd say the supply of water doesn't contain any continuity of the type of water supplied originally?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

It is just an obligation to supply water and then as to the quality of water your argument is you go to the Health Act.

MS SCHOLTENS QC:

Yes, and back about –

WILLIAM YOUNG J:

What do you say about the word “continue”?

MS SCHOLTENS QC:

Well, yes but you could –

ELIAS CJ:

It's the taps have got to continue to run.

WILLIAM YOUNG J:

Yes, but I mean it does imply some continuity.

MS SCHOLTENS QC:

Yes, that's right, but you could get your water from a range of different sources, you don't have to be, you know, getting it from the same source as back then but you might not be fluoridating, you might have fluoridated then and not be fluoridating now, that won't make any difference.

O’REGAN J:

But you'd have to stop supplying water with fluoride in it on the day this legislation came into force on your case?

MS SCHOLTENS QC:

No, no.

WILLIAM YOUNG J:

They should have stopped earlier you would say?

MS SCHOLTENS QC:

Yes.

WILLIAM YOUNG J:

For instance, when the Bill of Rights Act came into force.

MS SCHOLTENS QC:

Yes, yes.

ELLEN FRANCE J:

Well, this argument though is directed to the lawfulness regardless of the Bill of Rights, isn't it?

WILLIAM YOUNG J:

Okay, the vires.

ELLEN FRANCE J:

It's a vires argument.

MS SCHOLTENS QC:

It is, it is, the Bill of Rights Act makes a difference to the nature of prescribed by law, for example, whether fluoridation is prescribed by law. So there's a layering, there's a vires argument and then there's a slightly higher argument if section 11 applies then this power needs to be more visible than it is.

GLAZEBROOK J:

Well you'd probably say that the Privy Council decision was wrong in any event.

MS SCHOLTENS QC:

Absolutely, yes.

GLAZEBROOK J:

Yes, and certainly wrong in the context of the Bill of Rights.

MS SCHOLTENS QC:

Yes, things have changed. I think it's not – to answer your question, Justice O'Regan, it's not addressing fluoride at all, it's not saying do it, it's not saying don't do it. It's not, I don't think, it turns, the legislation turns its mind.

WILLIAM YOUNG J:

So even if the previous water supply contained fluoride the power to continue to provide water services doesn't it carry over the power to supply fluoridated water?

MS SCHOLTENS QC:

Well I presume that those supplying water services assumed that they had the authority to do so before the Act and they continued to have the authority after it, I presume.

GLAZEBROOK J:

But you say they didn't and that the Privy Council decision was wrong based on a misunderstanding and, in any event, even if it wasn't wrong in 1964 it was as soon as the Bill of Rights was brought in?

MS SCHOLTENS QC:

Yes, obviously it was right while it was right.

GLAZEBROOK J:

Well, it's right because they're final, but you would say –

MS SCHOLTENS QC:

Yes, that's right, yes, and I'm not suggesting that.

GLAZEBROOK J:

– it is not a decision that we should follow?

MS SCHOLTENS QC:

No, that's right. I'm hoping to persuade Your Honours that to the extent you might see it as relevant to these issues, it proceeded on a misunderstanding of the situation.

GLAZEBROOK J:

Although it may nevertheless be relevant to what Parliament thought it was doing when it enacted the Act and what the local authorities thought that they had a continued ability to do once the Local Government Act came in.

MS SCHOLTENS QC:

Yes, and I will address that in a –

ELIAS CJ:

But your argument has to be that under the Local Government Act 2002 there is no hook on which, or that from which you can derive an implied power to fluoridate.

MS SCHOLTENS QC:

Yes, yes, that is the argument, to this Act or the other Acts.

ELIAS CJ:

And that if there isn't a power under the Health Act or able to be implied there, then there is no power to fluoridate.

MS SCHOLTENS QC:

Yes. Yes, that's what we say, so the fact that they're fluoridating is neither here nor there.

ELIAS CJ:

It's got nothing to do with the supply of water which they are obligated to continue to do.

MS SCHOLTENS QC:

Yes. Yes, that's right. So –

ELIAS CJ:

I can't remember now, where did pure water come in, in the…

MS SCHOLTENS QC:

That came from the Municipal –

GLAZEBROOK J:

That was the…

ELIAS CJ:

That was the previous Local Government legislation?

WILLIAM YOUNG J:

The Municipal Corporations Act 1954.

ELIAS CJ:

Yes, yes.

MS SCHOLTENS QC:

Yes, yes, it was the one before this.

ELIAS CJ:

Yes, yes.

MS SCHOLTENS QC:

So this –

ELIAS CJ:

So there's a different, an entirely different legislative framework.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

And we shouldn't waste time, you say, with the Local Government Act 2002?

MS SCHOLTENS QC:

Well, no, this was one the places where the Court found the authority.

ELIAS CJ:

Yes, I understand that, yes.

MS SCHOLTENS QC:
But I say that it's – you can't see any authority to fluoridate in those words.

And just to – you'll see the rest of Subpart 2 in terms of obligations relates to closing, you know, the impact on closing or transferring small water services and you have to go through quite an exhausting binding referendum process before you can do that, and contracting out of water services is also covered, and then the regulatory provisions are in Part 8. I don't think we need to go through those, just to note that they are there, and that the ones that relate to water in, specifically, are in sections 192 to 194 and they relate to the power to restrict water supply and wastage of water.

GLAZEBROOK J:
And what do you take from that?

MS SCHOLTENS QC:
That there's nothing in –

GLAZEBROOK J:
Oh, no specific – right, yes.

MS SCHOLTENS QC:
No specific, yes. Although there are regulatory powers, they don't point to the ability to fluoridate.

Then the Health Act, I've referred to that at submissions 69 to 91, and Part 2 of the Health Act is at…

ELIAS CJ:
So is there nothing in the Local Government Act to do with water treatment?

MS SCHOLTENS QC:
Not beyond – no, no.

ELIAS CJ:

No. All right.

GLAZEBROOK J:

At the time did the Health Act deal with that because, I mean, certainly, I would have thought the obligation to provide drinking water does say it must be safe to drink, whether –

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

However you do that?

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

I wouldn't have thought you could say you could provide unsafe drinking water.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Except it doesn't use the term "drinking water", does it?

GLAZEBROOK J:

It does under "water supply".

ELIAS CJ:

Right.

GLAZEBROOK J:

"Water supply" is defined as drinking water.

ELIAS CJ:

Right.

GLAZEBROOK J:

So the water services are water supplier.

MS SCHOLTENS QC:

Now I'm not sure, before this 2008 amendment which introduced a whole Part 2A relating to drinking water, I'm not quite sure what the law was, and it looked like perhaps my learned friends could assist with that, I'm not…

GLAZEBROOK J:

Well, are there…

MS SCHOLTENS QC:

They didn't think there were any.

GLAZEBROOK J:

No, well, I would have thought it's just implicit in drinking water that it has to be safe to drink.

ELIAS CJ:

Oh, yes.

GLAZEBROOK J:

And then you had the choice, presumably, as to how you did that?

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

And then in 2008 they decided to be more prescriptive.

MS SCHOLTENS QC:

Yes, that would make sense. So Part 2A, you can find that at tab 1 of the appellant's authorities, volume 1, and Part 2A begins at page 18, and you'll

see there the purpose being, “To protect the health and safety of people and communities by promoting adequate supplies of safe and wholesome drinking water from all drinking-water supplies.” So, safe and wholesome is the recurring theme with these provisions, so, and it overviews the Act there. So the Act provides for the Ministry to maintain a register, it provides for the Minister to issues or adopt drinking-water standards and imposes a ranges and duties on drinking-water suppliers, et cetera.

So there are a considerable number of provisions, perhaps if we just look at interpretation at 69G, page 21. At 22 “drinking water” is defined there as meaning, “Water that is potable or, in the case of water available for supply, water held out as being suitable for drinking,” blah, blah, blah. So potable –

ELIAS CJ:
What’s “water available for supply”?

MS SCHOLTENS QC:
So that's for drinking and other forms of domestic and food preparation use – I don’t know, “water available for supply”.

GLAZEBROOK J:
Sorry, what was the…

ELLEN FRANCE J:
What was the question?

ELIAS CJ:
Well, I just wondered what (a)(ii), “In the case of water available for supply.”

MS SCHOLTENS QC:
I don’t know, sorry, I hadn't thought about that.

ELIAS CJ:
No, that’s all right.

MS SCHOLTENS QC:

It may become clear. But “potable” is defined on page 26, “Water that does not contain or exhibit any determinands to any extent which exceeds the maximum acceptable values (other than the guideline values) specified in the drinking-water standards.” So we had, before this Act we had voluntary drinking water standards which nominated certain maximum allowable values for all the various things that might be in water, and so this Act then sought to bring that into force and drinking water standards were issued under the Act by the Minister, and we’ll come to that. So “determinands” is the description, and it’s defined on page 22, “Of the substances, organisms, characteristics or possible characteristics that can be dealt with and measured.” So lithium is a – sorry, not lithium – fluoride (I think lithium as well), fluoride is a determinand.

GLAZEBROOK J:

When you say that, is that just an assertion because it comes within the definition or is there something in the Standards?

MS SCHOLTENS QC:

In the Standards, you’ll see it’s referred to in the Standards.

GLAZEBROOK J:

Right.

MS SCHOLTENS QC:

Then “wholesome” in relation to drinking water is defined on page 28 as, “being potable” and essentially having the aesthetic – there are two, well, there are a number of determinands, but aesthetic determinands are the ones that affect things, not so much health but colour, taste, smell, et cetera, and wholesome water has those determinands managed as well as simply, as well as potable, which has the more significant determinands managed. So potable water might be perfectly okay to drink but looks a bit brown or something. You'll see at 69H, in terms of the duties, and there are a lot of them on drinking water suppliers, there's an “all practicable steps" requirement.

Then to go over to page 33, drinking-water standards. So again we say this is about ensuring that water is safe to drink. 69O, "The Minister may issue or adopt standards applicable to drinking water and they can specify or provide for all or any of the following," and then there's a list, "Requirements for drinking water safety, composition, maximum amounts," et cetera, and a number of other matters.

And then at (3), "The standards issued or adopted under this section," so, "May include guideline values for avoiding adverse aesthetic effects, may contain different provisions for different categories of bulk supply," et cetera. And then the fluoride provision that was put in after the Select Committee process, "Must not include any requirement that fluoride be added to drinking water." And so this is the provision that the Court of Appeal found confirmed that –

ELIAS CJ:
Sorry, which provision's that?

MS SCHOLTENS QC:
Section 69O(3)(c) on page 34, confirmed the finding that fluoride was necessarily authorised by the legislation.

WILLIAM YOUNG J:
It rather assumes fluoride might be added though doesn't it?

MS SCHOLTENS QC:
Well, that's a discussion I'd like to have, but I'd like to have it in the context of a clear picture of what these regulations, what these standards are all about, because it's, yeah, I've –

WILLIAM YOUNG J:
Well, take your own time.

MS SCHOLTENS QC:

Sorry, it is, I mean, it is obviously a provision that we're going to have to discuss and I do want to do that but can I just go through these matters first, and essentially to make the point that these are very much about, and to reiterate the point, they're about ensuring safety and potability. There's nothing in the duties and provisions here that would indicate one might add something to water for a therapeutic purpose. Certainly you can add chlorine to the water to disinfect it, to make it pure, but to add something simply for a purpose outside of the purposes of this provision.

ELIAS CJ:

So you'd require public health to be read down in the context of the legislation?

MS SCHOLTENS QC:

No. I certainly don't, I think public health is fairly clearly spelt out in the legislation, as to what qualifies.

GLAZEBROOK J:

Where's public health –

ELIAS CJ:

In H.

MS SCHOLTENS QC:

Sorry, which provision are you looking at, Ma'am?

ELIAS CJ:

I'm looking at O(2)(h).

WILLIAM YOUNG J:

It's at 69O(2).

MS SCHOLTENS QC:

Oh, I see, right. Yes, well, in that situation, because public health is mentioned in a number of places in the Local Government Act and obviously

in the Health Act, which is all about public health, I think you have to read it about the drinking water safety, that's what these things are all about.

ELIAS CJ:

Well, that's a submission you have to make that in the context of the legislation that is the only concern is with the safety of drinking water.

ELLEN FRANCE J:

Well, that does raise the question of why you then add almost immediately afterwards, "(3)(c), must not include any requirement that fluoride be added."

WILLIAM YOUNG J:

It rather suggests that it contemplates that fluoride might be added as a public health measure.

MS SCHOLTENS QC:

It reflects the, as the Hansard, the Select Committee report shows, the concern that the Minister might require, might use it to require fluoride to be added and so Parliament was prohibiting that requirement.

ELIAS CJ:

Is it part of the argument that a provision that says you mustn't require that fluoride be added to drinking water is a very backhanded way of empowering the making of regulations to add fluoride?

MS SCHOLTENS QC:

Yes…

WILLIAM YOUNG J:

I don't think it would be set, I don't think it's the argument. I don't think the argument is that this empowers it, it's that it presupposes…

GLAZEBROOK J:

Well, it may be the empowering, it comes under public health, the earlier, well, the empowering argument would be public health and the way it's set out,

that's an exclusion from the empowering requirement in terms of public health, so you'd have to read down public health to say it doesn't include fluoride.

ELIAS CJ:

Yes you do, you do.

GLAZEBROOK J:

Because that arguably is the empowering provision, the public health, (h).

MS SCHOLTENS QC:

The (h).

GLAZEBROOK J:

And those, what's in (3) is taking away from what has been provided in (2).

MS SCHOLTENS QC:

Except what I would say, that subsection (2) specifying the requirements for safety and drinking water composition.

GLAZEBROOK J:

Well, you say public health has to be read in the context of –

MS SCHOLTENS QC:

Yes, yes I do.

GLAZEBROOK J:

– say, aim of the Act of providing potable drinking water?

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

That's a – I'm paraphrasing that because it's obviously other obligations.

MS SCHOLTENS QC:

Yes, and that I guess is fluoridating, which in effect is adding a medicine to water, is that a matter relating to raw water or drinking water?

ELLEN FRANCE J:

Well you do then get back to the purpose though, 69A(1) “Protect the health and safety of people by promoting adequate supplies of safe and wholesome drinking water.”

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

What was “wholesome”, wholesome was defined, wasn't it?

MS SCHOLTENS QC:

Yes, that was when it had all the –

GLAZEBROOK J:

It says “potable”.

MS SCHOLTENS QC:

– the colour and smell and stuff taken out as well.

GLAZEBROOK J:

Well, again it really probably comes down to the Privy Council, the debate between the Canadian Supreme Court and the Privy Council in terms of what that might mean.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

Although it might be argued that that (h) is read just as it says, that it is a public health measure, this is a public health measure and it would be unjustified, just as any other public health measure would be justified.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

And so that the justified or determined by law is there but it may still necessarily be…

ELIAS CJ:

Not reasonable.

GLAZEBROOK J:

Not reasonable.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

And in fact even if it's authorised by law it may still not be reasonable because it's not required by law and so you could still argue that it shouldn't be added even if it is prescribed by law.

MS SCHOLTENS QC:

Yes, yes. So on the two arguments I suppose first is putting aside the Bill of Rights Act and thinking just in terms of the vires point. With all the – accepting all the matters that you've raised, I think I'd also submit that this is very low-level, you know, standards adopted in relation to drinking water, seems to be an odd place to find, to have a look at the standard to find authorisation.

GLAZEBROOK J:

Although it was clearly lawful in turn, because the Privy Council said so in respect of that previous Act that the Privy Council was dealing with. I think you said there was another one in between.

MS SCHOLTENS QC:

Yes, Municipal Corporation, yes, yes.

GLAZEBROOK J:

But if the other Act was in exactly the same terms –

MS SCHOLTENS QC:

More or less, yes.

GLAZEBROOK J:

– then it was probably lawful under that Act as well.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

So the argument must be it became unlawful under the Local Government Act because the Privy Council decision can't be explicitly transferred over, which is a slightly odd argument, I think, because it certainly was lawful because the Privy Council said so, and it mightn't have been right to say so but it did, and that's the end of it.

MS SCHOLTENS QC:

Yes, but if Parliament decided not to put into the 2002 Act the provision that authorised fluoridation according to the Privy Council –

GLAZEBROOK J:

Well, but that was my point before, that it did, didn't it, by saying drinking water?

WILLIAM YOUNG J:

Or continue.

GLAZEBROOK J:

Well, or continued but –

MS SCHOLTENS QC:

But it didn't put –

GLAZEBROOK J:

– I mean, I'd prefer to say the drinking water because that just seems to me to imply it has to be water that's fit to drink which is all that pure water meant.

MS SCHOLTENS QC:

Right, yes, I see what Your Honour is saying and the submission that we make is that it's a different provision in that it doesn't pick up the same points as the Privy Council, so Parliament chose not to re-enact the provision that authorised fluoridation.

GLAZEBROOK J:

Well, one would certainly have expected, if they chose not to re-enact it that they would have said, "We've decided we're not going to authorise it." So in a purposive sense it would be odd to think that Parliament was by, by very much by a side wind without actually saying so taking away the power to fluoridate.

MS SCHOLTENS QC:

Yes, and that's certainly the approach the Court of Appeal took. Again, I mean, it's in the written submissions. We argue that Parliament can be wrong and in this case we would say if that's what it was thinking then it was wrong.

GLAZEBROOK J:

Or that we should interpret the Local Government Act by saying that to add, at least to add extra impurities is not in accordance with the obligation to provide drinking water because we're not bound by the Privy Council reasoning.

MS SCHOLTENS QC:

Yes, and I wouldn't call them "impurities". I'd call them – this is a medicating water, that's what it is. It's adding something for a therapeutic purpose and nothing else.

GLAZEBROOK J:

I said at least in terms of adding the impurities which is –

MS SCHOLTENS QC:

Sorry, sorry.

GLAZEBROOK J:

Yes, I understand the broader argument, yes.

MS SCHOLTENS QC:

Yes, yes.

GLAZEBROOK J:

The broader argument is that that just doesn't come within the pure drinking water or drinking water because it's adding something that's not for the purpose of drinking water. It's for a totally different purpose.

MS SCHOLTENS QC:

That's right, yes.

It's just, the drinking water is just the, the method by which the medicine is delivered, and what we're looking for is some provision that will authorise the Local Government to deliver medicine through the water supply and that is what we won't find.

ELIAS CJ:

What's raw water?

MS SCHOLTENS QC:

Raw water? There's a definition for that.

GLAZEBROOK J:

That's intended for domestic and food preparation use.

O'REGAN J:

So what do you say the purpose of section 69O(3)(c) was? If there's no power for the standards to deal with fluoridation why is that there?

MS SCHOLTENS QC:

We say that Parliament intended to direct the Minister not to require fluoride be added to the drinking water.

WILLIAM YOUNG J:

But that's because Parliament mistakenly thought the Minister would otherwise have the power to do so.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

Or alternatively, for the avoidance of doubt because people were raising that issue, I suppose.

MS SCHOLTENS QC:

Yes. The – perhaps there is an argument that by incorporating by implication or corollary something which has the opposite purpose and effect we say that strained Parliament's language and I refer to the *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449 in support of this argument in relation to section 69O(3)(c), members of this Court will be well familiar with that case which the Court of Appeal held that following the *Atkinson* case that the – and, sorry, if you want to see it, it is at tab 14 – following the *Atkinson* case the Court held that an unlawful Ministry of Health policy which denied payment to certain classes of family carer in all the circumstances was not a family care policy as defined in the legislation that had been introduced specifically to validate the *Atkinson* family care policy. The statutorily defined term "family care policy" was a policy by which in certain cases, "The Ministry would pay certain classes of family carer." The Court found this did not allow the corollary a policy which in certain cases would not pay or would prohibit payment. They said, "Despite the fact that's what Parliament clearly intended it could not be implied into the legislation." We say that that is analogous and, in particular, I refer to paragraph 69 of that case which is on page 581. So it says at 69 and 70 where the Court refers to Mr Heron's argument, "May be correct that the Ministry did in fact permit payment for support services

provided by a range of non-resident family members but whatever that permissive policy was it was not the *Atkinson* policy. A family care policy now has a discrete and self-contained definition explicitly based upon the Ministry's power to pay 'in certain cases for providing disability support serves to… family members.' We cannot be expected to strain Parliament's language to incorporate by implication or corollary within the scope of that permissive definition a prohibitory policy which had the opposite purpose and effect, or to read into the plain words of the text what the Ministry now submits the words were meant to be. And, as this Court has previously observed, the inquiry is not as to what the legislature meant to say but as to what it means by what it has in fact said. To that we would add the words, 'Nor can the Court be expected to adopt an interpretation based on what Parliament has not said'.'"

WILLIAM YOUNG J:

The stronger bit of this or perhaps to me the perhaps more relevant aspect of these provisions is not so much whether they discretely authorise the addition of fluoride to water but whether they proceed on an assumption, a legislative assumption, that there is power to do so by reason of the Privy Council judgment and the continuation of the water services powered by the local Government agent. So what's your response to that?

MS SCHOLTENS QC:

Well, if they did wouldn't you expect to see at least something that referred to medication.

WILLIAM YOUNG J:

They may have thought – I'm not trying to be offensive – but they may have thought it was too obvious, it was so obvious it went without saying that when they continued the power to provide water services they were continuing everything that went with it and then this legislation comes over the top of it and is drafted in terms which I think do assume a power to fluoridate. Now the question what should we do about that, because I mean -

GLAZEBROOK J:
And whether that's enough to say prescribed by law that there's an assumption, I suppose, is the other, the other issue.

MS SCHOLTENS QC:
I think when it comes to the Bill of Rights Act if we are dealing with a section 11 right, as I ask you to find, then it's a bit different because then, yes, I don't think Parliament could have presumed that that power would simply continue.

So what the Courts, I submit, did with section 69O(3)(c) was imply an ability to fluoridate drinking water from a provision which has the opposite purpose and effect, namely, a prohibition on requiring fluoridation of drinking water. That's what it says.

ELIAS CJ:
In any event, I'm not sure, no one's relying on the Minister having issued drinking water standards.

WILLIAM YOUNG J:
I think they are.

ELIAS CJ:
Are they? Oh, they are.

GLAZEBROOK J:
Yes, because there is a reference in those standards.

ELIAS CJ:
To fluoride? Okay.

MS SCHOLTENS QC:
It's not to fluoride, it's just fluoride appears in the drinking water standards and the Court found, the Court of Appeal found that with the –

ELIAS CJ:

Oh yes, in terms of…

GLAZEBROOK J:

Whether that helps, if there isn't a power to do it then it probably doesn't help the standards anyway but it does help the, it certainly helps the argument on assumptions.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

Yes, but the Court found, it really went to four sources to find the, to interpret, yes, to find the power and that was the Local Government Act, the Health Act, Drinking-Water Standards for New Zealand 2005 (Revised 2008) and something else, sorry, it's gone. Maybe it was just three.

So then the final point, and it's made in the submissions, so I'd like to take you to the case about Parliament's assumptions do not make the law. So if Parliament assumed something that doesn't necessarily make it so. Obviously this may be limited in its effect but we would say it would apply here, and this is the House of Lords decision in *Inland Revenue Commissioners v Dowdall, O'Mahoney & Co Ltd* [1952] AC 401 (HL), and it's at tab 22 of volume 2 of our authorities.

ELIAS CJ:

Actually we had a case in the Supreme Court about misfiring, what was that?

WILLIAM YOUNG J:

The case about the Bathurst resources.

MS SCHOLTENS QC:

Oh, okay, that was a similar principle, is that what you're saying?

WILLIAM YOUNG J:
Yes.

MS SCHOLTENS QC:
Right, I'm sorry, I wasn't aware of that. So this one, which I thought Justice Glazebrook might enjoy, because it's a tax case, she would, at least, understand it. It relates to the company you pay tax in both Ireland and it was then assessed in the UK and whether the proportion of the tax paid in Ireland ought to be deductible and it was clear that Parliament intended that that was to be the case but the Court found that to be immaterial. So at page 857, no perhaps go to 844, you'll see there Lord Reid indicating, in the middle of the page, just after the quote, he's referring to, I'm not sure what he's referring to, "This certainly indicates that Parliament, when enacting this legislation must have been of the opinion that foreign income tax was in some cases at least a good deduction under some other provision of income tax legislation, and it is difficult to see what that other provision could be if not rule 3(a)." And then at 357, which is perhaps the clearest of the judgments, 357, the last page, this is Lord Radcliffe –

O'REGAN J:
Is it 857?

MS SCHOLTENS QC:
857. In the first full paragraph, "What it comes to is this. Parliament has not made any enactment that requires or authorizes the making of the allowances now claimed. It has not declared the law to be that such allowances are proper deductions. The most that can be aid is that it is fairly certain that those who framed section 30 of the Finance Act 1940 believed that such allowances ought to be given or were in fact being given." Then, "A misuse of words to say that the law Courts ought to give effect to the 'intention' of Parliament that overseas excess profits tax should be allowed. The beliefs or assumptions of those who frame Acts of Parliament cannot make the law. Section 30 will be just as much effective in those cases when it does operate as it would be if overseas excess profits tax were not, in general, an allowable deduction, for wherever it operates it operates under the authority given by

Parliament in that Act and not otherwise." And it refers to the *Ayrshire Employers' Mutual Insurance Association Ltd v Inland Revenue Commissioners* [1946] SC (HL) 1 where they, "Disregarded the plain, though mistaken, assumption of the legislature as to the prevailing law." And so the submission there is what you have is a, if you read it that way, it's a plain but mistaken assumption of the prevailing law.

GLAZEBROOK J:
Although if they did have that it was probably induced by the Privy Council decision wasn't it? This isn't just an assumption – this is an assumption that came out of the air that that assumption of Parliament is one that came out of a clear indication that it was authorised.

MS SCHOLTENS QC:
Yes.

GLAZEBROOK J:
Well, not only that, it came out of the fact that it was authorised because the Privy Council had said so.

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
But under a different legislative…

GLAZEBROOK J:
Well still, but it's whether the legislation was actually – it's not a mistaken assumption in that sense and it was a true assumption that it was certainly authorised under the previous law.

MS SCHOLTENS QC:
Yes. I'll just come back to the point that they didn't, the law that previously authorised it wasn't re-enacted.

ELIAS CJ:

When did that change?

MS SCHOLTENS QC:

2002.

GLAZEBROOK J:

Because the earlier – it had been re-enacted under those previous legislation but that's assuming that continue and drinking water doesn't re-enact the previous legislation.

MS SCHOLTENS QC:

Yes, yes.

GLAZEBROOK J:

And there isn't any mistaken assumption as to the previous law. They were totally right on the previous law. It was authorised.

MS SCHOLTENS QC:

Yes. And again, 2002, you do have the Bill of Rights Act overlay then as well.

GLAZEBROOK J:

Yes.

GLAZEBROOK J:

Although then you probably do have to deal with *Hansen*.

MS SCHOLTENS QC:

With?

GLAZEBROOK J:

Well just how that legislation is interpreted. Because that's a different argument, to say that you shall interpret the Local Government Act in light of the Bill of Rights is a different argument from the one that we're making at the moment.

MS SCHOLTENS QC:

Bill of Rights Act, yes, yes, and I'll be coming to that in the prescribed by law but it won't take long but it's really a gloss on this, on this argument.

GLAZEBROOK J:

Yes.

ELIAS CJ:

So does that, that complete –

MS SCHOLTENS QC:

Yes it does Your Honour, just the, sorry there was one point that I just was looking for –

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

– and that is, I think Your Honours will have seen it because you've read this, but in terms of paragraph 65 of the submission, we just note that the submission that – the quote from the *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 case, which I know is well known to Your Honours and you referred to it in the *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 case, but that we say, in terms of express language and logic, we don't find this authorisation in these provisions.

Now I didn't take the Court to the Drinking-Water Standards and I should, at least, just orientate you to them.

ELLEN FRANCE J:

I think it's Mr Prendergast's affidavit.

MS SCHOLTENS QC:

So volume 6, which is part of the Medicines Act Appeal but I gather the standards was before the Court in the South Taranaki case as well. So we're looking at tab A, page 1245, it's perhaps best to start at – well, the beginning you'll see these are the standards, the forward by the Director-General of Health, on page 1229. These are the revised in 2008 version. Again, what you'll find in all of these standards, I submit, is a focus on safety and quality of the water. That's what it's all about.

And then the water quality standards themselves – there's no overview, which is worth considering, at pages 1238 through to 1242, or 1243. And then at 1244 the standards themselves, you'll see the first page has microbial determinands under 2.2. And then on page 1245, this is the inorganic determinands and this is where you'll find fluoride, it's about halfway down, it's on in the white boxes, and you'll see fluoride and it's got 1.5 milligrams per litre as a maximum allowable value. And then you'll note –

WILLIAM YOUNG J:

Sorry, I haven't got this. What page? 12 –

GLAZEBROOK J:

45. Yes you are there, about half-way down.

ELLEN FRANCE J:

We have got a better copy somewhere I think but…

ELIAS CJ:

Yes, I've seen something better than this.

GLAZEBROOK J:

About half-way down in a white box.

MS SCHOLTENS QC:

Yes.

O'REGAN J:
And footnote 2 as well.

MS SCHOLTENS QC:
Yes. Footnote 2, I was going to draw this to your attention. "So for oral health reasons the Ministry of Health recommends that the fluoride content for drinking water in New Zealand be in the range of 0.7 to 1 milligrams per litre. This is not a MAV."

WILLIAM YOUNG J:
I see there's a reference in footnote 3 to nitrate something or other, which I can't read so is that introduced into water for health purposes too?

MS SCHOLTENS QC:
No I think this is a maximum value that's probably been reduced because of these concern.

GLAZEBROOK J:
That's not a footnote to fluoride anyway is it, it relates to something else.

WILLIAM YOUNG J:
No it's another one, yes.

GLAZEBROOK J:
I can't actually work out what it is. It might be –

WILLIAM YOUNG J:
It's nitrate something or other, which I can't read.

GLAZEBROOK J:
Yes it's one further, after nickel.

MS SCHOLTENS QC:
So presumably that's – they've brought it down because these are maximum values relate to what they've concluded can be safe.

WILLIAM YOUNG J:

What's “short term” only? Does that just mean for short periods?

MS SCHOLTENS QC:

Again, I presume, “Short term exposure. Now short term only.” I don't know.

ELIAS CJ:

What's that a footnote to?

GLAZEBROOK J:

That this is a nitrate something or other, it’s one of the other ones, not fluoride.

WILLIAM YOUNG J:

Looks like – it’s the cyanide. It’s got, “Total cyanide, short term only.”

MS SCHOLTENS QC:

This says there's a nitrate short term, nitrite long term, nitrite short term in the table. And it looks like, the instructions, under “Remarks” says, “Expressed in milligrams per litre as nitrous oxide. The sum of the ratio of the concentrations of nitrate and nitrite to each of their respective MAVs must not exceed one.” So something special about it.

O'REGAN J:

So a determinand is not necessarily something added, it’s just something that’s not in the finished product?

MS SCHOLTENS QC:

Yes, yes absolutely. Yes, in fact, very few of them are added. The only ones I’m aware of are the ones that are used to make water clean and clear and fluoride but there's certainly quite a lot of them. And the aesthetic determinands are the ones on page 1248 and 9, so those are the sort of extra ones that make the water, if you get them under control you've got wholesome water but if you don’t you've still got potable water, which you can drink. Yes. So I think, Your Honour, I have come to the end of that part, up to the third issue. I have not got long to go with the third and fourth issues.

ELIAS CJ:
All right, because we really do need to conclude the appellant's…

MS SCHOLTENS QC:
Yes.

ELIAS CJ:
Just thinking of how much we might have to get through. Anyway, perhaps you can just have a look and see what time may be required. We would be able to sit till five if you think that we're going to be squeezed for time tomorrow.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.19 PM

ELIAS CJ:
Thank you, yes Ms Scholtens.

MS SCHOLTENS QC:
Thank you, Your Honour.

The third issue for the appellant whether the limits are prescribed by law sufficiently for the purposes of section 5, so this is page 20 of the written submissions. And fairly briefly on this one, the much cited quote of His Honour Justice McGrath in *Hansen* is noted in the outline. In *Atkinson* the focus was placed firmly on the need to be clear about the limits to the right and at volume 3, tab 27 of the appellant's authorities *Atkinson* page 1078 at the end of the decision the Court commented in paras 181 to 183 about prescribed by law. "Discussion at the hearing about whether the authorisation for the policy was sufficiently specific and publicly accessible to meet the requirements in section 5, that the limit is one prescribed by law. The issue potentially arises because there is a statute which contains a general provision, although not without some specificity as to the funding arrangements. The specifics of the policy are then found in the various

service specifications and in contractual arrangements." So a number of documents. "There is little doubt that the protection under section 5 applies only if the limit on the section 19 right is prescribed by law." Then the Court quoted from the *Hansen* judgment. And finally, "The need to be able to identify the limit with precision reflects the nature of the analysis required under section 5 to determine whether the limit is indeed reasonable and demonstrably justified. It would be open to argument therefore that an administrative policy not prescribed in that manner did not meet the requirement."

So that just emphasises the importance of the limits being clear and accessible. The submission is made that in this case you can't find anywhere in the legislation the authority to add compounds such as fluoride to the water for a medical purpose, therapeutic purpose, non-water supply purpose.

I think my learned friend for the Crown makes some submissions on the basis that there is a discretion resting with the Council here and so the focus is on the discretion. I submit that the *Attorney-General v IDEA Services* [2013] 2 NZLR 512 (HC) judgment of the High Court is helpful here. It really just brings the whole thing back again to the need to be very clear in the boundaries on the discretion conferred.

ELIAS CJ:
Where do we find that?

MS SCHOLTENS QC:
IDEA Services is in the Crown's bundle, second respondents. Sorry, no it's not. It's got a hyperlink missing. I can give you the –

ELIAS CJ:
Well just tell us the submission you make, we've got the reference to –

MS SCHOLTENS QC:
Yes I think I've pretty much made it which is that – and I've got the records, thank you. It is in the first respondent's authorities, volume 1, tab 4. Sorry.

ELIAS CJ:

So what were you wanting, or were you not wanting to take us there.

MS SCHOLTENS QC:

No I wasn't wanting to take you to it, Your Honour, just to note that the three requirements flow from prescribed by law in the context of the exercise of a statutory discretion noted in that case. "The limitation needs to be within the discretion conferred be sufficiently precise and accessible." So it's the same, essentially the same framework from *Hansen* that is being overlaid on a discretionary power. So I understand my learned friend, and perhaps it might be sensible to hear from him on this first, but submits that there is a difference in looking at prescribed by law.

ELIAS CJ:

Well, I have some slight difficulty with the submission, which is your principle submission, that the legislation is deficient because it's only an implied empowering provision. That's really your submission isn't it? But there's some difficulty I would have, well, I can understand why it's being said, that the more sensible way to look at it is in terms of application and whether the standard that's set, or adopted, by the person empowered to make the decision is what you focus on. There's something slightly odd about saying the prescribed by law has to apply to the empowering provision.

MS SCHOLTENS QC:

The way that I have looked at it is that the – going back to, I guess, the *Hansen* approach, is – so ascertain Parliament's intended meaning and then whether that, and that's what we've just been looking at. Then whether that meaning is apparently inconsistent with a right or freedom and it's in this exercise is it inconsistent –

ELIAS CJ:

But Parliament isn't prescribing fluoride, the application of fluoride. It's simply empowering the local authorities to do that.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

I just haven't encountered an argument, it may well be there is some authority but I haven't encountered an argument that says providing a general power of empowerment, sorry, general power to apply or prescribe runs foul of the requirement on limitation, that it be prescribed.

MS SCHOLTENS QC:

So what you would expect is that when, for example, the Council decides that they are going to fluoridate with water and so the limit, you run up against the right, at that stage that's where we should be focused.

ELIAS CJ:

Well it was just really an open question. I just haven't thought about it, or encountered it in this sort of…

GLAZEBROOK J:

I'm not sure that's your argument though is it?

MS SCHOLTENS QC:

No it's not.

GLAZEBROOK J:

I think you say it's not prescribed by law because Parliament hasn't –

WILLIAM YOUNG J:

Can't it be prescribed by implication?

MS SCHOLTENS QC:

Well it might be prescribed but not here because the implication is so difficult to – it's not accessible, it's not clear. This is –

WILLIAM YOUNG J:
Well if the implication is along the lines that it's so obvious that it goes without saying wouldn't that be prescribed by law?

MS SCHOLTENS QC:
Yes.

GLAZEBROOK J:
So your argument is based on the fact that it's not prescribed by law because you can't interpret the legislation to say that the local authorities are empowered to add fluoride.

MS SCHOLTENS QC:
That's right.

GLAZEBROOK J:
It's not an argument that legislation empowering to add fluoride would not be prescribed by law.

ELIAS CJ:
I see, yes I see.

GLAZEBROOK J:
As I understood it.

MS SCHOLTENS QC:
Yes, no that's right, I'm sorry, I was actually trying to respond to an argument of my friend's. That probably wasn't a good idea, he should have made it first but yes, that's right, it's interpreting, and in interpreting the legislation in the prescribed by law stage of the analysis. Now we are going to interpret it against the Bill of Rights Act so we are, sorry, that takes you back to the scope of the right doesn't it, yeah. No, so now we're –

GLAZEBROOK J:
Although *Hansen* would have you interpret it in an ordinary sense before you looked at the Bill of Rights wouldn't it?

MS SCHOLTENS QC:

Yes, yes, so –

GLAZEBROOK J:

Not the Chief Justice's judgment but the majority judgment.

MS SCHOLTENS QC:

Yes, His Honour Justice Tipping, you start by ascertaining Parliament's intended meaning and then whether that meaning is apparently inconsistent, but I – don't you still have the standard statutory interpretation norms that will apply here but –

GLAZEBROOK J:

Yes, it's just I wasn't sure whether you were arguing it should be interpreted in light of the Bill of Rights now which isn't what *Hansen* says, well at least not at the first stage.

MS SCHOLTENS QC:

No. Well I don't think there's more to be said other than, you know, this import of the submission is that this is not somewhere where the limits are clearly identifiable expressed with precision and readily accessible.

GLAZEBROOK J:

I'm not quite sure why you're talking about limits?

MS SCHOLTENS QC:

The limit on the section 11 right which is the power to add fluoride to the water.

ELLEN FRANCE J:

So you're saying is this a justified limit.

GLAZEBROOK J:

I see what you mean, that's the limit, yes I see what you mean.

MS SCHOLTENS QC:

So turning to the fourth issue. The section 5 is fluoridation demonstrably justified test. Here the submissions and appendix B are directed at this point.

WILLIAM YOUNG J:

So you say that we have to decide it was a good thing or a bad thing?

MS SCHOLTENS QC:

I think if you get to this point you have to decide whether the Council has persuaded you that the matter is a justifiable limit.

WILLIAM YOUNG J:

But does that mean we look at it ourselves as to whether it's a good thing or a bad thing?

MS SCHOLTENS QC:

Yes. So the first submission, there were I think a couple of points just arising in relation to the methodology, if I can call it that, in relation to section 5, again looking at *Hansen*. So the first is the issue of a threshold which is something that we argue in this situation at least the Court didn't give an appropriate emphasis to the values that are at stake here, bodily integrity, dignity, autonomy, those values that underpin the section 11 right. And we say that to properly give effect to the right requires that the types of diseases that might justify treating a citizen without their consent would need to be carefully considered and they may be limited to circumstances where a failure to treat puts other citizens at risk which is what one could glean from the *White Paper*.

So tooth decay obviously doesn't meet that threshold, we say, it's not contagious, it's easily prevented, it's easily treated, it poses no risk to third parties, but it's a manageable risk to the individual. Those are all the sorts of things that – those are the sorts of things that we'd expect to see as part of the section 5 analysis.

Then the standard of review, the onus of proving that the limit of the right is demonstrably justified is on the Council as the party seeking to limit that right.

We say that there were two errors in the way the Court approached it. First, we say there is no deference due in this case to Parliament as Parliament has not considered the matter. This would only be relevant where Parliament had recognised the measure it proposed to be limiting in the section 11 right and discussed its reasons for so doing.

WILLIAM YOUNG J:
I'm just puzzled thinking about this question of deciding whether fluoride is a good thing or a bad thing. If we decided it was a bad thing would we interpret the legislation against permitting it whereas if we thought it was a good thing that wouldn't be a reason for interpreting the legislation to allow it? It's seems to be the corollary of your argument.

MS SCHOLTENS QC:
If you thought it was, if you thought –

WILLIAM YOUNG J:
Was a bad thing. We would say it's not a limitation that can be justified in a democratic society, therefore we don't permit it.

MS SCHOLTENS QC:
Yes. If you got to a point in the analysis where you had to work out whether it was a good thing or a bad thing.

WILLIAM YOUNG J:
Yes.

ELIAS CJ:
Well, and you'd do a proportionality analysis. You wouldn't really be saying –

WILLIAM YOUNG J:
No, no, but I'm not saying –

ELIAS CJ:
Yes.

WILLIAM YOUNG J:

I'm not really hung up on the language of good or bad.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

But the interpretation of the section would depend on, of the legislation, would depend upon what we think the underlying policy should be.

MS SCHOLTENS QC:

Yes, if you get to that point. I mean, we've taken –

WILLIAM YOUNG J:

I wonder if that's right?

MS SCHOLTENS QC:

We've certainly taken the view that if the Court were to recognise that a section 11 right was engaged then this would be something that would interest Parliament and that they would then consider in terms of…

ELIAS CJ:

Well, you might do in *Moonen v Film and Literature Board of Review (No 1)* [2000] 2 NZLR 9 (CA). You might say it doesn't look as if some of these matters were properly considered –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– and it should go back to be, well, I suppose –

MS SCHOLTENS QC:

Right.

ELIAS CJ:

– is it a decision? I don't know whether it's one that you'd quash and send back.

WILLIAM YOUNG J:

What happens to the legislation in the meantime?

MS SCHOLTENS QC:

Well, this is a –

ELIAS CJ:

No, no, I'm talking about the – not the legislation. We're onto now the application, aren't we?

MS SCHOLTENS QC:

Yes. Certainly, the merits and demerits of fluoride is not the sort of thing I would imagine a Court would want to –

WILLIAM YOUNG J:

But aren't we talking about interpreting the legislation at this stage?

MS SCHOLTENS QC:

Pardon?

WILLIAM YOUNG J:

We're talking about an interpretation, aren't we?

GLAZEBROOK J:

Well, this assumes, isn't it, that we've interpreted the legislation –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– to say you can put fluoride in just on an ordinary purpose of interpretation.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Yes, but then you're coming to –

GLAZEBROOK J:

Then you see whether it's justified. If you say it's not, you try and interpret the legislation in another way and if you can't that's – it's a section 4.

WILLIAM YOUNG J:

I mean, this is essentially the point. If we – to – I'm simplifying, we think it's a bad thing.

GLAZEBROOK J:

You're pulling back a few steps.

WILLIAM YOUNG J:

But we think it's a bad thing that would encourage us to interpret it, the legislation, against permitting it.

GLAZEBROOK J:

To the extent that that's possible.

ELIAS CJ:

Well, that's what section 6 says.

GLAZEBROOK J:

Well, that would be the *Hansen*. You would try to interpret it at that –

ELIAS CJ:

Yes.

GLAZEBROOK J:

– having decided it was non-justified. At least, I think it is. I've just recently gone through it but I think that's the start, because I hate those stages, to be honest, but that's what I think it says.

ELIAS CJ:

Anyway, it's only methodology.

MS SCHOLTENS QC:

Yes. Yes, it is, and, I mean, in terms of the whole section 5 analysis there's got to be a wide range of things that could be considered and I would have thought different approaches and different results that could be arrived at among them, just particularly where the Court did not have all the relevant information in front of it, as here it has a snapshot of information about the merits of fluoridation.

So the second point about the standard of review in the High Court was about their assessment of the evidence and the conclusion that there was a sufficient evidential basis to support the conclusion that the significant advantages of fluoridation clearly outweigh the increased risk of fluorosis. So they did get down to that detail.

WILLIAM YOUNG J:

But that's looking at it through the eyes of the Council rather than directly through the eyes of the Court, isn't it?

MS SCHOLTENS QC:

Yes, yes, that's what the Court held.

WILLIAM YOUNG J:

So what do you say we should do? Look at it directly through our own eyes?

ELIAS CJ:

Well, that's the big Bill of Rights Act debate, isn't it, whether when you have to make the assessment the Court does it or whether it's a judicial review approach.

MS SCHOLTENS QC:

Yes, yes.

ELIAS CJ:

And that's, you know, the Supreme Court UK is backsliding on that.

MS SCHOLTENS QC:

Right.

ELIAS CJ:

So it's all in a bit of a state of flux, I would have thought.

MS SCHOLTENS QC:

And I would imagine it would be very difficult for the Court to do a full analysis and judgment of what's – of the science, especially on the basis of what it has, and what the test scene appears to call for is for the Council to demonstrate on the balance of probabilities that it's, these things are there.

WILLIAM YOUNG J:

It's a good thing. Not that it's arguable that it's a good thing or the view that it's a good thing was open to it.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Well it's not as large as that, is it, it's that it is a justifiable limit.

MS SCHOLTENS QC:

Yes.

GLAZEBROOK J:

Under that it doesn't have to be the best thing.

ELIAS CJ:

Well it has to be no more than is –

GLAZEBROOK J:

Reasonably necessary.

ELIAS CJ:

– reasonably necessary to infringe the right.

MS SCHOLTENS QC:

Yes. And so it's up to the Council to demonstrate, to get you to a certain point where you might consider that things are – it's looking like its justified and then perhaps on the basis of what the appellant puts up, see whether that holds.

GLAZEBROOK J:

And what do you say, we couldn't get to that stage?

MS SCHOLTENS QC:

No, you could, in terms of assessment the evidence there is a number of paragraphs in the written submission and in appendix. So from the appellant's perspective in response to the onus that's on the Council we'd say, well, if you just look at the two really significant internationally recognised reports which are the York review which is in the supplementary volume but it is something that's been in the evidence in previous Courts, it just seemed to miss getting into the main part. So it's the whole of that volume, supplementary volume on that. That report – it's a review of all the various studies and rates them by how reliable they are and that was in 2000, and then the Cochrane review which does much the same thing but was concerned to see if things had changed, it's 15 years later, and that's at volume 7, page 1534 and that's a significant report review as well. They are

both international reviews and they both assess the evidence over the last 50 years or so relating to fluoridation.

ELLEN FRANCE J:
Having read them both, you could at least come to the view that there are benefits from fluoridation.

MS SCHOLTENS QC:
Yes.

ELLEN FRANCE J:
You might quibble about the extent of those.

MS SCHOLTENS QC:
You might quibble about how firmly they have been established because I think both reports refer to the need for more robust evidence.

ELLEN FRANCE J:
Yes, that's true but in terms of the assessment that we would be undertaking why is that not sufficient, that is, there are benefits, yes, more research would be good and then if we look at what happens elsewhere, United States, for example, fairly recently have reiterated that they will carry on with fluoridation. Why do you say that wouldn't meet the section 5 test?

MS SCHOLTENS QC:
Without going further than those two reports when you look at the evidence, or the concerns about the evidence of the overall efficacy, so is it worth doing, are the benefits that we get from fluoride worth what appear to be the detriments, and are there detriments that we haven't properly tested yet. I mean that's a fair summary of where that evidence takes you. Then, I mean in terms of, for example, the US situation I think there's some evidence from one of the senior US scientists involved in fluoridation, sorry, I've forgotten her name, but it is in the appellant's evidence, and I think most of the key evidence is summarised too but there are, there is much debate and, I guess the Court of Appeal certainly seems to accept that too.

ELLEN FRANCE J:

Well you are really saying the standard, in terms of section 5, it has to be what? I'm just trying to see how you would express that. There can't be any doubt or?

MS SCHOLTENS QC:

No, well because the merits of fluoridation would be one and one important, but one of the various things that presumably would be considered at the justification stage, but if – depending, for example, if you thought that the right that was being infringed was a very significant right then you might want very powerful evidence to support that infringement. If you thought it was less significant then you might not require the same level of information.

GLAZEBROOK J:

Well is that any more than proportionality?

MS SCHOLTENS QC:

No I think that's –

GLAZEBROOK J:

That is proportionality?

MS SCHOLTENS QC:

Yes, yes, I think so. Then there are only a few brief points that I wanted to finish on. First, was the rational, no rational connection, we argue, because it's clear that the measure that is delivered systematically, by drinking water, was for an effect that only works topically on the surface of the teeth, so querying whether this is a rational connection.

Secondly, the limit is more than reasonably necessary, so the least rights limiting measure. The Court did not consider whether the desired objective could be achieved by another effective method that had less impact on the right. And counsel relies inter alia on *Hansen* at 217, where His Honour Justice McGrath considered that there was an alternative which was more appropriate and the enquiry here is into whether there was an alternative but

less intrusive means of addressing the legislative objection, which would have a similar level of effectiveness and we agree that that is the approach.

GLAZEBROOK J:
And what evidence do we have in front of us about that?

MS SCHOLTENS QC:
We have evidence about toothbrushing in Scotland. I think there is evidence about, I'm afraid I'd need to come back to you with a list but...

ELLEN FRANCE J:
Well there is some discussion, I think, of it in the Court of Appeal judgment, from memory.

MS SCHOLTENS QC:
Apparently at 120 of our submissions we've listed a number. So 120, alternatives such as – there's a reference there to the evidence, that's not before Your Honour, at, before the Court, at 90, but there's certainly another reference to a Scottish toothbrushing programme and there's evidence in relation to sugary drinks, snacks, in schools, fluoridating salt, fluoride tablets. So Dr Litras apparently addresses that evidence. And then, finally, the limit is not proportionate, we say, to the objective. The Court erred in failing to consider the overall weakness of the evidence of benefit. And – yes, that's effectively that.

And then finally, section 6, we submit that the only interpretation consistent with section 11, the section 11 right open to the Court, is that there is no authority for the Council to add a therapeutic product to the water supply. The Council argues under section 4 that there is no possible alternative interpretation, that Parliament's so clear that it meant to limit the right its meaning should be adopted, and in response to that we simply say that that is, we say, not this case.

Now if I could, unless there are any questions, could I hand over to my learned junior to deal with the last two issues, and we should be fine for time?

ELIAS CJ:
Yes, thank you. Yes, Ms Hansen.

MS HANSEN:
May it please the Court, I will address Your Honours on the fifth and sixth issues, and just to recap, the fifth issue is whether HFA and SSF are medicines under the Medicines Act in the absence of a validly made regulation declaring them not to be medicines for the purposes of the Act, and the sixth issue is whether the Medicines Amendment Regulations 2015 are valid.

And if I can summarise at this point, I have four key points. First, the decision of the High Court in the Medicines Act case is wrong as a matter of statutory interpretation. The definition of "medicine" in section 3 of the Medicines Act plainly applies to HFA and SSF. HFA and SSF also qualify as general sale medicines under section 99 of the Act. And it's my submission that in its written submission the Crown appears to have implicitly conceded this point as it does not seek to defend the High Court's reasoning.

The second point is that if the Medicines Act decision is wrong then the Medicines Amendment Regulations were made on an error of law because they were premised on the High Court correctly stating the law about the status of HFA and SSF for the purposes of the Medicines Act, and my submission is that the regulations are consequentially invalid.

And the third point is that the regulations are additionally invalid because they were made for the improper purpose of rendering the appellant's appeal against the Medicines Act decision moot. This constitutes an unjustifiable interference by the executive and Council in the administration of justice.

And the fourth point is that the appellant's appeal against the Medicines Act decision is not moot, and perhaps I'll deal with the mootness point first. So as set out in the written submissions at paragraph 125 the appellant's primary submission is that the Court of Appeal was required to hear and determine the Medicines Act appeal and that it was not moot for several reasons, and the

first reason, which is set out in paragraph 126, is that as the Crown conceded and the High Court accepted in the Medicines Regulations case, the Medicines Act appeal was not moot as the effect of the regulations could only be prospective.

WILLIAM YOUNG J:
But that's between the parties it was moot because the Council hadn't – I suppose, sorry, who were the parties to the Medicines Act case?

MS HANSEN:
The appellant and the Attorney-General. Perhaps I can address that, Sir, with my next point is that the regulations cannot and do not determine whether HFA and SSF were medicines prior to the regulations.

WILLIAM YOUNG J:
Yes I understand that.

MS HANSEN:
And the status of HFA and SSF prior to or in the absence of the regulations was the issue in the High Court and remains the live issue between the parties now.

ELLEN FRANCE J:
Sorry, Ms Hansen, could I just check? In Justice Collins' judgment he says, paragraph 2, that you sought two declarations. Is that an accurate summary of what was sought by that point, because I know the amended statement of claim is slightly different?

MS HANSEN:
The statement – the was only one statement of claim in the Medicines Act case.

ELLEN FRANCE J:

So what he refers to is a declaration that when manufactured, sold, and supplied or distributed by location authorities for the purposes of community water fluoridation HFA and SSF are medicines under the Act?

MS HANSEN:

Yes.

ELLEN FRANCE J:

And then the Ministry was required to take all necessary steps to ensure manufacture, et cetera, complied.

MS HANSEN:

That's right and can I just check the statement of claim which is in volume 1.

ELIAS CJ:

What tab?

MS HANSEN:

Tab 9. But effectively what was sought was that a declaration that at that time they were medicines and needed to be regulated under the Medicines Act and obviously one step the Minister could properly take having been apprised of that correct legal position is to consider a regulation, however, that would be on the basis that the substances were medicines and he would have to consider whether that was appropriate to no longer have or not to apply the Medicines Act controls to that substance.

So the status of the regulations, in my submission, or prior to the regulations, status of HFA and SSF prior to or in the absence of the regulations is the live issue and it remains the live issue and it's a significant issue because, in my submission, it will demonstrate two things. It will demonstrate whether the Crown has at all times complied with the Medicines Act in relation to HFA and SSF and, secondly, it will demonstrate, and this is a point made at paragraph 128 of the written submissions, it will demonstrate whether a fundamental premise underpinning the practice of fluoridation, namely that fluoridation

chemicals have never qualified for regulation as medicines under the Medicines Act is correct. So in my submission there is no question that a live issue exists and that the appeal is not moot.

But if there is any doubt, and these are matters that have not been raised in the written submissions and are responding to the Crown submissions, if there is any doubt the appellant submits the Court should hear the appeal as the issue is of wider public significance. It is of considerable importance to the appellant and, thirdly, it has implications, in my submission, beyond the Medicines Act decision.

So the first reason the Court should hear the appeal is that there is a significant public interest utility in the Court addressing the issue of whether the Crown has properly administered the Medicines Act in relation to HFA and SSF prior to the regulations and determining whether it has or has not. It is axiomatic that Governments must implement their policies lawfully and what the appellant seeks to know in relation to the fluoridation chemicals is whether the Crown has conducted itself in accordance with law. This is unquestionably an issue of significant public importance. The Crown must conduct itself in accordance with the law because if it doesn't the Crown's own behaviour undermines the willingness of citizens to obey the law.

Now on the issue of public interest utility, a particular case the appellant relies on is a decision of Justice Brewer in the High Court in *Taylor v Attorney-General* [2013] NZHC 1659. I have copies. May I hand that up?

ELIAS CJ:
Yes.

MS HANSEN:
So the issue in this case was whether regulations banning smoking in prisons was unlawful and these regulations were in force from 2 November 2012 to 4 March 2013, and they were retrospectively validated by an Act from 12 February 2013 but not for the period prior. So the Crown resisted the

judicial review application and said there was no point in the Judge giving judgment because nothing he could order could have any utility, and the Judge decided he should give judgment, and I refer Your Honours in particular to paragraph 13. He says, "I have decided I should give judgment on the substantive issues raised by the case." The principal pleading is that the anti-smoking regulations were unlawful and not authorised by the statute. "It is part of our democracy that Parliament delegates to the Government the right to make laws by way of regulations. It is important the Government keeps within the terms of these delegations. It is particularly important where a delegation relates to the use of a coercive power. In my view, there is a public interest in the Court addressing allegations that prisoners have been subjected to unlawful regulation, even if the only remedy might be a declaration that this happened. Equally, there is a public-interest utility in a decision that this did not happen," and I say the same reasoning applies to our case.

There is also a recent Court of Appeal decision, *Mitchell v Department of Corrections* [2017] NZCA 475. Shall I hand that up?

ELIAS CJ:
Yes, thank you. Do you have other cases you want to hand up? We might as well get them at the same time.

MS HANSEN:
Okay. I don't have any other cases but I have the Dietary Supplements Regulations 1985 which may or may not be of some sort of contextual assistance to the Court, which I will come to and address briefly.

ELIAS CJ:
Thank you.

MS HANSEN:
Now, sorry, I seem to have given away my copy. So just to quickly summarise the case, Your Honour, Ms Mitchell was sentenced on various charges on 2 December 2015. These relates to a breach of a protection order

and attempting to threaten to kill, but a different Judge imposed special release conditions on 29 July 2016, so that was some seven months later. Ms Mitchell was out of time to bring an appeal against the special release conditions and sought an extension of time to do so. The Department didn't oppose an extension of time but opposed leave being granted on the basis that the issue is moot because the release conditions imposed by the District Court Judge had long since expired, and I just, in particular, draw the Court's attention to the points made at paragraphs 22 to 25, and the Court cited at 22 the well-known principles in *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 but found that in terms of why Courts don't hear moot appeals but decided that in this case none of those considerations were engaged. They noted that the issue she wanted to address was one of considerable importance to her and also of wider public significance. That is at paragraph 23. And they also noted, down at paragraph 24, that the proper interpretation of section 94 had significance beyond the facts of Ms Mitchell's case and the Court granted leave in that case. So, as well as there being significant public interest utility in hearing this appeal, it is my submission that there is practical utility to the appellant in hearing the appeal, and a declaration that HFA and SSF were medicines prior to or in the absence of a regulation would vindicate the appellant's right to a declaration that the substances were subject to the Medicines Act, it would entitle the appellant to costs in the High Court and Court of Appeal and the Crown would also, rightfully, bear the consequences of being shown to have not administered the HFA and SSF in accordance with the Medicines Act.

It's my submission the declaration would also have potential relevance and may be of assistance to the *BORA* case. Now the appellant's case, as Ms Scholtens explained, is that the substances are being used as medicines, for a therapeutic purpose, and while it wasn't necessary for the purposes of section 11 to establish HFA and SSF are medicines, clearly a declaration that they are, unless exempted, might assist the Crown in its consideration of what is medical treatment.

In my submission such a declaration would also clarify that there is a material distinction between adding fluoride to water and adding chlorine. One is the

addition of a medicine and the other is the addition of a treatment chemical and it might also clarify an issue that was raised this morning about why fluoride in the water is different to iodine in salt and folic acid in bread and maybe that's an opportunity just to quickly address the Court on the issue of the Dietary Supplements Regulations. So the basic proposition is that there is a difference between using a substance as a dietary supplement and using it as a medicine. And the Dietary Supplements Regulations regulate dietary supplements and the meaning of a dietary supplement is contained at Regulation 2(a) and it defines a dietary supplement as something which is an amino acid or an edible substance. So there are six criteria that have to be satisfied for something to be a dietary supplement and in addition there are, for some particular supplements, there are maximum daily doses that can apply, and you see at Regulation 3 that copper is at five milligrams, for example, vitamin D is at 25 mcgs and folic acid is at 500 mcgs.

Now the other relevant Regulation is number 11, which relates to therapeutic claims. So no dietary supplement or package can claim any of the following matters. So it can't claim to treat or prevent disease, diagnosed disease or ascertain the existence, degree, et cetera. So effectively a dietary supplement must not make a therapeutic claim, and if it makes a therapeutic claim then it is immediately going to be subject to the controls of the Medicines Act.

ELIAS CJ:

Sorry, what's the submission that you're making, based on this, in connection with the Bill of Rights Act case?

MS HANSEN:

What I'm trying to demonstrate is that there is a distinction between iodising salt and folic acid in bread –

ELIAS CJ:

Well, because it's regulated under the Food Act.

MS HANSEN:

That's right. So they're considered to be dietary supplements, in particular –

ELIAS CJ:

But does that, would that affect – why does that affect whether they're also treatment, under section 11?

MS HANSEN:

Well, I guess the first point is if it's for a dietary supplement purpose it's generally not for a therapeutic purpose. That's the first point, because a dietary supplement –

ELIAS CJ:

Well it just means that it's added to food doesn't it?

MS HANSEN:

For dietary supplement purposes.

ELIAS CJ:

But, well, okay.

GLAZEBROOK J:

Not a curative purpose.

ELIAS CJ:

No, no.

ELLEN FRANCE J:

But it might have other purposes, that's all.

ELIAS CJ:

Yes.

MS HANSEN:

Well, I guess it's quite useful –

GLAZEBROOK J:

Well, it's not a curative purpose but that's the submission, isn't it? The distinction is it's not curative and that would be medical treatment whereas something that merely supplements a diet is not, I mean that's just a, it's a submission, I presume, based on this.

MS HANSEN:

Well, we got into the discussion about whether it was, you know, compulsory, iodisation of salt might be medical treatment. The issue will be what is the purpose of the intervention.

ELIAS CJ:

Well, it may not be advertised as something that's going to treat or prevent disease, but what's the purpose of putting this in the food except if it has some benefit?

MS HANSEN:

Yes, as a dietary supplement, and I suppose that's the difference, there are doses which qualify as dietary supplement doses and then higher doses will qualify as medicines. So, for example, vitamin D is, you'll see down at paragraph 3, clause 3, it's 25 micrograms, mcgs, is the maximum dose that you can have in a dietary supplement. Vitamin D is also a prescription under the Medicines, or has been classified as a prescription medicine under the Medicines Regulations and a much higher dose is required to qualify as a medicine. So it shows that you have to actually consider what's the substance actually being used for and what's its purpose and what's its claim. And with fluoride, obviously, the only purpose is treating and preventing disease. Is that clear Your Honours?

ELIAS CJ:

Not entirely to me I must admit but maybe I'll –

GLAZEBROOK J:

I think it's just the submission is that it's not, doesn't come under section 11 –

ELIAS CJ:

Yes, it's not a medicine.

GLAZEBROOK J:

– unless it's got a therapeutic purpose and these don't, although there doesn't…

WILLIAM YOUNG J:

Well, they can have a therapeutic purpose.

MS HANSEN:

I probably wasn't going that far. I was just trying to differentiate between substances which I use for dietary supplement purposes as Dr Menkes distinguished between, you know, folic acid and bread being a dietary supplement purpose versus – I mean fluoride, for example, is often used for other therapeutic purposes as well as dental decay but then it's a medicine.

So I'm not sure I can take that point any further, but it's just to really emphasis that there is a difference – when it's a dietary supplement it's regulated under the Dietary Supplements Act 1985. If it's a compulsory dietary supplement there may be issues about section 11 as Ms Scholtens explained. So turning back, so I'm saying that a declaration in the Medicines Act case would be of assistance, I submit, and the broader issues that Your Honours are considering in the BORA case.

So a third reason, in my submission, to hear the appeal is because the proper interpretation of how the Medicines Act applies to the fluoridating chemicals has significance beyond the facts of this case. Now it's my submission that if the High Court decision is correct and fluoride at less than 10 parts per million is not a medicine under the Medicines Act it necessarily follows that all substances in the Medicines Regulations Schedule which define or classify prescription medicines, pharmacy-only medicines and restricted medicines, then all those substances to the extent that they are less than 10 parts per million are not medicines. And it's my submission that this would create a significant loophole in the Medicines Act and would jeopardise the integrity of

the Act. This was a matter raised by the appellant's in the notice of appeal. Would it be helpful for me to demonstrate to the Court how there might be a loophole or?

O'REGAN J:
I think it's probably better just to do the argument on whether it is a medicine or not.

GLAZEBROOK J:
Well, unless you're doing so by reference to the Act.

ELIAS CJ:
Unless it demonstrates it, yes.

GLAZEBROOK J:
I mean, it's hard to answer that question in the abstract.

MS HANSEN:
Well, the material I was going to draw Your Honours' attention to is just to show how the Ministry of Health administers the Medicines Act, and their approach is that is something makes a therapeutic claim that is in and of itself sufficient to quality, to bring it under the Medicines Act jurisdiction. So to qualify as a medicine they would treat anything that makes the therapeutic claim and/or anything that contains a substance that's listed in the Medicines Regulations Schedule, so the product only has to contain a substance, and there's no minimum threshold that must be satisfied in terms of 10 parts per million. So the Ministry's approach is, "If your product makes a therapeutic claim or contains something in the Medicines Schedule, even at less than 10 parts per million, it's a medicine." But, as Justice Collins has held, he decision is not limited simply to fluoride, it really applies to all of the substances.

WILLIAM YOUNG J:
Well, it may be linked because he says that the control of fluoride in concentrations less than what's contemplated in the regulations is governed by the Health Act and the Drinking-Water Standards.

MS HANSEN:

Well, shall we just go to –

WILLIAM YOUNG J:

So – I think he said that didn't he?

MS HANSEN:

Well, perhaps it would be useful just to quickly go to paragraph 45 of the High Court judgment, which is at page 160 of volume 1 – not, it's not, beg your pardon. Paragraph 45, volume 1, tab 3, page 125. So he says there at 45 that the defect in my approach was that, "It ignores the threshold concentration required for substances to be medicines in Schedule 1 of the Regulations," and then he refers back to paragraph 29 which specifies that every reference to a medicine in the Schedule only applies if the concentration of that medicine is greater than 10 milligrams per litre. So effectively he's saying that –

WILLIAM YOUNG J:

But look at para 49. He's reading in conjunction with the Health Act and the public water standards, isn't he?

MS HANSEN:

Well, not –

WILLIAM YOUNG J:

Well, he says he is.

MS HANSEN:

Well, I mean, the Medicines Act needs to be interpreted in and of itself.

WILLIAM YOUNG J:

But he's read it in conjunction with, in a context including the regulations in the Health Act.

ELLEN FRANCE J:

And he's doing that under the heading of context and that's because the definition of "medicine" is the type of one that's common that it refers unless the context otherwise requires. So I understood that he's looking at Schedule 1 of the Regulations as part of that context along with those other, the other thing.

MS HANSEN:

Well, he probably is, but I'd say he has erred in doing so. And just to demonstrate, I mean the –

WILLIAM YOUNG J:

Sorry, but the reason I'm picking you up is that it's actually, his decision's quite a narrow one, it's actually only about fluoride.

MS HANSEN:

Well, I would submit that you can't – it's not the fluoride exception to the Medicines Act. I would submit that the reasoning in 45 and –

WILLIAM YOUNG J:

Well, I just have para 49 in mind. So if you're suggesting it's otherwise you do have to address that.

MS HANSEN:

Well, perhaps I can illustrate why I say – paragraph 49 says that the threshold is vastly higher than when it's falling inside a medicine. So if we could just demonstrate. So 10 milligrams per litre would be the equivalent of 20 fluoride tablets dissolved in one litre of water. So the consequence of what the Judge is saying is that one litre of water would have to contain the equivalent of 20 fluoride tablets to constitute a medicine, and I say that that must be plainly wrong –

ELIAS CJ:

Why?

MS HANSEN:

– when you actually understand that.

GLAZEBROOK J:

Well, it is a naturally occurring substance though isn't it?

MS HANSEN:

Well, at very low concentrations.

GLAZEBROOK J:

But your argument is that the Health Department administers this by saying as soon as there's any concentration of anything it's medicine which could well be perfectly reasonable for most of the things in the – but not for a naturally occurring substance. I would have thought that's really what the Judge is saying isn't it?

O'REGAN J:

Otherwise all water is a medicine.

MS HANSEN:

No it's not because it's not –

O'REGAN J:

If it hasn't…

MS HANSEN:

– because if it's not supplied and administered for a therapeutic purpose.

O'REGAN J:

Well, it can be.

MS HANSEN:

Well, no it can't be because – well it's certainly not…

ELIAS CJ:

Well, have we got the – we might need to look at those, some of the definitions.

O'REGAN J:

Well, if you're rehydrating someone who's dehydrated –

MS HANSEN:

Dr Menkes makes a point about dehydration because generally it will be, somebody who receives –

O'REGAN J:

But the water you're giving them has got fluoride in it.

MS HANSEN:

But why is the fluoride in the water, I guess, is the question. I mean we drink water just to –

O'REGAN J:

Well yes, but on your argument, even if it was naturally there, the water will become a medicine.

MS HANSEN:

No, that's not correct, because to be a, constitute a medicine, it has to simply, it has to be manufactured and supplied for the purposes of administering to a human being for a therapeutic purpose and have a pharmacological mechanism of action. Water does not qualify as a medicine and certainly the appellant's case is that it is – water is not a medicine. But the fluoride, which is being added, clearly for a therapeutic purpose, into the water and the water is the delivery agent for the medicine.

O'REGAN J:

I do think it would be better to just do the argument on what's a medicine rather than an argument –

WILLIAM YOUNG J:
Why it's so important to note.

O'REGAN J:
– and why it's such an important point, yes.

MS HANSEN:
Yes, well, that was simply a reason, or a ground, I used to say this should be heard. But let me turn to the substance of the Medicines Act appeal and the key paragraphs 130 to 134 of the written submission contain the principal arguments. And in summary the key point is that the meaning of the definition of medicines in section 3 clearly applies to HFA and SSF, as the Judge held at paragraphs 34 and 35. And, perhaps if we go back to His Honour's judgment, which is at paragraphs 34 and 35 at page 123 of volume 1, "So the purpose of adding fluoride to domestic water supplies leads inevitably to the conclusion that the process of fluoridating domestic water falls within the definition of therapeutic purpose. This is because fluoride is added to prevent, alleviate and treat tooth decay. Water fluoridation is also designed to inhibit the physiological process. In addition the placing of fluoride in domestic water supplies has achieved its intended action by a pharmacological process. I'm therefore satisfied that introducing fluoride into domestic water supplies is undertaken for therapeutic purposes and satisfies the requirements of section 31(a)(ii) of the definition of medicine." And the definition of medicine he's set out is at paragraph 22. So it's my submission that HFA and SSF clearly qualify as medicines under the Medicines Act and that is all that is required to satisfy, or to qualify as a medicine, is satisfaction of those criteria.

And it's also my submission that fluoride, it's clear that fluoride at less than 15 parts per million, is a general sale medicine and perhaps if we could just quickly go to the relevant evidence. This is – there is a number of medicines that have been classified as general sale medicines, this is at volume 5, tab 3, exhibit D, at page 1072.

GLAZEBROOK J:
Sorry, I was just looking at something else, I've just lost the reference.

ELIAS CJ:

1072 on –

MS HANSEN:

Volume 5, Your Honour.

GLAZEBROOK J:

Volume 5, thank you.

MS HANSEN:

So the definition of fluoride as a general sale medicine – so just go to the, this is a database of medicines classifications put out by Medsafe. So it has fluorides in external forms and liquid form, but just going there to the last three lines, so fluorides in medicines containing 15 milligrams or less per litre or per kilogram, so that's the critical thing. So fluoride is a medicine because it contains less than 15 milligrams per kilogram.

ELLEN FRANCE J:

If something is a general sale medicine, do the Licensing Act provisions, licensing provisions of the Medicines Act apply?

MS HANSEN:

Yes, they do.

ELLEN FRANCE J:

Where do we see that?

MS HANSEN:

That's at section 17, I think. So the provisions that would apply, Your Honour, are principally the licensing, so the manufacture and supply would have to be licensed. The Medicines Act is…

ELIAS CJ:

Tab 4.

MS HANSEN:

Tab 4, volume 1.

WILLIAM YOUNG J:

What do you say the Council, the water suppliers, are doing in relation to it? Are they selling medicine by wholesale or what are they doing?

MS HANSEN:

Well, they're certainly manufacturing it in terms of –

WILLIAM YOUNG J:

Are they?

MS HANSEN:

The manufacturer, the superphosphate provider of this substance, and to the extent it's sold by wholesale to the Councils. So section 17 would apply, section 20. There'd have to be an approval.

WILLIAM YOUNG J:

But is the raw product itself – I suppose it might be. So you say that the raw chemical is itself a medicine?

MS HANSEN:

Well, it's – well, the substance is supplied, yes, for that purpose, so it's a hazardous substance –

GLAZEBROOK J:

But when it's manufactured it's not manufactured for a therapeutic purpose, is it? Didn't you say it's a by-product?

MS HANSEN:

Well, it's a by-product which…

GLAZEBROOK J:

So the manufacturers to manufacture the product, it just happens to have a by-product that is then sold.

MS HANSEN:

In certain circumstances this product is produced for the purposes of supplying water fluoridation providers because – and there's –

GLAZEBROOK J:

I mean, it's a slightly odd situation because that might be the case but equally it might just happen to be provided and then sold separately, but I suppose you could say it's still been manufactured for that purpose.

MS HANSEN:

Well, certainly it's been supplied to the Council and the Council supplies it.

WILLIAM YOUNG J:

So who do you say should get licences?

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

The manufacturer and the Council? Who should get licences?

MS HANSEN:

Well, I suppose that's an issue for the Ministry to consider. I mean, the principal objective of the appellant was to establish that these substances qualify for regulation.

WILLIAM YOUNG J:

Well, was – presumably legislation in this, to this general effect, would have been in place in 1965.

MS HANSEN:

I don't think it was, Your Honour, actually. In –

WILLIAM YOUNG J:

There must have been medicines legislation in the '60s.

MS HANSEN:

Well, there was, and I haven't got the earlier Act, but the point is that notwithstanding the 1965 *Lower Hutt* case, the fact that they authorised fluoridation doesn't mean that other statutory approval processes are avoided because obviously sometimes you have to get several approvals. So the fact that the Council might have been approved to put the fluoride in the water doesn't mean that the Medicines Act processes and approvals could be dispensed with.

ELLEN FRANCE J:

Well, the Medicines Act has a number of prescriptions, so, for example, in relation to packaging, labelling, advertisements and so on, and I'm unclear who are you saying, for example, would have to meet the labelling and the advertising requirements of the Act?

MS HANSEN:

Well, it may not be that – it may be that those particular provisions don't necessarily apply in this context.

ELLEN FRANCE J:

Well, doesn't that suggest it might not be? The context might mean this is not a medicine?

MS HANSEN:

Well, no, Your Honour, because it clearly meets the requirements to be a medicine in section 3.

ELLEN FRANCE J:

It is unless the context otherwise requires definition.

MS HANSEN:

Well, certainly the labelling – it may be that the manufacturer, the Council has to, or the Council has to label it. I mean this is not, these sorts of provisions apply or are intended to apply when you've got a, you know, you're going to be selling it, a tab of something in a pill form or something and it's going to be

packaged but that's not an exclusive requirement for a medicine, a medicine simply, it's just saying that if they are going to be, manufacturers have to satisfy these particular requirements.

WILLIAM YOUNG J:
I mean, this is all a bit of a sort of a sideshow, isn't it, because if Councils are statutorily authorised to fluoridate water then whatever licences are required can be obtained anyway?

MS HANSEN:
Well, they'd have to be obtained from –

WILLIAM YOUNG J:
I understand that, but I mean it would be difficult to see why they would be resisted or not obtainable if the statute actually, or if the local Government legislation authorises it.

MS HANSEN:
Well, I would submit that the Local Government Act 1974, I mean certainly under the old regime the Act doesn't go so far as to say, “And you don't have to get your Medicines Act approvals.”

WILLIAM YOUNG J:
No I understand that, I understand that, but would there be, is there any practical as opposed to theoretical difficulty about obtaining what licences would be required?

MS HANSEN:
I would say so, Sir, because the Act requires the safety quality and efficacy controls of the Medicines Act to be considered and applied so this, I mean, we can't second guess.

WILLIAM YOUNG J:
So it opens up another front.

MS HANSEN:

Pardon?

WILLIAM YOUNG J:

It would open up another front for dispute.

MS HANSEN:

Well, it would.

WILLIAM YOUNG J:

Yes.

MS HANSEN:

But the point is that if it's a medicine it falls for regulation under the Medicines Act and what particular requirements need to be satisfied will depend on the particular circumstances but –

ELLEN FRANCE J:

Well, that's not what the Act says. The Act says if it's a medicine then, for example, the labelling and so on, other restrictions apply generally speaking.

MS HANSEN:

Which paragraph are you, well, section are you looking at, Your Honour?

ELLEN FRANCE J:

Well, I just looked at a number of the provisions in the Act and I appreciate that in some cases there are some exceptions to the scope, et cetera, but if you look at 57, 58 and then the various provisions relating to containers and packaging in 44.

MS HANSEN:

Okay, in the bundle we don't have all of those provisions unfortunately. But in terms of the provisions that apply the other provisions that would probably be section 20 there'd have to be an approval.

WILLIAM YOUNG J:

But it's not a new medicine, is it? Is a new medicine something that hasn't previously been approved?

MS HANSEN:

Well, this hasn't been approved, Your Honour.

WILLIAM YOUNG J:

Does that make it a new medicine?

MS HANSEN:

Mhm. So –

ELLEN FRANCE J:

Sorry, can I just go back to one other point I'd raised earlier? Section 99 deals with the general sale medicines.

MS HANSEN:

Yes.

ELLEN FRANCE J:

And subsection (2) says, "General sale medicines means medicines that may be lawfully sold other than prescription, restricted and pharmacy only." So does that mean there are four types of medicines?

MS HANSEN:

There are probably five because there's a medicine. What does the Ministry define as a medicine? There is material in the case book or the case on appeal that, for example, a bottle of lavender oil that made the claim to treat burns was treated as claiming a therapeutic purpose so it was regarded as a medicine and needed to be brought under the controls of the Medicines Act. So you've got medicines are substances that satisfy the definition in section 3, and then additionally medicines, there'll be general sale medicines and then certain medicines will have been classified as prescription medicines, but to qualify as a prescription medicine it has to have a concentration of 10 parts

per million or more, unless of course the Regulation specifies a lower threshold concentration or dose.

WILLIAM YOUNG J:

I don't think fluoride would be a new medicine. It refers to, "Any medicine that has not been generally available in New Zealand before the commencement of the Act or at any time during the period of five years immediately preceding on the date on which it is proposed to become so available." Fluoride has been available in New Zealand for nearly 60-odd years.

MS HANSEN:

But that's, the only reason is because it hasn't been regarded as a medicine.

WILLIAM YOUNG J:

Sorry, but I don't read in the definition that it's a new medicine if it hasn't previously been the subject of approval, that's the point you were putting to me and I don't think that's right.

MS HANSEN:

Well, yes, and these were matters that were addressed in the High Court, the submissions, in terms of which particular provisions might apply. May I grab my submissions from – well, do you wish me to make any more submissions on this point?

GLAZEBROOK J:

Well, presumably if you should have applied for registration you have to apply or you're selling it illegally, because otherwise if you're making therapeutic claims and haven't applied, but it doesn't come within new medicine, there must be something in there that deals with it.

ELIAS CJ:

Well, we haven't got the full…

GLAZEBROOK J:

No, because it becomes a bit odd if you can get out of anything by just saying, "Oh, well…

ELIAS CJ:

There must be something like that.

GLAZEBROOK J:

Because the lavender oil would have been available beforehand, it's just the therapeutic claims that turned it into a medicine.

ELLEN FRANCE J:

Well, I think the licensing would apply but I don't think that section 20, the new medicine provision, wouldn't apply.

GLAZEBROOK J:

No, section 20 wouldn't apply, but I suspect there'll be other sections that, so you can't sell it without having…

MS HANSEN:

Yes, I mean in terms of going down to the, you know, minutest degree as to exactly what provisions applied, the key point that was made in the High Court was simply that these substances clearly met the criteria and the definition of a medicine, and qualified as medicines, and which were required to be subject to the regulation of the Act.

The next point I was making – so my key points obviously were that fluoride and fluoridated water meets the definition of medicine in section 3, that's all that's required to qualify, it's also fluoride in a concentration of less than 15 parts per million is a general sale medicine. Now the error, we say, that the High Court fell into is to get confused about what the concentration or what effect concentration has in terms of determining what is a medicine, and the simple point is that concentration does not define what a medicine is, section 3 does that, and that concentration determines whether medicine is classified as a prescription medicine, pharmacy only, or restricted medicine. And

perhaps if we can just briefly go to the Medicines Regulations, which are tab 4, go to the schedule – well, maybe we'll go to the Regulation 3 first.

GLAZEBROOK J:
Where are we now? Oh, I see, it's tab 5.

MS HANSEN:
So, the Medicines Regulations – is it tab 5? Sorry.

GLAZEBROOK J:
And where are we going? 311?

MS HANSEN:
Just looking at – so this Regulation deals in Part 1, and that's Reg 3, the classification of medicines. So, "All medicines and classes of medicines specified in Part 1 are hereby declared to be prescription medicines," and then there's restrictive medicines and pharmacy-only medicines. So the purpose of these regulations is to classify what substances which are already medicines to be a certain type of medicine in a particular concentration.

So if we just turn quickly to page 359, "Every reference to a medicine in this schedule applies whether the medicine is synthetic," and then it says unless specific reference is made otherwise, every reference to a medicine in this schedule applies if the medicine – only if the concentration of the medicine is greater than 10 milligrams per litre or per kilogram.

So prescription – so, for example, if we just look at maybe abacavir. I'm not sure what that is. That's a prescription medicine but it's only a prescription medicine at 10 milligrams per – or 10 parts per million or 10 milligrams per litre. At lower concentrations, if that is being used for a therapeutic purposes, this abacavir, number 7 on the prescription medicines, will be regarded as a medicine. And you'll see, so in relation to fluorides, though, I mean, the Judge seemed to think that fluorides had to be 10 parts per million but each of the definitions of fluorides, or each of the classifications of fluoride, first there's a prescription medicine, that's at page 384, so the 10 parts per million threshold

doesn't apply to fluorides for prescription medicine purposes because they have, it's been specified that fluorides are prescription medicines for internal use in medicines containing more than 0.5 milligrams per dose unit, and then it says, "Except in medicines containing 15 milligrams or less per kilogram."

And then pharmacy-only fluoride tablets, or, sorry, pharmacy-only fluoride is defined, or the restricted, sorry, is at 424, and then again it's the 10 parts per million threshold doesn't apply to these qualifying as restricted medicines, the restricted medicines in liquid form containing 5.5 grams or less. And then in relation to pharmacy-only medicines, which are listed at page 432, fluorides are a pharmacy-only medicine for internal use in medicines containing 0.5 milligrams or less per dose unit. And, in my submission, it is helpful for the Court to perhaps appreciate that one pharmacy-only fluoride tablet delivers 0.5 milligrams of fluoride and that is the same amount of fluoride that is contained in half a litre of water that is fluoridated at one part per million.

So in my submission the High Court made an error of statutory interpretation. The correct position is that these substances are medicines because they are supplied for a therapeutic purpose, have a pharmacological mechanism of action and they are a general-sale medicine, and they are required ipso facto to be regulated under the Medicines Act.

So moving now, if I may, to the error of law issue. If, contrary to the High Court's decision, HFA and SSF are medicines, the issue is have the regulations been made on an error of law, and it is not in dispute that the regulations were a fast-tracked measure expressed as confirming the status quo that the Medicines Act did not apply. And the first point is that it is worthy of note, in my submission, that the Crown has taken the time to enact a regulation that states the law in identical terms is that which it considers correct and as confirmed by the High Court itself.

Now effectively at the time there was unanimity at least between the Crown and the High Court as to what the correct position was but nevertheless the Crown proceeded to pass the regulation to confirm the position and at that time the only part contesting the position is the appellant who has been

unsuccessful, and I make the comment that the enactment of a regulation in those circumstances is odd and it's odd because it has no real effect. It's not purporting to change the law. It simply seeks to restate the exact same position as that considered by the Crown and the High Court to be correct. And in my submission that is usual because generally regulations change the law.

So the second point is that the regulation is clearly premised on the Crown's prior administration of the Medicines Act and the High Court's interpretation of the Medicines Act as being correct. It therefore follows, in my submission, that the correctness of the High Court's interpretation is a condition precedent to the enactment of the regulation that the Crown and High Court's interpretation is correct and, in my submission, that it must follow that if that interpretation is wrong there is a reviewable error of law and consequently the premise on which the regulation was made falls away entirely if the Supreme Court upholds what the appellant says is the correct interpretation of a medicine.

The appellant has referred in its submissions to several cases which confirm that where actions are taken in reliance on decisions that are subsequently held to be unlawful or wrong the actions taken in reliance are also vitiated. Those listed at footnote 106 and I refer in particular to perhaps *McNally v Attorney-General* [2010] NZCA 571, [2011] 2 NZLR 137, the *R (Shoesmith) v OFSTED* [2011] EWCA 642 and *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19 (HL) but perhaps if we could go to the *Shoesmith* case just as one example, that's at volume 4, tab 34. So in that case, just briefly, Ms Shoesmith was the Director of Children's Services in a local authority. Following the much publicised death of a child on a child protection register the Secretary of State directed that Ms Shoesmith be removed as Director of Children's Services and the local authority employing her in that role then summarily dismissed her on the basis of the Secretary of State's direction.

And the Secretary's direction was subsequently held unlawful on grounds of procedural impropriety and the Court of Appeal there held two to one that the

dismissal action itself was unlawful and void and it said there was no urgency for the local authority to dismiss Ms Shoesmith and that it proceeded on the basis that the direction was lawful and it took the risk of it subsequently being held to be void and the relevant paragraphs there are paragraphs 136 to 138 and that's at pages 1397 and 1398. So that just illustrates the point that actions taken relying on the lawfulness of a particular action which is then held to be invalid those subsequent relying actions are themselves void.

Now before finishing with the error of law, I need to deal with the Court of Appeal's proposition that the prior status of a substance as a medicine is not material to the regulation making power, and perhaps – that's at paragraphs 189 to 190 of the Court of Appeal judgment, which is in volume 1.

Now I'm assuming – so the Court's there saying, well I'm assuming that the Court is saying that even if HFA and SSF were medicines the regulation could still validly exempt them from the Medicines Act notwithstanding any mistake about their status.

GLAZEBROOK J:
Can we just check. Would you accept if there wasn't a mistake about the status it could exempt them?

MS HANSEN:
Well if there wasn't a mistake, then yes.

GLAZEBROOK J:
So there is power to exempt, you accept?

MS HANSEN:
There's a power to exempt but my submission is that –

GLAZEBROOK J:
No, no, I understand your submission. Are any of the cases that you refer to relating – do any of those cases relate to regulation?

MS HANSEN:

There's simply the *R (Reilly) v Secretary of State for Work and Pensions (No 2)* [2015] 2 WLR 309 (QBD) case and it's –

GLAZEBROOK J:

Because *Shoesmith* seem to be a relatively lukewarm indication of what you're saying is a general proposition. I mean it really said it depends on the circumstances but in this case it was this, in that particular case it was vitiated.

MS HANSEN:

Yes.

GLAZEBROOK J:

Whereas you put it in a much more stronger form, which wasn't justified by *Shoesmith*, which didn't, in any event, deal with a regulation.

MS HANSEN:

No, but I suppose the cases that I refer to which are in 106, the footnote, sort of illustrate the general proposition that –

GLAZEBROOK J:

Well if *Shoesmith* was your best one that you referred us to, I'm just pointing out it wasn't very good.

MS HANSEN:

Right, thank you. Perhaps we could refer to the *Riley* case, which is the case before *Shoesmith*, that's at paragraph, tab 33, volume 4.

GLAZEBROOK J:

I suppose I'm having a slight bit of difficulty with the proposition that says if you have the power to make a regulation and you make it for a reason that, or under a mistaken apprehension of something, but you still have the power to make it, that that mistaken apprehension vitiates the regulation.

MS HANSEN:

Yes and perhaps that's – it's my submission that appreciating the status of the substance that one is exempting is sort of the first step.

WILLIAM YOUNG J:

I understand that the status was contested. Their view was confirmed by the view of Justice Collins was that it wasn't a medicine but they knew there were challenges, that was disputed. They knew there was an appeal and they knew there might be collateral challenges in other litigation.

MS HANSEN:

Well it certainly wasn't passed on that basis, Your Honour. I would submit that the documentary material would demonstrate that the only reason they are passing this regulation is not to have any potential prospective change in the law, which is what would potentially –

WILLIAM YOUNG J:

Well, they don't think it is but is it, I mean, could they really put their hands on their hearts and say we're 100% sure that no Judge will ever say that this is a medicine.

MS HANSEN:

Well that wasn't even, that prospect wasn't even entertained or – so there was never any consideration, oh actually, maybe this –

ELIAS CJ:

But just for the avoidance of doubt.

WILLIAM YOUNG J:

Isn't this so obvious…

GLAZEBROOK J:

And that was suggested by Justice Collins as well.

MS HANSEN:

Well it was and that was an interesting suggestion by His Honour because strictly, I mean, his role is adjudicative and to perhaps –

GLAZEBROOK J:

Well, it might indicate that he had some doubt himself, having decided what it was, recognised there was doubt and said well for the avoidance of doubt that puts it beyond doubt then. Not for the avoidance of doubt but to put it beyond doubt.

ELLEN FRANCE J:

And that, in fact, is what the Court of Appeal records, at paragraph 173, in relation to the Cabinet paper. It recorded that Crown Law had recommended, as a matter of good public administration and to remove the basis for any further litigation et cetera to put the issue beyond doubt.

MS HANSEN:

But that was, it was never passed on the basis or there was never any consideration that it might be medicine.

WILLIAM YOUNG J:

But why would you want to put it beyond doubt, unless there is some doubt or scope for doubt?

GLAZEBROOK J:

But there mightn't be doubt in their minds, there wasn't because they are still arguing that. But they must have recognised that there was scope for doubt otherwise there was no point in passing it.

ELIAS CJ:

And cost and argument.

MS HANSEN:

Well, it's my submission that the documents or the documentary evidence doesn't suggest that there is any doubt in the officials' mind or the Minister's

mind about the correct status of this substance and they are simply not changing the law. They are simply confirming the law.

GLAZEBROOK J:

Well, what is your best case that says that a regulation is vitiated even if you – it would be intra vires because you passed it, because you have got a mistaken view.

ELIAS CJ:

Well, it would have to be that you were reviewing on the basis that it is unreasonable which is an available criteria for judicial review of subordinate legislation, I guess wouldn't it?

MS HANSEN:

Well, it also ties into the –

ELIAS CJ:

It's not just a vires issue.

GLAZEBROOK J:

No, I think the argument is that a mistake of law vitiates the regulation, so it is not unreasonable, it's a –

ELIAS CJ:

No but if you…

GLAZEBROOK J:

– a non-valid. That is what I understood the submission to be.

ELIAS CJ:

But if your rationale for what you do –

GLAZEBROOK J:

Oh, I can understand it could be.

ELIAS CJ:

Yes.

GLAZEBROOK J:

I understand that could be but I didn't understand that to be the argument, but…

MS HANSEN:

Oh, I didn't put it very well then. But the, so I guess, well my primary submission is that the regulations –

GLAZEBROOK J:

But here the rationale has actually come back.

ELIAS CJ:

Actually mistake of law is probably sufficient anyway.

MS HANSEN:

Well, that, I suppose that we've said it's mistake of law.

ELIAS CJ:

That's what you're saying really. Yes that's what I thought.

MS HANSEN:

Well, we have characterised it as error of law, mistake of law.

WILLIAM YOUNG J:

But it's a sort of, it's not really a black and white issue. It's the question of degree isn't it. I mean if you are looking at it in realist terms. They think it's not a medicine, they think the Judge is right on the money but they know that someone else might disagree, therefore to put it beyond doubt.

GLAZEBROOK J:

And actually they didn't need the regulation if it wasn't a medicine anyway, so it wasn't that they, it wasn't that they passed it. They passed it thinking they didn't need it rather than passing it thinking they did.

MS HANSEN:

Well, that's right but in fact under the way they did it, there was no need for the regulation and they certainly didn't put in the relevant materials that there was any need to cover off the prospect that they might be wrong.

WILLIAM YOUNG J:

Other than to remove any doubt.

MS HANSEN:

Well, there was never any contemplation that there was doubt.

WILLIAM YOUNG J:

Well, why say it if there wasn't?

MS HANSEN:

Which, where are you saying now?

WILLIAM YOUNG J:

Justice France.

ELLEN FRANCE J:

Paragraph 173 of the Court of Appeal's judgment, page 55 in the case on appeal, tab 1.

MS HANSEN:

Sorry which page, 173?

ELLEN FRANCE J:

173.

MS HANSEN:

That's right, that's what it said. But in terms, perhaps we will go to the primary document, it might be helpful.

ELIAS CJ:

Well, if it says this though, do we need to take time to go to the…

GLAZEBROOK J:

Well, the primary document, I think he is saying that said something slightly different, does it?

MS HANSEN:

Well, it's just that you need to see the whole document because –

ELIAS CJ:

Sorry, where is it there?

MS HANSEN:

Paragraph – now actually the best one was volume 8.

ELIAS CJ:

This is in the case?

MS HANSEN:

Case on appeal, volume 8.

GLAZEBROOK J:

And where are we?

MS HANSEN:

Sorry…

WILLIAM YOUNG J:

Is it tab SSJ2?

MS HANSEN:

I'm just checking whether it's SSJ2 or SSJ6, Your Honour, or, sorry, 8.

WILLIAM YOUNG J:

Well, at 1952 they say it's to provide legal clarity –

GLAZEBROOK J:

Yes, I've done – that's exactly how it's referred to.

ELIAS CJ:

Where are you, sorry?

WILLIAM YOUNG J:

Para 3.

GLAZEBROOK J:

To provide legal clarity.

WILLIAM YOUNG J:

1952, to provide legal clarity.

MS HANSEN:

Well, that's actually misquoting what His Honour, Justice Collins, said, and perhaps we should just go back to see –

WILLIAM YOUNG J:

No, no.

ELLEN FRANCE J:

Well, no.

GLAZEBROOK J:

No, no, but this is – it doesn't matter.

WILLIAM YOUNG J:

It's what the Crown Law has said. It's not what the Judge has said. It's what the Crown Law has said. "Crown Law has recommended an urgent amendment be made to the Regulations to provide legal clarity."

ELLEN FRANCE J:

And that's what the Ministers appears to have signed off on on 1953.

MS HANSEN:

To provide legal clarity, that's right, but on the basis that they weren't changing the law though, that they were just confirming the law.

WILLIAM YOUNG J:

No, they're not changing the policy. They say there's no change in policy.

MS HANSEN:

That's right. Well –

WILLIAM YOUNG J:

I mean, I think your argument – I mean, I can't see how you can get away from the words of it, actually. The purpose is to provide legal clarity. There must be doubt.

MS HANSEN:

Well, there's no consideration there that there is any doubt because they simply record what the High Court said.

GLAZEBROOK J:

Well, no, but they record. In the decision paper there they certainly don't but did you want to take us to SSJ8?

MS HANSEN:

Yes, and then SSJ8, the relevant – paragraph 5.

WILLIAM YOUNG J:

The "provide legal certainty"?

MS HANSEN:

Pardon me? So paragraph 5, "A large number of submissions," do not – "These submissions essentially restate many of the arguments made which were rejected by Justice Collins." So the point is that there, on that basis, there is no consideration that Justice Collins might be wrong.

WILLIAM YOUNG J:

But what's the point of saying "legal certainty" unless they accept that Justice Collins hasn't provided legal certainty?

MS HANSEN:

Well, that's probably right but the point here is that there was never any oblique or overt consideration that the Judge was wrong and that therefore there should be consideration of whether these substances ought to be subject to the Medicines Act. They were simply passed on the basis that they weren't subject to them.

WILLIAM YOUNG J:

But they have. Look at para 6.

MS HANSEN:

That's simply about –

WILLIAM YOUNG J:

You might say that Sir Peter Gluckman was wrong but, I mean, you can't say they haven't taken it into account.

MS HANSEN:

Well, it's – but the issue about the efficacy is a different matter to regulating the products under the Medicines Act. That's not an issue that is relevant to the Medicines Act in any event. The issue is the safety, quality and efficacy controls of the substance, so ensuring that the substance is manufactured to a sufficiently high quality to provide a safe product.

So that's a different point, in my submission.

WILLIAM YOUNG J:

Well, it's an overlapping point, isn't it? They're talking about toxicity, risk of harm.

MS HANSEN:

Well, Sir Peter Gluckman didn't deal with toxicity.

GLAZEBROOK J:

Whereabouts are we exactly?

WILLIAM YOUNG J:

Para 6 deals with toxicity.

ELLEN FRANCE J:

2027.

GLAZEBROOK J:

2827?

ELLEN FRANCE J:

2027.

WILLIAM YOUNG J:

2027. Para 6 refers to toxicity.

MS HANSEN:

Well, it's a very broad claim.

Well, I guess the general point is that –

GLAZEBROOK J:

Well, I suppose what that would show is that not only have they considered whether it's legal, they've considered whether it's actually desirable to give legal certainty, because they've considered submissions that are against that.

MS HANSEN:

Well, they – but they never just considered it on the basis that this substance should be subject to the Medicines Act controls. I mean –

GLAZEBROOK J:

Well, but haven't they, because they've rejected the view that it shouldn't be because they've rejected the view on which there were however many submissions but they shouldn't exempt it on the merits, haven't they?

MS HANSEN:

Well, I suspect that there was never any real consideration of that because they thought they never had to do any proper consideration of whether or not the Medicines Act applies because they were relying as quite clearly shown at paragraph 5, on the correctness of Justice Collins' judgment.

GLAZEBROOK J:

Do you say they do that when the analyse the submissions?

MS HANSEN:

Yes. Well, it clearly says that the submissions, the arguments that raise the issue of whether it was a medicine in the submissions were not considered because they felt that they didn't need to consider –

GLAZEBROOK J:

Can you just show me where that was?

MS HANSEN:

Well, I'm just really paraphrasing again paragraph 5. That's what I say paragraph 5 means because Justice Collins said, "This isn't medicine," and all submissions which contested that viewpoint.

GLAZEBROOK J:

Well, they say they've done – a copy of the draft report of the analysis of submissions is attached.

MS HANSEN:

Yes.

GLAZEBROOK J:

So where's that?

MS HANSEN:

That's at 230.

ELLEN FRANCE J:

The best point in your favour is probably the discussion at 2031 under A, "Fluoride is a medicine."

MS HANSEN:

That's right.

GLAZEBROOK J:

But they've then gone on to analyse the things that have been said about it to see whether it would be right to make the regulation.

MS HANSEN:

But I suppose the regulation was always contemplated or made on the basis that this wasn't a medicine in the first place so there was never any serious consideration of the possibility that it might be a medicine and my submission is that generally the power, well the purpose, let's have a look back to the purpose of the Medicines Act is to regulate medicines and if a substance is not a medicine it's not subject to the controls of the Act but it could be brought under the control of the Act if it was considered appropriate. So generally the power will be exercised to declare something that is otherwise a medicine not to be a medicine or declare something that is not a medicine to be a medicine but the key consideration, in my submission, and this is reflected in the written submissions, is that the exercise of the power should squarely confront whether the Medicines Act should apply to this substance and as I've already noted, the exercise of the power was unusual in this case because it declared something that the High Court had held not to be medicine, the Crown had

said wasn't a medicine so it declared something that wasn't a medicine in the first place, according to the High Court, not to be a medicine and my submission that there is actually no serious consideration of whether the Medicines Act should apply because it considered it didn't apply in the first place and that is demonstrated –

GLAZEBROOK J:
Well why does it go through all the submissions and say there's such really good evidence that it's a very good thing and it's not toxic and they do fluoridate outside New Zealand and it's a generally accepted scientific thing. Why would they bother doing that, why didn't they just stop at number A?

MS HANSEN:
Well they were obviously reflecting what the submissions were but if we look at the consultation document which is at –

ELIAS CJ:
I think we understand the arguments you're putting to us and we really do need to make progress.

MS HANSEN:
Yes I know. I guess the second point on the error of law is, and that's the point that the Court of Appeal made is that it's immaterial what the status is and my submission is that how can the law be immaterial because the substance at the time of the exercise of the regulation power will have a status in law and if one takes the Court of Appeal's statement to its logical conclusion that would mean that when regulating under section 105 the law, ie, the actual substance, stated that the substance to be regulated is irrelevant and immaterial and I submit that that's an unlikely, and certainly undesirable, proposition in that it can't be right that the power can be exercised with no regard for the actual status of the substance. And in this case the only regard, the only actual status that was had regard for was the fact that it wasn't a medicine.

And it's my submission that if the Minister had been considering taking HFA and SSF out of the Medicines Act, because it was otherwise a medicine for the purposes of the Medicines Act, that different substantive considerations would have applied and these are set out at paragraph 139 of the written submissions. It's my submission that if the power had been exercised on the basis that he was recommending a change that there would have been consideration of whether these therapeutic substances, which are the subject of widespread consumption and are by-products of an industrial process and typically contain arsenic, mercury and lead, should be subject to the quality, safety and efficacy controls, should the exemption be made in relation to a substance which is ingested but which is now known to work topically and not by swallowing. Is it appropriate for informed consent to treatment to be overridden in the delivery of these substances when, in relation to all other medicines, informed consent is a fundamental tenet and the other thing, the other matter, I submit, the Minister ought to have considered is should these substances, which are delivered in uncontrolled doses to entire populations, be exempt from the regulatory framework when pharmacy-only fluoride tablets are not and which are, as I've discussed, are of equivalent concentration and which are strictly controlled, in terms of dose and are advised not for pregnant woman and for children under three. So when you actually –

GLAZEBROOK J:

At page 2035 they do talk about toxicity. That was the point I was putting to you. A number of those things are actually discussed in this report on the submissions and 2035 says, "We don't accept toxicity." They might be wrong but they certainly did consider it.

MS HANSEN:

Well, it may be that there has been some kind of superficial consideration of toxicity.

GLAZEBROOK J:

Well, they would say it's not superficial because it's based on the latest scientific report on the matter.

MS HANSEN:

And the issue of toxicity is not, as I understand, addressed in that report in any…

GLAZEBROOK J:

Yes but your submission is that something different would have been done and they would have considered these things, but they did consider them. They mightn't have considered them adequately but does that possibly deal with unreasonableness but I'm not sure about error of law.

WILLIAM YOUNG J:

They do deal with toxicity in the report, 2044.

MS HANSEN:

That's – toxicity in what way though?

WILLIAM YOUNG J:

They deal with dental fluorosis and analysis of evidence for adverse effects.

MS HANSEN:

That's right, that's the toxicity of –

WILLIAM YOUNG J:

Deal with cancer, IQ, bone fractures.

MS HANSEN:

Yes, but I suppose what –

WILLIAM YOUNG J:

They don't deal with it in a way that's to your liking but they deal with it.

MS HANSEN:

Well, they deal with it in a way that addresses the toxicity of fluoridation.

GLAZEBROOK J:

At 2043, artificial versus natural fluoride, "They specifically relate…

MS HANSEN:

Which one is this Your Honour?

GLAZEBROOK J:

Page 2043.

MS HANSEN:

Well, I guess my point is toxicity is – perhaps I misunderstood how you were referring to toxicity, toxicity in terms of the effects of fluoridation. I was more looking at toxicity in the terms of the actual looking at the content and components of the fluoridating chemicals and…

GLAZEBROOK J:

What does artificial versus natural fluoride do, at page 2043? That's explicitly, I thought, dealing with the trace metals.

MS HANSEN:

No, it doesn't, Your Honour.

GLAZEBROOK J:

Well, "To ensure that any trace metals or other impurities are well below the minimum safe levels described in the Drinking-Water Standards for New Zealand." What else does that mean?

MS HANSEN:

Well, that's saying that they are being tested.

GLAZEBROOK J:

That's saying it doesn't matter because they're below the standards so it's not a problem. You might say it is a problem but they say it's not.

MS HANSEN:

Well, I'm just saying –

GLAZEBROOK J:

But it's just that they've certainly considered it, I would have thought.

MS HANSEN:

It may be on the point about – I'm not sure, though, that it can be necessarily accepted that the fact that they've considered that, that there's been monitoring of these impurities.

WILLIAM YOUNG J:

The concern you're facing if you said they didn't consider toxicity, it's just been put to you that they did and now you're sort of shifting ground again slightly.

MS HANSEN:

Well, no, I'm just trying to understand that toxicity – well, let's perhaps – I'm not going to make any more headway on that point, and so toxicity may have been considered but the point, certainly the points at 139.2 and to 139.4, in my submission, have not been considered and it is my submission that they ought to have been.

GLAZEBROOK J:

They do deal with informed consent because they actually deal with that at page 2034 under (e), and they may not have explicitly dealt with some of those but they certainly have implicitly because they went through all of the submissions that have been made and considered whether or not that regulation should be made in the light of those submissions.

MS HANSEN:

But it's still on the premise that the Medicines Act doesn't regulate the fluoride, so I guess, you know, there's consideration but there's not really consideration because they've never confronted the prospect that this substance is a medicine and that's my submission, that here they've been able to deal with the matter on the basis that it's not a medicine and pay lip service, if any service, and perhaps on the issue of toxicity there has been some consideration, but it is, I would submit, simply that it's a different exercise taking a medicine, something that is known to be a medicine, out of the Medicines Act as opposed to exempting something that the Crown never considered to be a medicine in the first place from the Medicines Act.

GLAZEBROOK J:

But you don't have to – but if it wasn't a medicine you wouldn't have to take it out so they must have considered the possibility it could be a medicine to make the regulation in the first place.

MS HANSEN:

Well, no, well, that's a logical approach certainly but, in my submission, that it's all been characterised as we're not doing anything. If we look at the, just simply look at the consultation document…

ELIAS CJ:

Well, isn't your argument simply that they made a mistake, there was a fundamental mistake because they didn't appreciate, on your submission, that this was a medicine?

MS HANSEN:

Yes.

ELIAS CJ:

Well, what…

MS HANSEN:

And that if they'd appreciated that it was a medicine –

ELIAS CJ:

Then they'd have done a better job than they've done in this?

MS HANSEN:

Yes, and there would have been different substantive considerations, and the whole process would have been different because –

WILLIAM YOUNG J:

What if they thought it may have been a medicine but it was unfair?

MS HANSEN:

Well, if they had said, "Well, actually there is a prospect that Justice Collins is wrong but we think nonetheless, even if these substances are properly, you know, are medicines under the Medicines Act, they should nonetheless be taken outside of the Medicines Act for these reasons." But that was not the nature of the exercise.

ELIAS CJ:

But doesn't the – don't the consideration that they run through, I mean, they are all directed on that, what does it matter really, if, if they're right?

MS HANSEN:

Well, I guess they've been able to regulate and take something out of the Medicines Act without ever confronting the possibility that it actually is a medicine, and it may be that's something that…

ELIAS CJ:

Well, they've clearly gone further than that because they've looked at all these considerations. They've got this –

GLAZEBROOK J:

So where do you say the – do you say the consultation document throws light on that? Where is it?

MS HANSEN:

It's at – perhaps it doesn't. Page 1954, Your Honour, tab SSJ3. So they talk about the maximum allowable value. In a recent judgment, the High Court dismissed the plaintiff's claim, they talk about the Medicines Act case, they don't refer though to the fact that there is an appeal but they say the Judge found that it isn't a medicine and that they say the regulation would provide greater clarity about the issue by removing any possible ambiguity, regularise the status quo.

GLAZEBROOK J:

And then they ask a very open ended question, "Do you support the amendment, if not, why?"

MS HANSEN:

Yes. And there were 1300 odd submissions and the overwhelming majority of them opposed the amendment.

WILLIAM YOUNG J:

And those submissions made the point that Justice Collins might have been wrong.

MS HANSEN:

That's right, but that wasn't ever seriously engaged with because those submissions were dismissed on the basis that Justice Collins found otherwise and therefore no further consideration needed to be entered into.

ELLEN FRANCE J:

But if you look at all of the things that might mean it should be regulated as a medicine, why would it matter if your starting point was a different one?

MS HANSEN:

Sorry, Your Honour, what?

ELLEN FRANCE J:

Well, if you look at everything, all of those factors that mean it should be treated as a medicine or at least that's the view advanced, and you reject those, why does it matter what your starting point was?

MS HANSEN:

Well, I'm – that's a fair point but I think my submission would be it was never considered that it should be a medicine or it was simply that it was not a medicine in the first place and that's sort of where the starting point is an odd place because if it was simply to preserve the status quo, that then is not to

change the law. But what the discussion we've had shows is that actually what they were doing is not only confirming the law but they were potentially changing the law. And the Court of Appeal said that the key thing was that they were simply confirming the status quo. And my submission is confirming the status quo is entirely different from legalising the status quo and that quite different considerations apply, and if they had been able to legalise the status quo under the guise of an exercise which was to confirm the status quo I submit that that maybe, that has been less than transparent. So perhaps, I mean, just for Your Honours there has been one other exercise of the regulation making power and that was to exclude certain dentifrices and anti-dandruff preparations from the Medicines Act. That was done, that is Regulation 58A. So these products would have been otherwise related products under the Medicines Act and there was a decision that it was reasonable to take them out of the Medicines Act control. And there were two reasons why it was taken out. First, that the regulation of these products under the therapeutic product legislation was not the norm in other jurisdictions and, secondly, there were other sufficient consumer protections outside the Medicines Act, namely in the cosmetic standard group. That material is at volume 7, tab 1, exhibit Q. I won't take Your Honours to it but just demonstrate that the only other exercise has been taking what is a related product out of the Medicines Act and it was considered that it was appropriate to do so because there were sufficient quality controls outside the Act. I mean, my simple point is, and despite the discussion, that the regulation was made on the basis the High Court was correct and to the extent and that really it wasn't ever confronted that the High Court might be wrong. So just the fourth point, and I will be quick. The fourth point is that the regulations as well as being vitiated by an error of law, that they have been vitiated by an improper purpose, namely the purpose of rendering the appellant's appeal moot. Now the documentary evidence does, in my submission, show that rendering the appeal moot was a purpose of the regulation and that the appellant submits that this is an improper exercise of subordinate legislative power because it was intended to retrospectively favour the Crown in litigation against it, and that that's a direct –

GLAZEBROOK J:

Why retrospective? Because it is only prospective?

MS HANSEN:

Well, I think the intention was to render the appeal moot, that's the stated purpose of the regulation in the documents, and you're right. So strictly it couldn't have that effect but that was the stated purpose. But if there was any issue of mootness it was simply prospectively, and if the regulation had the power to actually declare something, that the regulation validly declared something that is a medicine not to be a medicine, so if it changed the law, it still was only prospective.

GLAZEBROOK J:

So what's wrong with that?

MS HANSEN:

What's wrong with…

ELIAS CJ:

Prospectively.

GLAZEBROOK J:

Because it's not just in respect of your client, it's more general, what's wrong with a prospective amendment?

MS HANSEN:

Well, there's nothing wrong with a prospective amendment. But to the extent it extinguished the extant appeal, that's what the appellant is objecting to.

WILLIAM YOUNG J:

So they can't change the law between High Court and Court of Appeal, even prospectively?

MS HANSEN:

No, that's not what we're saying, but we're saying that it can't extinguish the appellant's extant appeal rights in relation to the High Court case.

WILLIAM YOUNG J:

But isn't that then a matter for the Court of Appeal as to whether it's worth going on with the appeal if the controversy has no ongoing significance?

ELIAS CJ:

Yes.

MS HANSEN:

Well, I hope I've submitted to you, Your Honour, that the issue of whether or not this is properly a medicine or was properly a medicine prior to the regulation is an issue of significant public importance, given that the whole practice of fluoridation is premised on it never being a medicine, and the Ministry fact sheet says quite clearly –

GLAZEBROOK J:

But this is a different point. You're say that they couldn't pass the regulation because they were trying to render an appeal moot, so they couldn't pass a prospective regulation.

MS HANSEN:

They couldn't pass a regulation that rendered the appeal moot other than –

ELIAS CJ:

But whether it rendered it moot was something for the Court of Appeal to consider. The regulation doesn't have that necessary consequence.

MS HANSEN:

No, it doesn't, but it was made for that purpose.

ELIAS CJ:

Well, it may have been, that might have been the motive, but why is it a basis of invalidity of the regulation?

MS HANSEN:

Well, I would submit that it can't actually make the appeal moot per se, therefore having that as an objective or a purpose is improper because –

WILLIAM YOUNG J:

Well, say the, right when the proceedings were issued the Ministry of Health has said, "Oh, well, we've always through it's not a medicine but we guess it's possible that it's arguable that it's otherwise. Let's put this controversy to bed now with a regulation." Would that have been objectionable?

MS HANSEN:

No.

WILLIAM YOUNG J:

So they could have –

MS HANSEN:

But it wouldn't have – sorry…

WILLIAM YOUNG J:

So they could have said, "As from this point on it's not a medicine, and as a matter of interest it'll remain to be seen whether the Judge will be prepared to hear the case…

GLAZEBROOK J:

Or whether the person would carry on with it.

WILLIAM YOUNG J:

Yes. So if they're entitled to stop to, as it were, put in a regulation before the litigation gets to hear it, why can't they put in a regulation after the High Court when they've won?

MS HANSEN:

Well, it wasn't – yes, but they never regulated on the basis that they could be wrong, I guess, and that's where –

WILLIAM YOUNG J:

Well, yes, we've gone down that track a dozen times.

GLAZEBROOK J:

That's a previous point.

MS HANSEN:

I know, but that's I suppose the point. But my –

WILLIAM YOUNG J:

So I was just interested to see how the first point you made, was it fingers crossed?

MS HANSEN:

Pardon?

WILLIAM YOUNG J:

Is this just a reiteration of the point we've been around?

MS HANSEN:

No, it's not, because –

ELIAS CJ:

No, it is an improper purpose argument but…

GLAZEBROOK J:

But we're just trying to find out why it's improper. Because it's a prospective amendment, and just because your motive might be to stop a Court case, or one of the motives, because it's not just to stop this Court case it's to stop any other Court cases as well presumably, and to ensure that it is actually, that they can continue to fluoridate water without coming under the Medicines Act, which is the main purpose of it.

MS HANSEN:

That's right.

GLAZEBROOK J:

Because they've gone through and decided it shouldn't be.

MS HANSEN:

That's right, but the fact is, I suppose, that still doesn't resolve the issue of whether it has always been a medicine and it has not been properly regulated under the Medicines Act until the regulation was enacted in 2015 and that's actually the point. I mean this is just simply about whether there has been lawful administration of the Medicines Act by the Crown because an important premise underpinning fluoridation is that this substance has never been a medicine and in my submission there is public interest in, and this is what the appellant has been seeking, to establish whether or not that's correct because as – but I can't take that point any further, I've made that point.

GLAZEBROOK J:

Well, we understand that. We were just really trying to see whether there was an independent point, which you said there was, on the fourth point.

MS HANSEN:

The fourth point is that it can't, maybe there is some issue about, that the issue about the status can be resolved as from the date of the regulation, but that doesn't extinguish the appellant's kind of vested appeal rights that accrued prior to the regulation, which – and those appeal rights just simply wished to establish what the status of these substances was prior to the Medicines Regulations. So, to the extent that the, removing the appellant's appeal rights simpliciter –

ELIAS CJ:

The regulations don't remove.

MS HANSEN:

They don't do that, no. So, but the point is that the appellant still hasn't had its appeal heard in the sense that even though there's no –

GLAZEBROOK J:

And we understand that and you say we should hear, the Court of Appeal should have heard the appeal and we should.

MS HANSEN:

Yes. So – now the, and sorry, I didn't intend to be this long at all. So there's the *Riley* case, which talks about interference by the legislature, and that's at volume 4, tab 33, but I'll move on in the interests of brevity. In New Zealand, obviously the right to have access to the Court is a fundamental right and any interference with vested procedural rights must be clearly authorised and the Court of Appeal says that rendering the appellant's appeal moot, or having that as an expressed purpose, is not improper because in this case the appellant's appeal right is impaired, as a result of the proper purpose, the Court found, of promoting legal certainty, and they rely on the *Canterbury Regional Council v Independent Fisheries Limited* [2012] NZCA 601, [2013] 2 NZLR 57 case for that. Perhaps if we go to that, which is volume 2, tab 17. And the relevant – so at page 655, from paragraphs 136 onwards, my submission simply is that the *CRC* case is quite different to the situation in our appeal. In the *Canterbury Regional Council* case the Court found that the Minister was authorised, under section 27 of the Canterbury Earthquake Recovery Act 2011 to revoke a Resource Management Act 1991 document and that the consequences of the revocation was that the right of appeal, in respect of the document, would cease to exist. And the Court said – and this is at paragraph 143 on page 656 – that basically impairing the appeal right against the now revoked RMA document occurs as a matter of logic by necessary implication from section 27 in the definition of a resource management document. And it said that consequently the CERA contemplated that the Minister's exercise of the power could end appeals before the Environment Court.

My submission is that the situation with the regulation making power in section 105 is different in that it is neither a logical, nor necessary, consequence of the exercise of the power to declare a substance a medicine or not, That vested appeal rights in relation to the prior status of that substance are impaired. So in other words, the impaired of the appeal right does not necessarily flow from section 105.

And further, the regulation making power itself obviously doesn't preclude judicial review of the regulation but in *CRC* case the power exercised by the

Minister, the power to revoke the RMA document, was unappealable and unreviewable and so you couldn't challenge the Minister's decision to revoke the document and any extant appeals in relation to the revoked document were extinguished, and the Court said that that's the logical and necessary consequence. But my submission is simply that the section 105 is in different terms and neither precludes a challenge to the resulting regulation nor impairs existing rights and that's the simple submission.

And my final submission is just simply paragraph 147 in the written submissions. It is submitted that because there is an error of law and an improper purpose it's an appropriate exercise at the Court's discretion to set aside the regulations as invalid. The Ministry elected to regulate in response to the Court's invitation. Given it was successful in the High Court it did not have to regulate at all and certainly not with such urgency. It assumed the risk that if the Appeal Court sees to the matter, might disagree with the High Court. It's express primary purpose was to defeat the appellant's right at least prospectively.

So unless there are further questions those are my submissions.

ELIAS CJ:
Thank you Ms Hansen. All right we'll take the adjournment.

WILLIAM YOUNG J:
We'll finish tomorrow about four, do you think?

ELIAS CJ:
How long, counsel, for the respondents do you think that you are likely to require.

MR LAING:
I will certainly get through in the morning, Your Honour. I am hoping that I will probably be more than two hours, two and a half hours.

WILLIAM YOUNG J:

Start at nine.

ELIAS CJ:

Yes I think we had better. Are you happy to start at nine?

GLAZEBROOK J:

It's not a strike tomorrow, is it?

ELIAS CJ:

Shall we start off and carry on for –

GLAZEBROOK J:

Is the public transport strike off tomorrow? Is the public transport strike finished? It is. It's just there has been some issues.

ELIAS CJ:

Would you like to sit on to five? Would you prefer to stop?

GLAZEBROOK J:

I think it would be better to stop.

ELIAS CJ:

All right, well we will resume at nine tomorrow, thank you.

COURT ADJOURNS: 4.38 PM

COURT RESUMES ON FRIDAY 17 NOVEMBER 2017 AT 9.01 AM

ELIAS CJ:
Yes, thank you, sorry, Mr Laing.

MR LAING:
If Your Honours please, I will be going through my submissions in order but not reading them. I'll try to be as succinct as possible.

ELIAS CJ:
Yes.

MR LAING:
I'm very conscious of time today.

ELIAS CJ:
Thank you.

MR LAING:
I'm hoping that I won't be more than a couple of hours. I'll try to stick to that. There's a few issues I'll have to canvass that arose yesterday. So if I just start with my introduction summary, it's quite important context to note that these proceedings started off as fairly normal just review type proceedings but with the overlay of the Bill of Rights Act issues, and the decision that was originally challenged was a decision by the Council to fluoridate two water supplies, two small towns in its district, and as, in all good traditions, there was a vote of 10 to three in favour of fluoridating the Patea and Waverley water supplies.

I don't think I need to say anything else about my page 1. The issues on appeal are pretty clear, and just turning to page 2, though, at my paragraph 6, I then have a summary as to the Council's position in relation to this appeal. Firstly, the Local Government Act does empower the addition of drinking water as did previous legislation. The central focus should, in my submission, be section 12, general power of competence, and I will come back to develop that argument in more detail in due course. Also the Health Act is

confirmatory of that position and I will again be spending some time on that. Fluoridation is not – drinking water is not medical treatment. The Council adopts my friend, Mr Powell's, submissions on that point, so you will not hear from me on that unless there is anything you wish to ask me. If fluoridation engages the right of refusal, then it is – fluoridation is prescribed by law and is a justified limit, and finally, in my submission, there is no other possible interpretation to – it's the last part of the *Hansen* test.

So moving over to page 3, the interesting thing about this case is that although the focus has to be on what Parliament's intention was, the delivery of that is by local authorities in New Zealand, so there is this dichotomy between the focus on what the legislation says, what the Bill of Rights says, but delivery is at the local level, and that is simply because the Local Government Act provides that local authorities powers in relation to drinking water. So that is a fact that I notice came through yesterday in some of the questions from Your Honours and I'm happy to sort of deal with that further in due course but it is an interesting dichotomy here and, of course, the way to challenge that decision was to bring just review proceedings against a decision to fluoridate water.

There is quite interesting context in the affidavits that were filed in the High Court in paragraph 10 including by Dr Simmons who was Chief Medical Advisor of the Taranaki District Health Board and was prior a local dentist and in my submission, those two affidavits, and I'm sure you read them, provide very important local and, by inference, national sort of context to the issues around fluoridation, and I just refer the Court to the summary of Dr Simmons' evidence, it's in the Court of Appeal decision at 130 to 134 and for Ms Pryor its 135 to 136 in the Court of Appeal decision.

So just moving onto page 3 of my submissions, it's also important to note here that the Ministry of Health has an important role in evaluating and reviewing scientific studies on fluoridation as well as commissioning its own studies. It supports fluoridation and actually actively encourages local authorities to fluoridate its water supplies.

And by way of further context I refer at page 4 to the fact that the issues, the merits of fluoridation have been considered by a Commission of Inquiry and it's back as far as 1957 and then also by the New Zealand Human Rights Commission, so it is interesting that this debate has come up again at this time. It was put to bed probably at the time by the Royal Commission back in the ‘50s plus the Privy Council case but now it has arisen its head again.

I then very briefly deal with the affidavit the was filed by the Council and in my submission that evidence is the best evidence before this Court. It is topical evidence about local New Zealand conditions and so there is Dr Whyman and his evidence was summarised in the Court of Appeal decision at 117 to 127. And that evidence provides some pretty important overview about the state of oral health in New Zealand and the reduction in dental decay associated with fluoridation. So in my submission that is very good primary evidence and it is local evidence. There was also Professor John McMillan, Professor of Biomedical Ethics at the University of Otago. Dr Robyn Haisman-Welsh, formally Chief Dental Officer, Ministry of Health, and she describes in some detail the Ministry’s position in relation to fluoridation, its role in local Government decision-making and how it researches issues relating to fluoridation. And, finally, Mr Howard Wilkinson. He has a very short brief of evidence. It's just describing how fluoride gets in the water, at least in his own area. I then come onto a topic that I don't want to spend much time on but this is an issue that has arisen because there are three sets of proceedings and sort of almost invariably some of the evidence has been transplanted from one case to another. Now the issue for the Council there is that the evidence that was not in contention in its own proceedings has not been able to be the subject of rebuttal evidence or anything like that so if the Court is minded to have regard to those documents, that evidence, then I think it's very important to put that caveat beside it. It's not evidence that the Council has been able to respond to.

ELIAS CJ:

In what area are you concerned about because the argument addressed to us doesn't really get into the evidence to any great extent except perhaps in relation to section 5. Is it in that area?

MR LAING:

It's in that area if Your Honour pleases.

ELIAS CJ:

Yes, I see, yes, thank you.

MR LAING:

But to my mind, probably the one particularly that was in debate in the Court of Appeal was the Cochrane Report, and just on page 6 there at 21 I just refer to what the Court of Appeal said about that. It was very – acknowledging the fact the Council couldn't respond to it and they'd put very little weight on it but I will come along, later on, to say well the Cochrane Report doesn't get the appellant's very far anyway and Her Honour Justice Ellen France yesterday sort of made that point. So I don't want to labour that issue, it's an issue that's in there and it's just really a matter of caution in terms of what is taken as evidence and what is taken as perhaps just a document in the background.

So with that sort of beginning I come onto the issue about the power to fluoridate water. We are very happy to adopt the Court of Appeal's analysis on point but in my submission the issues probably got overlooked, the really core issue around section 12 of the Local Government Act didn't really find prime place in the Court of Appeal, and I want to just try to take you through that in some detail.

I don't think I need to say very much about the Privy Council case. There was just two things that I wanted to mention though. Firstly, the appellant's at paragraph 51 of their written submissions, refer to evidence about impurities in the water that would have been supplied in Lower Hutt and my submission that's just pure speculation. There is no evidence on that point at all. We

don't know what form of fluoride delivery was involved there so in my submission that's just pure speculation. Secondly –

WILLIAM YOUNG J:
We probably would – isn't there a reference in one or other of the judgments to what the compound was that was added?

MR LAING:
Yes but not in terms of what impurities might be added, if Your Honour pleases.

ELIAS CJ:
Contaminants.

WILLIAM YOUNG J:
Oh I see, I thought this was a reference to, as it were, what's left.

MR LAING:
My friend referred to the fact that –

WILLIAM YOUNG J:
Oh, there's lead or…

ELIAS CJ:
Cyanide.

MR LAING:
Yes. So and my submission to that's not, it's just not something that can be really drawn and nor do you have to draw really go down that road. So that's the first point I just wanted to make about the Privy Council decision.

Secondly, leaving aside any differences at all what is really, I think, in my view inescapable is that as at the commencement of the Local Government Act there was very clear law about the power to fluoridate water. There can't be any doubt about that and if Parliament – and so that's the background in

which Parliament enacted the Local Government Act 2002. There can't be any misapprehension about the state of the powers at that stage.

The important thing about the Local Government Act 2002 is that it did not repeat many of the very specific powers that were in the former legislation and this is evident by the fact that there was this general power of competence, section 12, and in my submission the supply of drinking water, and in my submission the incidental power to fluoridate water is now found in section 12. That is the primary authority –

GLAZEBROOK J:
I actually have real trouble with that because I think section 12 says you're not confined to powers that are set out elsewhere but you have general powers to function as a local authority so what you have to then find is to say well, does the local authority, assuming it is a therapeutic purpose, have power to medicate without consent effectively. So let's assume it's medical treatment. Does that give power – because if it's not medical treatment then you're probably right but if it is medical treatment does that very general power that just says you have a power to perform functions give you a power to medicate? Would the local authority then, for instance, be able to say well, let's put some tranquilizers in this water or we're actually having a bit of trouble with whooping cough, let's put a whole pile of antibiotics in there because that – and when it's put that way it doesn't sound like a section 12 power to have that.

MR LAING:
I am going to come to that. My submission is that section 12 is a starting point and it talks about full capacity to carry on or undertake any activity or business. So that's a starting point. The, there are the limits in section 12(3) and it is those limits. So my starting point would be there is the power to supply drinking water is in section 12. In fact there is no power elsewhere in the Act to commence a new water supply. So –

GLAZEBROOK J:
Their duty is to do so, aren't there?

MR LAING:

– only to continue existing supplies.

GLAZEBROOK J:

Oh, okay.

MR LAING:

So you will not find anything in the Local Government Act that refers to commencing a new water supply so you have to start from the point of view that that is part of the general power of competence. But I think Your Honour's point though comes to section 12(3), which is the limits on those powers. And if I can just perhaps just turn to that. So if you look at section 12(3), the starting point is is there anything in contrary in the Local Government Act about the power to fluoridate? And the answer in my submission is there is not, it is neutral. And clearly you have to rely on section 12 for a new water supply, and I will come to section 130 later on. So if I can just put that to one side for a moment but what I will be saying about section 130 is it is a continuation power, and so that is the very point. So nothing in my submission to the contrary in the Local Government Act.

Then you turn to the Health Act, which was the subject of a lot of debate yesterday, and in my submission there is nothing to the contrary in that Act and in fact I already draw, I have already asked the Court to consider section 23 of the Health Act, which is a really wide power and duty to abate nuisances, but on my submission it would include the power to deal with improving dental health, any form of health, and also then, as mentioned yesterday, the two powers in Part 2A, 69O(3), the one which refers to the power to fluoridate and also 69(2)(h) and I will come back to those in due course. So in my submission, public health is very much the focus of the Health Act and that is quite consistent with the power to fluoridate for the purpose of the public health.

GLAZEBROOK J:

I don't think we have got section 12 of the Health Act.

MR LAING:

Section 23. I am sorry I have just noticed it hasn't been included in the case on appeal.

GLAZEBROOK J:

Well, I don't think we have got that either. Whatever it was, we haven't got it.

MR LAING:

We can probably bring it up.

GLAZEBROOK J:

The question was really whose duty was it under the Health Act I suppose. When you say there is a general duty, whose duty?

MR LAING:

That includes local authorities.

GLAZEBROOK J:

That is what I was wanting to know, yes.

MR LAING:

Very, very much so.

GLAZEBROOK J:

All right, okay.

MR LAING:

It is a fairly archaic provision, it talks about nuisances.

ELIAS CJ:

Can you read it out to us sorry, just so that we understand the submission?

MR LAING:

Sorry, Your Honour?

ELIAS CJ:

Can you read it out to us?

MR LAING:

I will just find it here.

ELIAS CJ:

Yes, thank you.

GLAZEBROOK J:

Now I am assuming that was in force at the time. Remember we were talking about that. That was presumably in force at the time the Local Government Act came into force before 2A was introduced.

MR LAING:

This is section 23 of the Health Act. I will just read you those –

ELIAS CJ:

Just what you are relying on.

MR LAING:

– yes, so I will just read you the opening words there. "Subject to the provisions of this Act it shall be the duty of every local authority to improve, promote and protect public health within its district." Now for that purpose every local authority is hereby directed and empowered to appoint officers, cause inspections," and it is quite then very specific sort of powers. So in my submission it is those opening words that are important and there's a duty there too.

ELIAS CJ:

Well, is there a wrap-up and any other part?

MR LAING:

No.

ELIAS CJ:

You say there are specific powers?

MR LAING:

There is then –

WILLIAM YOUNG J:

A duty.

ELIAS CJ:

It's the duty.

GLAZEBROOK J:

There is a duty to do that.

MR LAING:

– it's a duty.

GLAZEBROOK J:

It's a duty to do that and there are specific powers.

MR LAING:

Yes it's a duty then followed by some specific provisions.

ELIAS CJ:

Yes.

MR LAING:

Empowering and directing.

ELLEN FRANCE J:

And in terms of the specific provisions, do you rely on (c) or not, so 23(c)?

MR LAING:

In part in (c), (c) would deal with –

GLAZEBROOK J:

Do you want to read that out because we're at a disadvantage?

MR LAING:

"If satisfied any nuisance, or any condition likely to be injurious to health or offensive, exists in the district, to cause all proper steps to be taken to secure the abatement of the nuisance or the removal of the condition."

WILLIAM YOUNG J:

So do you say absence of naturally occurring fluoride in the water is a condition that exists in the district?

GLAZEBROOK J:

Well, it's quite a significant provision.

MR LAING:

It could have that in connotation but my submission really relates primarily to the opening words, the duty in the opening words, which is to –

GLAZEBROOK J:

And then the general powers that you have under section 12 of the Local Government Act to fulfil that duty presumably –

MR LAING:

Yes.

GLAZEBROOK J:

– which is the tie in of the two together, so the duty to, for public health, and then the powers that you have under the Local Government Act as well as the specific powers under section 23. Is that –

MR LAING:

Yes, Your Honour, so your starting point, section 12. Is section 12 then read down in some way by that Act or by another Act, and so we come – of course, section 23 has been in the Health Act from 1950, so we then had the Drinking-Water Standards part engrafted onto it, and in my submission that's – it's just as consistent as well. In fact, you know, it deals very specifically with public health. So I say you can't read down the power to fluoridate by the Health Act.

GLAZEBROOK J:

Well, it actually suggests that the, whatever the (h) is, O(2)(h), dealing with public health, is not just related in a very narrow sense to wholesome drinking water but a more generic public health that fits in with the section 23 requirement.

MR LAING:

That is my submission.

GLAZEBROOK J:

Yes.

MR LAING:

Yes, very much so, that there's no inconsistency between the original section 23 and the new Part 2A of the Health Act. So that's the second limb of section 12(3) and the third limb is, in my submission, there's nothing in general or to the contrary either, so I would say the starting point therefore is that there is a power to fluoridate and that's not, cannot be read down or dismissed by any other provision, any enactment. So I think that is –

GLAZEBROOK J:

Or indeed is actually reinforced by those provisions.

MR LAING:

Yes.

GLAZEBROOK J:
If anything, reinforced.

MR LAING:
Yes, yes, so – and, of course, the starting point is also that this is against the background of the Privy Council case and what had to be assumed or was assumed or what inference can be drawn from the commencement of the 2002 Act.

I just want to deal with one final point there, and that is in the appellant's submissions they raise an issue. Well, sorry, yesterday, I think it was Ms Scholtens yesterday, raised an issue as to whether the supply of water was a regulatory function. In my submission, it's not and I simply refer the Court to the High Court decision at 41 to 43, and that aspect of the decision doesn't appear to have been appealed and certainly was not a focus in the Court of Appeal, but I just leave you with that reference there.

ELIAS CJ:
Sorry, what was the reference again?

MR LAING:
High Court, 41 to 43, Your Honour.

ELIAS CJ:
Yes, thank you.

MR LAING:
I can find – go to that. This is at 41. His Honour has referred to the *Laws of New Zealand* there. "The power of general competence does not extend to regulatory or coercive powers not possessed by ordinary citizens." At 42, "Ms Hansen's argument requires that a territorial authority could fluoridate only if the power was among those conferred in Part 8. She says that because it is a population-based measure." Then at 43, "The argument cannot be sustained. The addition of fluoride quite simply cannot be characterised as a regulatory function," and then there's references and

dictionary definitions of “regulatory”. “It does not involve the exercise of regulatory power.”

And the important point is, of course, that regulatory powers are contained in some detail in the Local Government Act because that is an area where restrictions are required to make sure that there is a fair balance of rights but, in my submission, the power to supply water and put whatever you want to into water is not a regulatory function as such at all.

ELIAS CJ:
Well he doesn't deal with coercive, does he?

MR LAING:
Your Honour?

ELIAS CJ:
He doesn't deal with the other limb, he says it's not regulatory because of the dictionary definition of what regulation means but does he deal with the argument that it doesn't extent to coercive powers?

MR LAING:
No.

ELIAS CJ:
So what’s your answer on that. I mean it must be a coercive power.

MR LAING:
So if I go back one step…

ELIAS CJ:
Yes.

MR LAING:
Regulatory powers are very clear. What the regulatory powers are and I made it quite clear, they are very prescribed powers –

ELIAS CJ:

Yes, the regulation making powers, you're defining as.

MR LAING:

Yes, powers to be to property, powers to enact bylaws, things of that nature. There isn't –

GLAZEBROOK J:

Just so I'm clear, are you saying they are set out in the legislation effectively?

MR LAING:

Yes, and so when you look at section 12(3) the starting point is that there are some powers that are subject to very specific, you know prescription, they are regulatory powers and so that's there but there's nothing in the local Government that really draws a distinction between coercive nature of a power. So in my submission that really comes down to the Bill of Rights issue.

ELIAS CJ:

The principle is that a general empowerment doesn't enable you to regulate people's conduct or coerce them. That's the general principle which the Judge is responding to by saying regulation is to be taken to mean the making of regulations which I must say I would have a slight query about if the principle is as stated in the *Laws of New Zealand*, but I'm just asking you, what is your response to saying that this was a coercive power.

MR LAING:

It could be at one level characterised as a coercive power but in my submission it is a power which is authorised.

ELIAS CJ:

I understand that argument, I'm not bothered about that, it's just –

MR LAING:

But then again you could say the same thing about putting anything in drinking water.

ELIAS CJ:

Well you could.

MR LAING:

And clearly the Act contemplates the additions to drinking water to make it safe and in my submission to also, for health reasons so if it is regarded as coercive in Your Honour's sense then, in my submission, that is definitely impliedly authorised.

ELIAS CJ:

Well, it really does seem to me that the whole argument comes down to whether it is authorised.

MR LAING:

Yes, it does. So, you know, the word, there's no sort of dichotomy as such in the Local Government Act between coercive other powers, the distinction is regulatory and if there's an element of coercion and some other power. I mean you could take the example of rubbish collection. Council goes along and says, "Well we'll pick your rubbish on Mondays," and somebody says, "Well, no, it doesn't suit me, I want my rubbish picked up on Wednesday," and they'll say, "Well, no, no, take it or leave it," sort of thing. So even non-regulatory powers have a degree of sort of coercion or you have to fall into line sort of thing. So I don't see that distinction as really being apt, you know, it's more of a question is it authorised or not and then you go to obviously the Bill of Rights considerations if you have to.

ELIAS CJ:

But the fact that if there is a general principle that a power of general competence doesn't extend to regulatory or coercive powers not possession by ordinary citizens, then maybe that bears on your interpretation argument, whether they are impliedly authorised.

GLAZEBROOK J:

That was always my issue with relying on section 12, but I think you've answered it by saying you have duties under the Health Act.

ELIAS CJ:

Under the Health Act, yes, yes.

MR LAING:

Yes, and I don't think, I don't, so I'll just perhaps just respond again. I don't think there is a general sort of principle about coercive powers, it is simply a constraint. You look at section 12, then you look at any other provision to the contrary in the Local Government Act, and there are plenty of them, plenty of regulatory type powers you have to comply with, which is very clearly spelt out. And, of course, the same with other acts, we have the Resource Management Act, which is a whole other regime. The Council can't come up in the planning area or the resource management area, the Council's bound by the Resource Management Act so that is an act to the contrary, as is the Building Act, again, another regulatory act.

ELIAS CJ:

I understand that, thank you.

WILLIAM YOUNG J:

Your coercive powers here are really the powers of a monopolist. Councils are the only water suppliers and they are, in that sense, something of a monopolist.

MR LAING:

There are private water supplies.

WILLIAM YOUNG J:

Are there?

MR LAING:

Yes.

WILLIAM YOUNG J:

You mean reticulated –

MR LAING:

There are, throughout the country, there are –

WILLIAM YOUNG J:

Network water supplies.

MR LAING:

There are mainly, they're legacy suppliers but there are people who supply – there are groups, they'll either form a corporated society or have some mechanism and deliver water that's not otherwise available.

WILLIAM YOUNG J:

But in most cases the network will be owned by the Council I take it?

MR LAING:

Not always, not always.

WILLIAM YOUNG J:

All right, well, be more particular. Are there private network suppliers in Patea?

MR LAING:

There are, there are suppliers –

WILLIAM YOUNG J:

In Patea and Waverley?

MR LAING:

There are, I'm aware of situations where –

WILLIAM YOUNG J:

In the towns we're concerned with?

MR LAING:

No, no. In these towns, no.

WILLIAM YOUNG J:

No, okay, so in those towns you are, in effect, a monopolist.

MR LAING:

You are and for most purposes the Council is the monopoly supplier but there are some rural water suppliers, for instance, where the pipes go down the road, they're owned by an organisation or a group of farmers or something like that. But they still have to comply with Drinking-Water Standards. So are we finished, I think we are finished on this topic, can I move on?

ELIAS CJ:

Yes thank you.

MR LAING:

I just want to turn very briefly to section 130. It was dealt with in some detail yesterday. In my submission section 130 is sort of properly understood as a, what I'd call a continuation power. It's words that His Honour in the High Court used. It clearly compels like authorities to continue with existing water supplies and, for instance, it can't close them down without going through various procedures but it does not empower the commencement of a new water supply, so it is a continuation power and basically ensures that existing water supplies aren't closed down without some sort of democratic process. But also, in my submission, to the extent it's necessary to make it, if a fluoridated water supply existed at the commencement of the Local Government Act, in my submission that's simply, that's continued, it's within the section 130. So even all things, other things, being equal, in my submission that would enable that water supply to continue in its present form.

ELIAS CJ:

Sorry, okay, go on.

MR LAING:

At 33, on my page 10, I refer to submissions the appellants made by a lack of debate on the, in Hansard during the passage of Local Government Bill. In my submission that's not surprising. If Parliament does not intend to change something then is there any need for it to actually –

ELIAS CJ:

I'm sorry, just going back to section 130 though. It is an obligation that's laid on the local Government organisation. You say it is to continue to provide water with the make-up it had at the time the Act came into effect. So with fluoride?

MR LAING:

I'd certainly say that it, it would include fluoridation, yes, section 132.

ELIAS CJ:

Well, would the local authority be able to change its stance, if that obligation is imposed on it by statute, in the way you say?

MR LAING:

That, I think, depends on section 133, Ma'am, it refers, "In order to fulfil the obligations local Government organisation must" and there's various things it must do or must not do, rather, "Not use the assets as security, divest ownership, lose control, not restrict the water supply." So those are the sort of powers that – they are the mandates that, specific mandates that it must adhere to.

ELIAS CJ:

Yes.

MR LAING:

But I, if you're going to ask me whether the would mean that they could never make a decision.

ELIAS CJ:

Well, if you're saying that 132 is an obligation to continue the supply as it is being provided and that supply includes the addition of fluoride, what authority would they have to change it?

WILLIAM YOUNG J:

Well, it might be the authority to continue to supply on the old basis, that is, with or without fluoride as they decide.

MR LAING:

Yes, my submission really is –

GLAZEBROOK J:

It allows you to continue, it doesn't require you to continue.

O'REGAN J:

These people weren't supplying it with fluoride so it doesn't make any difference.

MR LAING:

I think His Honour's reformulation is actually very elegant and I'm happy to adopt it.

WILLIAM YOUNG J:

Well, I'm glad that makes two of us at least.

MR LAING:

My submission is if there is fluoride in the water supply then that is a water supply that's there as at the commencement of the Local Government Act. I don't know whether it follows that they could not ever alter the constitution – consistency of what goes into the water thereafter.

GLAZEBROOK J:

Well they must be able to because –

MR LAING:

Yes I think they must be able to, yes.

GLAZEBROOK J:

– if in Hawkes Bay you were supplying unsafe water you must be able to, for instance, you must be able to change that constitution to make it safe at least.

MR LAING:

Yes, my point was slightly more limited.

ELIAS CJ:

No, I understand what your point is, I was putting to you the consequences of your point. I, for myself, think that it is a pointer to this being concerned with supply rather than with what they supply, apart from it being water.

MR LAING:

Yes, my point sufficient made if it's simply that if fluoridation is occurring it can continue because that's part of what the water supplies under section 130 –

ELIAS CJ:

I understand that, yes.

MR LAING:

It's not that, 130 is not the forefront of my argue.

ELIAS CJ:

No, I should hope not although I think it may be forefront of others.

WILLIAM YOUNG J:

Well I don't regard it as irrelevant.

GLAZEBROOK J:

Actually now it's just a continuation power.

ELIAS CJ:

It's just a continuation power.

GLAZEBROOK J:
It's not as significant as has been put on it as you say because –

MR LAING:
But it shows a degree of consistency that the Privy Council case nothing being said on the passage of the 2002 Act and section 130 is simply, I say again consistent with that or not inconsistent, certainly not inconsistent.

So that's really all I was going to say on section 130. I then come onto the Health Act and I don't, I won't repeat what I have already said but at 35 I refer to section 23 and I say that section 23 has been in force, substantially the same form since 1957, it was amended then and there has been some minor amendments since but to a large degree that provision has been in there throughout.

GLAZEBROOK J:
Now probably without a general power before the Local Government Act those powers that were there to promote public health might have limited the ability of Council to do anything else, would they?

MR LAING:
It would, they were very general –

GLAZEBROOK J:
Because you had to have specific powers that you found it may have been that you were limited to whatever the powers were in section 23 that were outlined specifically, unless you could find another power in the Local Government Act that gave the Council a positive right.

MR LAING:
If it was a regulatory power I'd agree with that.

GLAZEBROOK J:
Is it just regulatory because there were all of those vires arguments in terms of, well, especially swaps and matters of that kind, weren't there?

MR LAING:

There are very specific other powers in the Act that followed about, you know, buildings that were too noxious to inhabit, closing down orders, things like that but nothing much about water. So the powers for drinking water were really just, there were standards but they were not compulsory standards, they were simply ones that the local authority could adopt.

GLAZEBROOK J:

No, sorry, I was really looking at section 23. Given that local authorities before the Local Government Act had to have positive powers, I was really just asking you in terms of section 23 before the Local Government Act, would those powers that are specifically set out in 23 have been the limit of the powers the local authority had, subject to them finding powers, specific powers in the Local Government Act itself?

MR LAING:

I would say those opening words, Your Honour, the words "duty", was a very general…

GLAZEBROOK J:

All right, so you'd say you look at the opening words even before the Local Government Act?

MR LAING:

I'd say duty and – yes. So, if you like, it was a mini power of competence.

So that's, I mean in section 23, and I don't think I need to go further there. Then we turn to Part 2 of the Act, and I don't want to sort of repeat what was already said yesterday about that, except where I differ. There was a lot of discussion in the appellant's submissions about the distinction between drinking water potable and wholesome, and I just thought I'd just say a few words on that topic. And that really is drinking water is water which is potable and potable water is where there was no exceedances of MAVs for determinands other than aesthetic guidelines, and that's the difference. So if

water's cloudy it may be perfectly fit to drink but it may aesthetically not meet, not be good to look at.

ELIAS CJ:
Put you off, yes.

MR LAING:
Wholesome water is water that is potable, but it also complies with the guidelines for aesthetic determinands. So again in simple layman's terms it's water, it looks okay, as well as being capable of being drunk. So I think that's quite important.

And then the other issue is that there are really three quite separate duties under Part 2A. You've got 69S, the water supply has got to be adequate, an adequate supply, water supply, 69V, you take all practical steps to ensure drinking water complies with the standards other than aesthetic, or the determinands, and then 69W, duty to take all reasonable steps to ensure the drinking water supply is wholesome. So that's a sort of bit of context, if you need it, there. And in my submission there's nothing there that's inconsistent with fluoridation because fluoridated water is potable and presumably fluoride has no effect on whether water is wholesome.

At page 12 I just go on to refer to 69(3)(c), and I'm very content to adopt the Court of Appeal's analysis of that provision. But I do say that if there was no power to add fluoride that provision would be redundant. And I refer to the Select Committee on the Bill, to time, I think the makes it very clear what Parliament's intention was, but also just provide the Court with three additional references to the Hansard from the first and second reading, and this is in the appellant's bundle of authorities and it's 475, 476, Honourable Sue Kedgley –

O'REGAN J:
Hang on, whereabouts is it in the – oh, are you just giving us references?

MR LAING:

I'm just giving you references, I don't think I need to take you to those passages, because they're totally consistent. So, Your Honour, it's 475 to 476 –

ELIAS CJ:

Where are you in your submissions?

GLAZEBROOK J:

Appellant's bundle – oh.

MR LAING:

I'm on page 12, Your Honour, at 38.

ELIAS CJ:

Oh, yes, thank you.

MR LAING:

But I'm just adding to 38. So 475, 476, first reading, Honourable Sue Kedgley, 481, 482, first reading, Honourable Judy Turner, and 052, 052, second reading, Honourable Sue Kedgley. And again this is expressing quite clearly the concerns were that the powers could be interpreted as being mandatory, so, and they were the concerns raised by the members of Parliament there.

So I now want to just focus on a matter that arises out of my friend's submissions and, in particular, the purpose of Part 2A which is in 69A, and it's on – that's appellant's authorities, volume 1, page 18. "The purpose of this Part is to protect the health and safety of people and communities by promoting adequate supplies of safe and wholesome drinking water from all drinking-water supplies," and in my submission the reference there to health is quite consistent with section 23 and consistent with the power to fluoridate.

Then also if we then go over to 69O, which is the case on appeal, at pages 33 and 34, and I just want to go to 69O(2)(h), and this matter arose yesterday,

and again, in my submission, "Any other matters relating to raw water or drinking water may affect public health," so again I submit that is confirmatory of the power to fluoridate as is, of course, 69(3)(c). So in my submission the Part 2 goes beyond simply safety, in other words taking out things that could affect public health in drinking-water, or – then it's safe to drink, but also the wider connotation of public health.

If I can just turn to another related issue, and this is these, the MAVs. They are discussed in quite detail in the Court of Appeal at 32 to 55, but the – I'd just like to take you to the Drinking-Water Standards themselves, which is Case on Appeal, volume 6. The Drinking-Water Standards are part of 2A and they start at page 1226, but the passage I want to take you to is at 1241.

"The MAV" – 1.5, do Your Honours have that?

ELIAS CJ:
Yes.

MR LAING:
"The MAV of a chemical determinand in drinking-water is the highest concentration of a determinand in drinking-water that, on the basis of present knowledge, is considered not to cause any significant risk to health of the consumer over 70 years of consumption of that water." So I think this puts MAVs in some context there, and I also note that the Court of Appeal at 54 noted that they are very conservative and incorporate a safety factor.

And just finally on drinking-water standards in section Part 2A, the appellants at I think it's paragraph 7 of their submissions, refer to HFA and SSF being products of the fertiliser industry. Now I don't think that's necessarily correct in all cases but the point is clear is that any additives to drinking-water must comply with the Drinking-Water Standards. So there isn't just a wholesale ability to dump nasties into drinking-water using fluoride, so in my submission that's a very important point, and I'd simply take you again to the case on appeal. It's volume 6, Drinking-Water Standards, at 1245. This is a table, it's table 2A, if Your Honours please, and you'll see, it's very – my copy's rather

hard to read but amongst the things in there referred to are arsenic, cadmium, chlorine, chromium, cyanide, fluoride. So the Drinking-Water Standards are a very comprehensive set of rules as to what can be put into drinking water and it is simply not credible to say that there are going to be dangerous or inappropriate quantities of these other trace elements from fluoride.

So that is probably all I need to say on the topic of the power. I note at page 1543 the issue – difference between fluoridation and chlorination. I don't need to read that to you but, so that –

ELIAS CJ:
Your pagination seems to be a bit different from ours but paragraph 43 you're referring to?

MR LAING:
Paragraph 43. So unless there are any further questions I'll move onto section 11.

GLAZEBROOK J:
To be honest I think there is a distinction between chlorination and fluoridation if you, in the sense that one is an additive for public health reasons and the other is to make it fit to drink but I'm not sure it matters in that context.

MR LAING:
No and they're broadly both public health interventions.

GLAZEBROOK J:
That would be true as well, in the sense that if you don't have safe drinking water you're going to be ill but…

MR LAING:
Yes.

GLAZEBROOK J:
The other one is to improve the health rather than make the drinking water safe to drink.

MR LAING:
Yes, that's right. So I, at paragraph 44 and 45 I come onto summarise the Council's position on its appeal. It relies on the Court of Appeal's analysis that fluoridation does not constitute medical treatment and the section 12 rights engage. So it supports the Attorney's submissions on that issue. However, if the Court was to conclude that fluoridation medical treatment then it's submitted that the High Court was correct in its observation that the intrusion is minimal. That was not an issue that sort of appeared in the Court of Appeal but I just refer Your Honours to the High Court decision at paragraph 94 and my reasons for making that submission appear at my paragraph 45.

I then move onto section 5, justified limitations, and at 47 I set out the *Hansen* steps and I realise that there are other ways of cutting and dicing the test, but in my view the *Hansen* analysis is probably the one that I certainly find easiest to make submissions about and so I've followed those steps and I say at 48 that step 1 is addressed in our response to the first ground of appeal and step 2 is addressed by the Attorney in his submissions, and the submissions then follow the remaining steps 3 to 6. So I start with the issue at step 3, is fluoridation a justified limit, in terms of section 5? And I note, at 49, that the grounds of appeal relate to both parts of section 5. Again, we rely on the Court of Appeal's analysis and the Attorney's submissions on the first limb.

Turning to the second limb. We again rely on the, this is Justice Tipping's analysis, but just a few preliminary points about section 5. The High Court and Court of Appeal both found that the power to fluoridate, which is subject to the test, it's the power to fluoridate as opposed to the Council's exercise of that power, and refer to the *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 case, that hasn't been challenged on appeal and, in my submission, it must be right, so it is the power in the first instance rather than the Council's exercise of that power.

GLAZEBROOK J:
Although in fact in your case it might be better to say that it's the Council's exercise of the power in the sense that these particular communities had particular problems in terms of oral health.

MR LAING:
I understand that point, Your Honour. If –

GLAZEBROOK J:
I don't mean that you therefore don't go against it but I'm wondering whether that distinction is necessarily terribly useful in the sense that it may be that a power is all right but it can only be a justified limitation if it's exercised in a particular way?

MR LAING:
Yes I –

GLAZEBROOK J:
And in particular circumstances.

MR LAING:
I've thought about that quite deeply before making the submissions and I feel compelled to say that on my reading the appropriate starting point is the statutory power. Now your point about local conditions can be met in other ways because it's a local Government decision making process, so even if there is an undoubted power to fluoridation, and I say there is, at local level all those issues around the Bill of Rights, all those issues can be retuned in various ways and if you look at what happened in this particular case was something like 500-odd submissions which raised every possible issue, including local conditions and the very poor state of health and that was very persuasive on the part of the, you know, the Council level to initiate a fluoridated water supply so, my submission, those issues won't be lost at the local level.

ELIAS CJ:

I suppose one of the criticism might be made is that if you have a Bill of Rights Act impact is it – and if the interpretation being contended for is an apparently entirely open-ended discretion, is that, does that push you to a more restricted interpretation of the power because it's a bit cavalier in terms of rights for a power to be given that isn't constrained. Now no power is ever unconstrained and it will have to be exercised when it comes to be exercised in a context of legislation, the Bill of Rights Act as well, I suppose, but it might push you, it might be a factor which would suggest a more restricted interpretation of the power in the first place, that's the –

GLAZEBROOK J:

You do seem to be accepting as well that the exercise of the power can be subject to the Bill of Rights so I'm not, I now don't understand the submission at 52. Sorry, there's probably two different points.

MR LAING:

The way – I certainly, my submission is that the power, the Bill of Rights issue arises directly in relation to the statutory power in the first instance. I certainly – and there's good reason for that here and that is that local authorities are otherwise going to – a pretty practical reason if not a legal reason is that otherwise local authorities sitting round a table will have to make decision about whether there is power to fluoridate water in the first instance because you can't get away from the Bill of Rights issue otherwise. So unless it's determined at a central level that debate comes down every time a decision is made to fluoridate water or indeed to take fluoride out of water. So, and I certainly think that based on those, the *IDEA Services* case and the *Slaight Communications* case, my submission is that very clearly the power, the statutory power in the first instance, is where this analysis must take place. You do raise an interesting point though, is that leaving aside what the result of this case might be, if, for instance, the Court upholds the right to fluoridate at this level, does it arise again?

GLAZEBROOK J:

Yes, it's interesting.

ELIAS CJ:

If it upholds the power of local governments, authorities, to fluoridate.

MR LAING:

To fluoridate, yes.

ELIAS CJ:

Because…

MR LAING:

And finds that it's – and goes on –

ELIAS CJ:

Because Parliament is explicitly not making a determination that there should be fluoridation, that's explicit.

MR LAING:

No, it's a power. It's a power to be exercised.

ELIAS CJ:

Well, on your best case it is if you get past a more restrictive interpretation because of section 11, and you say you should because all of the protections, Bill of Rights Act, the contextual ones about what the legislation is for, will bite on the exercise of the power.

MR LAING:

That's correct.

ELIAS CJ:

So Parliament is not being negligent in leaving it to –

MR LAING:

No, no, and so, in my submission, it's inescapable that at this stage that we're looking at the power and the Bill of Rights implications of the exercise of that power, that this exercise must not take place, so, in my submission, it's not appropriate of the Courts to defer to local authorities on this point and –

ELIAS CJ:

Well, I suppose if you're putting it in terms of the Bill of Rights analysis, there is no need to adopt a, applying section 6, a restrictive interpretation of the power in order to prevent a breach of section 11 because that will be addressed in the decision whether to use the power.

MR LAING:

That is – yes, that is one way of looking at that step 6 from *Hansen*, yes, it is a way of dealing with it, but this – at the – it'll be – depending on the outcome of this case, of course, this doesn't, of course, prevent another argument arising as to whether you can relitigate at a later date, but it's beyond us at the moment.

GLAZEBROOK J:

Well, wouldn't we do the two together because your argument, wouldn't it be, in terms of the two that there is this general power, there's no need to write, read it down, and in this case the power was actually exercised appropriately given the state of dental health of – well, given the studies that have been done in respect of it and the state of dental health, in particular, in the two communities we're talking about?

ELIAS CJ:

Is that the basis of the claim? I'm now – the statement of claim?

GLAZEBROOK J:

Well, the statement, well, it's – I'm not sure, actually, because it was challenging the whole ability to fluoridate, but whether it –

MR LAING:

All administrative law grounds, including relating to the Bill of –

GLAZEBROOK J:

Yes. Well, unreasonableness, I suppose, if the decision was –

ELIAS CJ:

What was the…

MR LAING:

Yes, all of which are dropped off at this stage, so all we're left is whether the decision was valid because of –

GLAZEBROOK J:

With the actual – yes.

MR LAING:

– the arguments that are now before this Court.

ELIAS CJ:

So it's not before us. Are you saying that the Council's decision is not before us?

MR LAING:

The Council's decision is still before Your Honour but the other administrative law grounds have not been pursued.

GLAZEBROOK J:

So it's really therefore just in terms of the power rather than in terms of the exercise of the power.

MR LAING:

Yes, so the grounds that are before you are the power to, is the power to fluoridate and –

ELIAS CJ:

Yes, yes, the validity of what the Council did but not whether it conformed with the Bill of Rights in itself.

MR LAING:

Yes, well, that's…

ELIAS CJ:

Sorry, I'd quite like to look at the statement of claim, if that's all right.

GLAZEBROOK J:

Yes.

MR LAING:

Well, perhaps we should see if we can pull this out, even if I come back to it, but –

ELIAS CJ:

Yes, come back to it if it suits you better.

MR LAING:

But it was the Council's decision on, I would've thought, quite a large number of grounds it was under challenge and I'm – the only reason we can be here is that the Council's decision is still under challenge.

ELIAS CJ:

Yes, but it was challenged on a vires ground in part.

MR LAING:

Vires, consistent – but all the Bill of Rights issues were argued in the High Court of course. So –

WILLIAM YOUNG J:

The substantive argument is that the Council does not have the power to fluoridate the water.

ELIAS CJ:

Yes.

MR LAING:

That's right, either because there's no power in the first instance or because you can't do so consistent with the Bill of Rights.

WILLIAM YOUNG J:

By reason of the Bill of Rights there isn't a power.

ELIAS CJ:

But it's not the same thing though as saying that the Council's decision, if it had that power, was challengeable on administrative law grounds.

ELLEN FRANCE J:

That was the second, that seems to me to be the second limb of this statement of claim.

ELIAS CJ:

Is it? Okay, I wanted to check.

GLAZEBROOK J:

Okay, but whether that's before us or not now might be an issue.

ELIAS CJ:

Yes.

MR LAING:

I would like to just look at the statement of claim myself before I sort of –

ELIAS CJ:

Yes, that's fine.

MR LAING:

– before I sort of, well I can probably do it over the morning break so I just want to make sure –

ELIAS CJ:

By the way, I think we'll take the morning adjournment at 11.00 rather than at 11.30, thank you.

MR LAING:

If Your Honour pleases. So I will come back on that point.

Really just to recap though on my 52, and it is – this is an unusual situation where there is the powers at central Government level but the exercise is one removed. So that is an interesting factor here but I will come back to some of the evidence which is I think really on point.

My paragraph 53, I just make the point that the, and it's a pretty obvious point, that the Courts can't resolve the debate about the merits of fluoridation in these proceedings even though there may be some suggestions by the appellants to the contrary. 54 –

GLAZEBROOK J:
If we're doing a justification, I think it was the question that Justice Young asked your friend yesterday, if you are doing a justification what exactly do you do in those circumstances if you're not looking at the merits of fluoridation.

MR LAING:
I sort of come to this because particularly, well the next couple of pages really I just sort of come to this. It's really a – 54, "If this Court finds that the limit to the right is not justified it must then ask whether the decision-maker in this case was entitled to come to a conclusion on the challenge." So I make a number of submissions about sort of latitude given to the decision maker, in this case Parliament. So perhaps just go to my 55 and following, if Your Honour pleases.

ELIAS CJ:
That's a fairly revolutionary question you've posed in the second sentence of 54. I'm not sure that we'd decide that Parliament was not entitled to come to the conclusion under challenge. Anyway, pass on.

GLAZEBROOK J:
No, but doesn't that mean the conclusion that it was justified?

MR LAING:
Yes.

GLAZEBROOK J:
I mean we may have a different view but it's whether there's a latitude to Parliament, is that what the point…

ELIAS CJ:
Yes.

MR LAING:
That's my only point there, Your Honour, it's a question of how much slack the Courts give to Parliament on this sort of issue.

So in 55 I did say well the Courts generally give more deference in issues where there are elected members representatives that involve questions of public policy and so in my submission this is such a case.

56, "Latitude or deference to be given to the decision maker also depends on the context of the decision," and I referred then to Justice Tipping again. "The spectrum which extends from major political, social or economic decisions at one end to matters which have a substantial legal content at the other." And again, "If the decision maker is Parliament and it has manifested its decision in primary legislation, the case for allowing a degree of latitude may well be stronger."

And at 57, "The power to fluoridate, in my submission, and other public health policy decisions, sits at that top end of Mr Justice Tipping's spectrum that concerns matters of policy. Parliament's made a decision to give local authorities a power to fluoridate involve weighting of private interests against the public good and medical opinion, so it also involves a consideration of who's best placed to make decisions on fluoridation and, again, I say these are highly political decisions and best determined by a Parliament.

And that brings me onto the related issue, about the standard of proof in this context and I refer to the *Ministry of Health v Atkinson* case. The context will reflect the type of evidence required to meet the standard of proof and the Court of Appeal also engaged on that topic. It referred to the *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 case, and I set out the passage from Professor Choudhry's article, which was referred to in the *RJR-MacDonald* case. So I don't think I need to dwell – this is all very familiar territory to Your Honours, I don't think I need to dwell on that to any great extent. I do summarise the position at 61, "Consistent with the authorities, the Council submits that the evidential inquiry, under section 5, is limited to whether Parliament's position relating to the power to fluoridate water is reasonably open to it." So that's, in my submission, the appropriate threshold. "There must be a reasonable basis for its position but no more. In making this decision Parliament must be given latitude to balance competing values and the information before it." So in my submission that really does follow from the nature of the power, the highly political type of power.

But then moving over to 62 and 63 –

ELIAS CJ:

I just have to flag that I find this analysis quite wrong. I know that there is a respectable line of authority for it but I wouldn't want you to think that I accept this line. The Supreme Court of Canada is operating in quite different circumstances and I think it is an extraordinary question to ask the administrative law review question, of whether a position Parliament takes is reasonably open to it. It seems to me that here, the question for us, is a section 6 question and whether the apparent meaning in the legislation is capable of being given a more rights compliant meaning. That's the question, I think, for us, when we're looking at what Parliament has done.

MR LAING:

That is the ultimate question Your Honour.

ELIAS CJ:

Well, I think it's the only question myself, but anyway.

MR LAING:

I still – these submissions are made in the context of what sort of threshold and it also is made in the context that we're dealing with a case where the Courts are not capable of adjudicating between the merits on one side or another, so there must be some threshold, and I can see there is a threshold that the proponent must reach. In my submission is in this sort of –

ELIAS CJ:

But Parliament hasn't decided that the water should be fluoridated so the only question is whether the power that is conferred on the local authorities is, as you say, a power which includes the ability to fluoridate or not. That's the only question.

MR LAING:

And what, well obviously what is Parliament's intention.

ELIAS CJ:

Well that is taken from the language that Parliament has used and its purpose.

MR LAING:

Yes.

ELIAS CJ:

So that's the meaning.

MR LAING:

Yes, but –

GLAZEBROOK J:

Well for these purposes we're assuming, aren't we, that the meaning is that Parliament did mean to allow fluoride to be added.

ELIAS CJ:

Yes, yes.

GLAZEBROOK J:

And then the question is –

ELIAS CJ:

And then the question is –

GLAZEBROOK J:

– if that's a justified limitation isn't it.

ELIAS CJ:

If you get to that. I mean why would you? But, however…

MR LAING:

Well the, just to be clear, these submissions are made in the context of step 3 of *Hansen* so we're looking at –

ELIAS CJ:

Yes I know.

GLAZEBROOK J:

Well you're saying, for a start, that section 11 isn't engaged, but we're assuming, for step 3, that it is.

MR LAING:

We're assuming to the contrary it's engaged, so that is the context of those opening submissions there. My submission is that it is a justified limit and that you can safely reach that conclusion, and I'll come to that now.

ELIAS CJ:

Yes.

MR LAING:

So these are issues around weight of evidence, difference, and it is just simply background, and whether I'm right or wrong, Your Honour, on the point –

ELIAS CJ:
No, no, I understand, you're addressing section 5, that's all.

MR LAING:
I'm addressing section 5 and just looking at what, in my submission, the appropriate approach is, but whether Your Honours agree or not with that approach, I still go on and deal with section 5 in the round.

ELIAS CJ:
Yes, that's fine.

MR LAING:
So if I can do that, and I can be fairly brief. Perhaps I just should before I deal with anything else, I've already dealt with a submission that Parliament is, shouldn't be given, given a degree of deference because it didn't consider the issue. In my submission, as well, given the background, that's not surprising. There is no need for Parliament to, on a new enactment, to consider matters that are not controversial or not, not being changed or whatever.

In my 64, I refer to the Health (Fluoridation of Drinking Water) Amendment Bill and Your Honours will recall that was the reason for deferring this hearing for a period. I don't want to say much about that except that the Bill has been continued by the new Parliament on 8 November this month, so the Bill is still before the House but I don't think I need to say anything further about that.

So I then come to the question which I raised before, 66, if the section 11 right is infringed, is the power demonstrably justified in a free and democratic society, and I'd refer to the High Court and Court of Appeal approach which refer to Justice Tipping's approach in turn. Does the limiting measure serve a purpose sufficiently important to justify curtailing the right or freedom? (b) Is the limiting measure rationally connected with its purpose? Does the limiting measure impair the right or freedom no more than reasonably necessary? And also there's limit in due proportion.

So I really very quickly start off with the importance of the objective. In my submission, at 67, the reduction of severity, incidence of tooth decay, with the incidental benefit of reducing oral health inequalities, is a highly important objective, and it's – and I say consistent with legislation.

I then go on to refer to the affidavits. Your Honours can read that material. But I would, I refer in particular Dr Whyman's affidavit about the prevalence of tooth decay throughout New Zealand. So this is nationally focused evidence not locally focused evidence, and 70, I say, contrary to the appellant's submission that tooth decay is easily prevented and easily treated, the levels of dental decay referred to by Dr Whyman, and Dr Simmons, exist notwithstanding long-term promotion of brushing your teeth and free dental care. So that is the sort of national context.

The local context I refer to at 71. The situation is worse in Patea than in other areas of the country, and I give some figures there as well.

70, and this comes back to Your Honour the Chief Justice's point, the appellant's suggestion of a high threshold for the type of disease that might justify limiting s 11 is unsupported by authority and is unjustified. In any event, dental decay is a serious disease which, with respect, would meet such a high threshold. So in my submission, the primary evidence in this case is very clear. It is focused not only on the local context but is also deals with national context in terms of tooth decay.

I then go on to talk about the rational connection test and I say there is a clear rational connection between fluoridation and its objective. Fluoridation increases the amount of fluoride available for consumption in drinking water which in turn decreases the incidence and severity of dental decay across the population which receives it. And as the Court of Appeal noted, this point is accepted by the appellant's witnesses.

And so I don't need to read 74 and 75 but I will just refer Your Honour's again to the Court of Appeal's decision at 153 to 155 which is on that point.

I then go on to just deal with the issue where the impairment is greater than reasonably necessary. I first of all deal with an argument that was raised, well, it's raised by leave to appeal application in the submissions and I just say that that formulation by them is not, in my submission, correct and in 77 I refer to the *Atkinson* case, "We agree that if there is an alternative option that will have less impact it does not follow that the Ministry's option is outside the range of reasonable alternatives."

And again at 78 I refer to Justice McGrath in *Hansen* who said, "Whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness."

So if we just now just come to really where the evidence lies. You do have contrary affidavits from the appellants but, in my submission, the totality evidence shows a persuasive body of evidence that a consumption of water with a sufficient concentration of fluoride is effective in reducing the incidence of dental decay. And so in my submission that is the really important starting point.

Even the Cochrane Report that I've referred to already is cast out about the extent of the efficacy but there is no doubt that the conclusions in that report conclude it is an effective way of dealing with tooth decay. And there is – my friends produced, as part of their submissions, an appendix. It's appendix B that deals with, that summarises the evidence. Now, I was going to go through that to a degree and just give you opposing references from the Council's evidence but what I thought might be useful is just to hand up one sheet of paper which I have gone through and just counterpointed the evidence.

ELIAS CJ:
Yes, thank you.

MR LAING:
I don't think I need to take Your Honours there, I just wanted you to have that before you so you can just understand how the evidence has, is sort of

counterpointed and where you would find passages in the Council's evidence which had a different view.

So to the extent there is a threshold, in my submission there is ample evidence before the Court that it can draw a conclusion that the impairment is not greater than is reasonably necessary.

I am now over to my paragraphs 80 to 83 and this is dealing with what the High Court and Court of Appeal said about alternative mechanisms. So alternative mechanisms are raised as a means of saying well this is going beyond more than reasonably necessary but I don't need to go, take Your Honours through that but if you just look at 81 to 83, I think that puts that in context.

If I go to 85 though, even if this Court were to be required to analyse the full spectrum of hypothetical ways of improving oral health noted in the appellant's submissions, as opposed to ways of making additional fluoride available for consumption, it is submitted that there is still no equally effective alternative to water fluoridation.

And in 86 I sort of make the point that a lot of people don't brush their teeth twice daily, 2009 New Zealand Oral Health Survey found that only about 45% of children aged 2-17 years and 65% of adults aged 18 years and over brushed their teeth twice daily with fluoridated toothpaste. That's in the affidavit of Dr Whyman at paragraph 89.

And at a local level, I say at 87, the situation is likely to vary from community to community. In Patea and Waverley, it was Dr Simmons' opinion that even if tooth brushes and toothpaste were free, there is no certainty that they would be used.78 Also Ms Pryor's observation that many of her elderly patients with diseases like arthritis cannot brush properly which increases decay.

And then at 88, In relation to other hypothetical measures suggested by the appellant, such as banning of soft drinks and sugary snacks in school, and tooth brushing programmes, there is no evidence that these measures could

be as effective as water fluoridation, even if they could be effectively legislated for. Banning soft drinks and sugary snacks in schools and tooth brushing programmes in schools would only assist children who attend, whereas fluoridation helps all people who have their own teeth.

So in my submission at 89 the Court of Appeal properly concluded that fluoridation is within the range of reasonable alternatives available to Parliament to address the problem of dental decay, particularly in low socioeconomic areas, and that any other measures may be seen as complimentary. So because this case has sort of moved on from a sort of local focus my submission very much again though, there's sufficient evidence of a national level New Zealand based evidence that supports that submission at 89.

I will now move onto the next issue, is the limit in due proportion to the importance of the objective. The Court of Appeal clearly concluded that fluoridation was a proportionate response, and I just refer there to 160 to 164 of the Court's decision.

The problem that fluoridation helps address is important and widespread, the prevalence and severity of dental decay in New Zealand is high and worse in communities such as Patea and Waverley. There is evidence that water fluoridation is safe and effective, particularly in areas like Patea and Waverley where oral hygiene is poor. Dr Whyman discussed the major peer reviewed scientific literature on the topic at paragraph 47. His opinion was that fluoridation is effective and that the benefits are real and significant and that is supported by the Ministry of Health.

At 93 I just refer to the fact that Dr Whyman also dealt with issues about safety of fluoridation and the most reliable studies and the only known risk was one of fluorosis and he deals with that in some detail.

At 94 I refer to the appellant's submissions that there is evidence of a number of possible health effects from consumption of fluoride. However, the evidence to contrary from Dr Whyman that there is no credible scientific

evidence that fluoride is related to any of these conditions at the levels recommended by the Ministry of Health and the Ministry of Health is the sort of national watchdog of that and there is nothing from them that suggests that there is these possible health effects.

I then 95 just note that if the High Court was correct to conclude that the intrusion into an individual's rights would be minimal, but that's not mentioned by the Court of Appeal.

So in summary it is submitted that fluoridation can properly be regarded as a proportionate response to its objective: the objective is important and the limit on the right is minimal.

97, I again come back to the point that this Court cannot ultimately embark on issues relating to the merits of fluoridation. The important point is there is a substantial body of evidence before the Court that indicates that fluoridation is a safe and effective means of reducing a widespread disease.

So that is my submissions on the section 5 issue other than I note at 99 and 100 there are some other – there's some international literature referred to in the High Court case. My submission is that really it is of interest but the primary evidence that's before the Court is in the affidavits, in particular I draw your attention to the Council's own affidavits on point.

So then I come to the ultimate conclusions on point. At 101, if fluoridation of drinking water represents an apparent inconsistency with the section 11 right, which is denied, on the basis of the submissions above it is submitted it's a justified limit, the apparent inconsistency is legitimised and Parliament's intended meaning prevails.

And then I come to the steps 5 and 6 and, again, I would say there is no possible interpretation, alternative interpretation, about the power to fluoridate. It's not a case where the specific words are ambiguous such that the consistent interpretation is to be preferred.

I refer there to the *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) case which I am sure Your Honours will be familiar with. Section 6 is a direction interpretation where the enactment is not clearly inconsistent but ambiguous. I refer to that paragraph there.

So that is in summary my submissions. I'm happy to deal with any questions at this stage.

ELIAS CJ:
No, thank you, Mr Laing.

MR LAING:
I note, Your Honours, it's about 10.30. I do want to come back about the – to you on the statement of claim issue.

ELIAS CJ:
Yes, that's fine. I think we can just interpolate you after you've had a chance to look at it.

MR LAING:
Thank you.

ELIAS CJ:
We'll bring you back on that. Thank you.

MR POWELL:
May it please Your Honours. I have not previously had the pleasure of appearing in this glorious building. I wonder if I might have the indispensable Ms Jameson close by?

ELIAS CJ:
Yes, of course, if Mr Laing would shuffle along perhaps.

MR POWELL:
Thank you very much. If it pleases the Court, I am anxious to move as quickly as possible to the areas where I can be of assistance, where perhaps the

ground is a little softer under than my feet than I might have thought and rising from the Court of Appeal, but – and I'm also mindful of the fact that the Attorney-General's role in the South Taranaki District Council proceeding was as an intervener given leave to address to specific questions, but in the comments that –

ELIAS CJ:
Well, the case has sort of morphed a little bit hasn't it, you're really almost the principal – well, no, not the principal respondent but you're a significant – anyway, you're here, not as Intervener in this Court.

MR POWELL:
But I just wanted to start with the point that Your Honour the Chief Justice raised just before, during my friend Mr Laing's submissions, when Your Honour referred to this really being about section 6, and the case has not been argued in that particular way and it wasn't my place as an intervener to comment on that. But I would submit that that is in fact the correct way to approach it, and perhaps if I just set that context before I start talking about what is or is not medical treatment.

ELIAS CJ:
Yes.

MR POWELL:
If we start with the question of where the power to add fluoride to water resides, and I'm in the hands of Mr Laing, in his argument he pointed to the Health Act and the Local Government Act, but we are there talking about an empowering provision. Now there can be no doubt that where Parliament empowers action to be taken there's not empowering action to be taken that is inconsistent with the New Zealand Bill of Rights Act so – and this is ground that was covered in *Drew v Attorney-General* [2001] NZCA 207: [2002] 1 NZLR 58 and has been covered in other cases since, that if the empowering provision has to be interpreted in a rights-consistent manner then it will be a power, at best, to add fluoride to water where to do so would not constitute an unjustified limitation of section 11, if indeed section 11 is engaged. Now as

Your Honour pointed out, nowhere is it suggested the Parliament has directed local authorities to add fluoride to water, they have simply allowed them to do it. So when we're using section 6 to interpret an enactment what we're really asking is whether Parliament has acted inconsistently with the Bill of Rights Act by enacting a statutory provision which is inconsistent, and this happens all the time with empowering provisions, there are numerous enactments which give constables the power to arrest but don't compel them to do so. Conferring a power to arrest is not Parliament authorising arbitrary detention, because it will always be assumed that the power is not to arrest arbitrarily. So whenever the issue arises for the Court it's an issue as to whether the constable exercising that power acted consistently with the Bill of Rights Act. So in the context of the water fluoridation issue, if it was directed at the –

ELIAS CJ:

I'm sorry, but I mean one can proceed on the basis that Parliament in conferring powers expects that they will be exercised in conformity with the Bill of Rights Act surely? Yes.

MR POWELL:

Yes, it must be assumed. So one can say Parliament is not infringing the Bill of Rights Act by granting the power and, to put it in the context of section 7, the Attorney-General would not need to bring that to the attention of the house because the answer is, "Well, we're not authorising anyone to do anything that is inconsistent with the Bill of Rights Act." But the case wouldn't get very far, it wouldn't have got very far, because the empowering provision doesn't direct any action, it just enables it, if you accept that.

GLAZEBROOK J:

Well, I think the argument is that it does, because compulsory fluoridation is inconsistent with the Bill of Rights, that's the contention. So to the authorising provision in itself is inconsistent with the Bill of Rights.

WILLIAM YOUNG J:

The argument is that is never consistent with the Bill of Rights.

MR POWELL:

Oh, yes, no, I understand that.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Yes.

MR POWELL:

If indeed the argument was it could never be consistent and by merely creating the power.

GLAZEBROOK J:

Well, that is the argument that's being made.

MR POWELL:

Yes.

ELIAS CJ:

That is the argument.

GLAZEBROOK J:

Because it’s compulsory.

MR POWELL:

Yes. Well, in that case that is, but that is how the argument would proceed. But if the answer was, well, it’s not always inconsistent with the Bill of Rights Act, it may be demonstrably justified to do it, then the issue would be whether the decision in the particular case was demonstrably justified.

ELIAS CJ:

Yes.

MR POWELL:

Well, that's all I wanted to say about that, and what I propose to do now is address the issue about the interpretation of section 11 and how the Courts should approach or how Courts do approach the interpretation of the rights in Part 2 themselves. Again, in respect of these matters I don't anticipate that there is too much disagreement about the first part of what I'm saying and I, as I say, I am keen to get to the point at which the argument needs to be had. And I'm also conscious of Your Honours' comments about methodology.

But in this particular instance when we come to be defining the rights themselves at the starting point method is important, so that it's done in a consistent manner, and *R v Hansen* does not answer this question. *R v Hansen* was about the much more vexed question of how the New Zealand Bill of Rights Act interacts with other enactments, and that is what led to the combinations of sections 4, 5 and 6 being interpreted in the way they were. But there was of course no issue in *Hansen* as to what the presumption of innocence meant, the question was how to interpret the Misuse of Drugs Act 1975 in a way that was consistent with it. What we have here is a question as to what a right guaranteed by the New Zealand Bill of Rights Act means.

ELLEN FRANCE J:

Well, why, I'm not clear why the methodology, to use that word, in *Hansen* doesn't apply.

ELIAS CJ:

He is applying it.

MR POWELL:

Yes. Well…

WILLIAM YOUNG J:

You say there's an anterior step…

MR POWELL:

Yes.

WILLIAM YOUNG J:

Is the Bill of Rights directly engaged…

ELIAS CJ:

Find out what right is.

MR POWELL:

Yes. That's the –

GLAZEBROOK J:

Yes, so first you need to find out what the right is because it can't be inconsistent with it if there isn't a right in the first place.

MR POWELL:

Yes.

GLAZEBROOK J:

And *Hansen* didn't give the methodology for that, that's what you're – assessing what the right is in the first place.

MR POWELL:

Well, no…

WILLIAM YOUNG J:

Well, it wasn't an issue in *Hansen.*

GLAZEBROOK J:

No.

MR POWELL:

Well, it was a part of Your Honour the Chief Justice's judgment you did refer to, to that, in the course of, in terms of how the justification provision in Canada is used. But in the majority decision, no, there was no, there's no

assistance about that. But what it does say is how section 5 should operate and the standard that should be applied when section 5 is used and section 5 is relevant to the interpretation of the right because, as I've tried to convey in the written argument, there is, the Drs Butler in their book refer to it in two stages and they must be right about that. The first question is what does the right mean and then in what respect is the right capable of limitation?

But the first stage of determining what it is that Parliament was intending to constitutionally guarantee when it enacted the right, there is the test for that, if you like, or one that seems, there's been no objection to it in this case and it does seem to be the best formulation, is the one of Justice Dickson in the *Big M Drug Mart* case that you look at the linguistic, historical and…

ELIAS CJ:
Yes, there were about three adjectives with that, yes. We get the gist.

GLAZEBROOK J:
And I think it is being challenged certainly in terms of historical.

MR POWELL:
Well, and the –

GLAZEBROOK J:
Or whatever the third one was. But historical has certainly been challenged.

MR POWELL:
Yes, so philosophic, the philosophic context.

But the interpretation of the right itself is purely –

ELIAS CJ:
What was the right – I can't remember – in issue in *Big Mart* or whatever it was, can you remember?

MR POWELL:

No, I'm sorry.

ELIAS CJ:

No, don't worry, that's fine.

GLAZEBROOK J:

It was in *Atkinson* certainly.

ELLEN FRANCE J:

Religion is it?

ELIAS CJ:

Oh, was it religion?

ELLEN FRANCE J:

Is it Sunday closing?

ELIAS CJ:

Oh, yes…

MR POWELL:

Well, when the Court is determining what the scope of the right is that is purely a question of law for the Court to determine, to interpret.

ELIAS CJ:

Yes.

MR POWELL:

And thereafter that will inform the processes that follow for the interpretation of legislation consistently with that. So in some instances the linguistic context will provide the answer, and perhaps the clearest example of that is the right to natural justice. Now natural justice isn't defined in the Bill of Rights Act, nothing is, it doesn't have an interpretation section. But when it came to consider what was meant by "natural justice", because Parliament had used a term that was widely recognised in New Zealand law it's been taken that it

was simply giving effect to the understanding of natural justice that we already had, and it wasn't really any need to go further, so that was a relatively easy one. It isn't for the Court today, but it'll be much more difficult when you have to define what a religion is or what a religious belief is, again it's not defined.

As far as *Hansen* was concerned, there was no room for argument about what the presumption of innocence meant because in large part it's clear that the criminal justice rights were simply giving effect to what we already had, although the notable exception is the right to trial without undue delay, while the common law or the law as previously applied in New Zealand certainly didn't countenance delay but inserting into the Bill of Rights Act a specific statutory or a constitutional right to be tried without undue delay, that was one example of the law being broadened, even though it's correct that it's affirming rights, it must be accepted that in some instances rights have been drawn from the International Covenant or from the close attention that was given to the Canadian charter, so some things have come in by that method. But the presumption of innocence itself is not one of the difficult ones.

So when it comes to assessing what was meant by "medical treatment" all the assistance that can be provided is by looking at the linguistic, philosophic and historical background to the right. Now as far as the language is concerned, in my respectful submission it doesn't get us very far because, as my friends for the appellant point out, the terms "medical" and "treatment" and the term "medical treatment" together is used in a number of contexts and of course you can always look at the dictionary definition, but that doesn't necessarily provide the answer as to what was meant here. Likewise, the Court of Appeal's observation that it appears inapt to describe a person drinking water as "undergoing medical treatment", that is a fair point, but again it was far from dispositive of what is meant.

As far as the philosophic underpinning is concerned, this is the point on which my friends have understandably laid great emphasis. There is no doubt that the Court is correct that it is intended to give effect to the underlying norms of dignity and autonomy and that is where the appellant's argument reaches its highest point. If Parliament had decided that the right to refuse medical

treatment was a right to resist any therapeutic intervention that you did not consent to, then why should it make any difference whether that is direct or indirect. If that is the, what they were seeking to constitutionalise was your right to say I will not have that treatment. It is not to be given to me unless I consent to it. I regret there are no –

ELIAS CJ:
But what do you take from that, that the Court should be astute to protect against erosion of the rights indirectly as well as directly?

MR POWELL:
Well no, it's more a point that if it was Parliament intending to guarantee a right to resist any form of therapeutic intervention, regardless of circumstances. So is the nub of the right is your right to refuse any form of therapeutic intervention.

GLAZEBROOK J:
Isn't that what it says?

MR POWELL:
Well it's capable –

GLAZEBROOK J:
Well it's not just capable, doesn't it just say that, medical treatment?

MR POWELL:
Well, it –

WILLIAM YOUNG J:
Medical as a treatment is a word that has, an expression that has shades of meaning. Undoubtedly it can be described as medical treatment.

MR POWELL:
Yes.

WILLIAM YOUNG J:

But not what most people would think of as medical treatment unless they consult dictionaries and go through it word by word.

GLAZEBROOK J:

Not if somebody's giving me drugs. I would think it's medical treatment. I don't care who gives it to me or how it's given to me, if it's given to me without me thinking about it, then it's treatment for me, isn't it, whether it's given to me with a whole pile of other people or from going to the doctor and getting it prescribed.

MR POWELL:

Well if it is that simple then yes you would be drawn to that conclusion. All –

GLAZEBROOK J:

I mean in order to stop me getting tooth decay somebody gives me a drug, or a –

MR POWELL:

Treatment.

GLAZEBROOK J:

Something that's, sorry, "drug" is probably not the right word, something that will stop tooth decay, then aren't I receiving treatment for tooth decay, at least in the prevention sense.

MR POWELL:

Yes –

GLAZEBROOK J:

I mean treatment can mean curative but I think now it means preventive as well.

MR POWELL:

Yes, there is a point at which the, when my friend made the distinction between what is dietary and what is medical treatment. There is a point at which they come very close to converging and that –

GLAZEBROOK J:

Well I think they probably do. They are preventive of whatever you might get otherwise.

MR POWELL:

But the point, the valid point is, now that it's understood, which it hasn't always been understood, that the effect of fluoride is topical, that is it mineralises tooth enamel, then whether or not it comes in via fluoridated water or a fluoridated toothpaste or a fluoride tablet, it has the same effect. So in that sense it is the treatment, or the strengthening of the teeth to prevent the disease of dental decay.

WILLIAM YOUNG J:

I wonder if a requirement for schoolchildren to wear suntan cream before they go outside to play would be medical treatment?

MR POWELL:

That's actually one – I was trying to think of it. Because Your Honour Justice Glazebrook yesterday made what I thought was a most, the most challenging hypothetical in the three stages of this case, which is what about the fluoride tablet, the teacher standing at the door of the classroom and saying, "Before you come in this morning, children, you are each to take your fluoride tablet." That's treatment, it's the application of topical fluoride by means of a tablet, and it's outside the scope of anything resembling a therapeutic relationship between doctor and patient, it's the schoolteacher saying it.

ELIAS CJ:

Your position isn't though that there has to be a therapeutic relationship, is it?

MR POWELL:

Yes, well that's my conclusion. My conclusion comes at the result of the historical analysis which I do need to try and explain some more about, because that does, in my submission, shift the balance as to what Parliament was intending.

WILLIAM YOUNG J:

If you've got a situation where it's long been accepted in New Zealand that water can be fluoridated, then it may be you can construe the Bill of Rights against the accepted understanding that that's something that's –

ELIAS CJ:

Not medical treatment.

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

Well you'd have to say that it's not medical treatment –

WILLIAM YOUNG J:

Yes, because – but what I haven't got a very good handle on is whether in the 60s there was a general recognition that people couldn't be subjected to medical treatment. There are echoes of this argument in the *Lower Hutt* case because that is one of the objections that people were being –

GLAZEBROOK J:

Well I think the answer was it was specifically allowed in the legislation is my understanding.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

Which in the 60s would be right.

MR POWELL:

And there was no human rights framework applied at that stage.

GLAZEBROOK J:

Yes, because at that stage, there were even decisions on refugees to say well we can send them back, doesn't matter whether they're going to be tortured or anything to do with it, for instance, because that understanding was that you didn't even interpret legislation in the context of international rights.

MR POWELL:

Yes.

GLAZEBROOK J:

I'm not sure that some of those earlier decisions, especially where there was specific authorisation…

MR POWELL:

But Your Honour Justice Young's point is valid in the sense that if we're trying to ascertain what Parliament was intending to constitutionally guarantee with section –

WILLIAM YOUNG J:

In 1990?

MR POWELL:

In 1990. If the fluoridation of water was sufficiently ubiquitous then it's not, you can't draw too long a bow, but would that not have been mentioned.

GLAZEBROOK J:

But one of the troubles with just having it specifically, don't you actually have to say, why then, just because it was there at the time do you then interpret it as being just a specific example of fluoridation rather than compulsory vaccination, because of course there were major community benefits in compulsory vaccination.

MR POWELL:

Well I get, I think the problem is that we don't have or appear to have any experience in New Zealand, or anywhere in the developed world, with the use of water or some other means of delivering treatment, other than with fluoridation. If things like vaccination programmes or inoculation, that could certainly engage section 11, but it always occurs in the context of the nurse or somebody administering an injection to a child, and that is undoubtedly –

GLAZEBROOK J:

Well I'm not sure. I mean say you have polio injections, I mean in most – sorry, polio the oral matter, it's not actually just a therapeutic relationship with a particular person. I mean it was just a general thing where you went along and people stuck TB injections in and matters of that kind, it might have been administered by a nurse, but in no way could it be said it was part of an individual therapeutic relationship. It was part of a public health measure that somebody or other comes and sticks needles in and the whole pile of kids who were lined up and in fact probably not even in any sense of having any interaction. You're just the next in line.

MR POWELL:

Well my own experience with the dental nurse was somewhat similar. I don't believe that my consent was sought at any –

GLAZEBROOK J:

But that's what I mean, it's –

ELIAS CJ:

It's a painful note you're introducing. I wonder whether we might – finish that, but we might take the adjournment.

MR POWELL:

I understand…

GLAZEBROOK J:

I mean it's stretching it to say there was an individual, is really what I'm saying, even in those major public health things, even, even though there was a permission – well actually I'm not even sure, to be honest I'm not even sure there was permission earlier.

MR POWELL:

My parents didn't care, they just…

GLAZEBROOK J:

I think you were just lined up.

MR POWELL:

Yes, I mean, I can't imagine what would have happened to somebody who did assert their right not to be, I think you probably would have incurred some other treatment.

ELIAS CJ:

Sanctioned.

MR POWELL:

But I take the point, I haven't presented the argument in that context, and in my view it still comes down individualised treatment in the sense that there is a treatment provider, the nurse, administering the treatment, and there is at least a point in that exchange where the patient can say, "No, I don't wish to have this." Now it's –

GLAZEBROOK J:

But isn't it worse where you don't have that ability to say no because it's being administered in some other way? I'm not so worried about fluoride, I must say, in this context, it's more the implication of the argument that would say, "Well, because it's being administered as an addition to water without an intervention, then actually it's open slather and doesn't come within the section 11 right." So antibiotics, statins, whatever else you might decide is a good thing to put in water – now of course you can't imagine now that

anybody would think it was a good idea to put those things in water, but if they're excluded from section 11 then in fact that can happen.

WILLIAM YOUNG J:

But they wouldn't be if you simply said, "Well, this is a particular issue, we've got a history, a legislative and judicial history under which mass fluoridation has been permitted, we will construe section 11 as not applying for fluoridation."

MR POWELL:

Yes, that's…

ELIAS CJ:

But that sort of history can't be determined when you have a Bill of Rights Act.

WILLIAM YOUNG J:

No, I'm not saying…

ELIAS CJ:

Because there were a lot of police practices that had to be reconsidered.

WILLIAM YOUNG J:

But it's just –

GLAZEBROOK J:

Well, exactly, there were a lot of practices before that Bill of Rights that were thought of as perfectly okay which is now being said not to be.

ELIAS CJ:

Now can I intervene and suggest that we take the 15-minute adjournment now, if that's convenient I should have said? Thank you.

COURT ADJOURNS: 11.02 AM

COURT RESUMES: 11.19 AM

ELIAS CJ:
Thank you Mr Powell.

MR POWELL:
Thank you Ma'am. Before I continue the Court expressed interest before this appeal was heard in the status of the water fluoridation, the Health (Water Fluoridation) Amendment Bill. I can give you an update on the position of that legislation if the Court wishes to know.

ELIAS CJ:
Yes, thank you, it's just probably vulgar curiosity.

MR POWELL:
Perhaps it is. Well the reinstatement of business motion was moved on the 8th of November and that was the continuation of the Parliamentary business that lapsed at the end of the last Parliament and that Bill is one of the ones that was reinstated. So it is now back on the order paper. It is sitting at number 20.

GLAZEBROOK J:
So that is reinstated at whatever stage it was.

MR POWELL:
Yes, the second reading.

GLAZEBROOK J:
Second reading, yes.

MR POWELL:
It requires second reading. At number 20 on the order paper and it's an order paper that doesn't include many of the Government's priority obligations, that would suggest that it is not likely to be reached quickly and I'm not suggesting

that the Court should do anything other than note and thereafter ignore it, if there did need to be a substantial amendment to legislation as a result of the Supreme Court decision, and I am getting way ahead of myself there, a Bill that is already before Parliament is not usually considered a suitable vehicle to effect that change in the law because it would be by way of supplementary order paper. So it's probably not that relevant but I thought I'd just update the Court because you'd expressed an interest in it.

ELIAS CJ:
Yes, thank you.

MR POWELL:
Before the break I was just coming to the end, I hope, of this question about the philosophic underpinning. Now as I said, there are no silver bullets here as to what the philosophical underpinning was and how much that should influence how the writers interpret it but there are two points to make about that to the extent that the intrusion into one's own integrity is a substance that you do not want to ingest. The distinction at that point between adding a substance to water for some other purpose such as chlorination in order to remove pathogens from the water still results in you ingesting chlorine.

Now for if the philosophical argument is correct then there is an important constitutional distinction between ingesting a substance for one purpose and ingesting it for another and my point about that is it appears to be an unlikely distinction.

GLAZEBROOK J:
Why would that be because it's just whether it's medical treatment or not and I suppose you could say chlorine is medical treatment because it's preventing you getting, throwing up in which case there's no distinction but then it's obviously specifically required not only that is specifically required under the legislation because you are required to provide drinking water which must mean safe drinking – well you're actually required to provide potable water, aren't you?

MR POWELL:

Yes but, as I say, if the clear view is that the particular concern that Parliament had was to constitutionally protect your right to resist medical treatment as against any other way that your personal security might be infringed upon then that's the answer, no medical treatment is special, it does make a difference that it is done for therapeutic purpose. We are quite happy to leave outside the scope of constitutional protection anything else the State might do with putting things in water or otherwise but because fluoridation is medical treatment and we do want to constitutionally protect against medical treatment in any form whatsoever that that is the justification for it.

So it may not be a strong point but it does, in order to reach that view you would have to be satisfied that there was or at least that Parliament had in mind a conceptual distinction of that nature that it wanted to cover medical treatment regardless of how it occurred but was not concerned to protect people against any other form of intrusion.

The other point –

GLAZEBROOK J:

I'm just not sure what the other form of instruction would be?

MR POWELL:

Well, as I say, if anything else is added to the water, because on my friend's argument and I don't, I'm only this to make a point, that there is no constitutional obligation to adding arsenic to the water. Now there's a legal obligation because it would be unreasonable and dangerous but what my friends are saying is arsenic would not be supplied for the purpose of medical treatment so it's not covered, it's only fluoride because fluoride is medical treatment. Now in order to be satisfied that that is the distinction that Parliament had in mind there does seem to me to be a satisfactory basis for that conceptual distinction.

WILLIAM YOUNG J:

Well, if you put chlorine in water to get rid of material that might cause people to be sick then the people when they ingest chlorine will ingest chlorine and the product of the processes that it's undergone and, as it were, in chlorinating the water.

MR POWELL:

Yes.

WILLIAM YOUNG J:

And it's plausible to assume that the additional material that people ingest because water is chlorinated will have some physiological effect.

MR POWELL:

Yes.

WILLIAM YOUNG J:

Not beneficial probably, and you're saying, well, why is it okay to chlorinate water with the consequence that people ingest substances that are not natural to water which have physiological effects are probably bad, and it's not okay to put in fluoride which is often found in water but not in New Zealand, not usually in New Zealand, and which does have some physiological effects but which on the balance of evidence are benign or positive.

MR POWELL:

Yes, that's the –

GLAZEBROOK J:

Medical treatment is always going to be positive.

WILLIAM YOUNG J:

Yes, but if the objection is that you're getting stuff put into your body you don't want then it applies equally to chlorine as it does to fluoride, that's your argument.

MR POWELL:

Yes, so you have –

GLAZEBROOK J:

Although the chlorine could also be medical treatment if you're looking at preventive here in fact.

WILLIAM YOUNG J:

Yes, but it doesn't help you once it gets in the body I think is the point that's being made. But anyway, there is a distinction between chlorine and fluoridation but you're trying to narrow it.

MR POWELL:

Yes, and so to be satisfied that that's what Parliament intended we'd have to be satisfied that Parliament appreciated that distinction and was particularly concerned to isolate, if you look at those drinking water standards, of all the things that could be in water that because fluoride constitutes medical treatment it's special, it has constitutional protection against fluoridation.

GLAZEBROOK J:

But why would Parliament be thinking anything of the sort when it enacted the Bill of Rights? It was just thinking about medical treatment in the context of a provision that dealt with medical experimentation, et cetera, so why would it be thinking of the method of delivery of medical treatment or not thinking of the method of delivery, it's just stating a principle.

MR POWELL:

Perhaps it might be an idea if I moved to what I wanted to say about the historical aspect to it in the *White Paper*, et cetera, which might make the submission that I'm going to make in answer to your question make more sense, although it may not.

So there's been no, again, no specific direction and I'm not suggesting that it needs to be resolved in this case. In normal circumstances when the Court is asked to construe a statute there is a limited amount of Parliamentary history

that the Court says is legitimate to have regard to in order to interpret it. What generally we have in relation to the New Zealand Bill of Rights Act is the *White Paper* and then there is the Select Committee report which followed it.

In my submission, because there is a need for the Court to be able to assess the historical and social context of what Parliament was doing that there is a wider compass to what the Court can look at in terms of the *White Paper*. But whether or not that's because constitutional interpretation is, as has been suggested, sui generis, it has its own rules or whether it's just the application of ordinary principles to what is, on any view, a bit special in terms of an enactment and that it's one that supposedly sets a measure against which other laws are to be measured that the Court can look at the prevailing position in respect of each right that might arise for consideration.

So I want Your Honours to have a look at the *White Paper*. I have here a copy of the *White Paper* in its entirety and, in my submission, it is a little bit dangerous to look at extracts from the *White Paper* because sometimes there are other comments that are made elsewhere that are relevant. But it's the particular structure of the original way that these rights were set out that I wanted the Court to look at.

I have three or four things to hand up. Would it be better to…

ELIAS CJ:

Yes, hand them all up together. What are they? They're the *White Paper* – what else?

MR POWELL:

There's the *White Paper*…

ELIAS CJ:

I'm glad to have another copy of the *White Paper* since mine is extremely fragile and precious, so I shall be able to keep it in my room.

MR POWELL:
This one's got "Crown Law Office Library" printed on the front of it.

ELIAS CJ:
That's all right.

MR POWELL:
And the extract from Hogg's book, which is tab 7, and the Canadian Charter provision and the 14th Amendment. Oh, no, I'm sorry, there's one more.

ELIAS CJ:
So you're taking us to the Bill of Rights Act – the *White Paper*, are you?

MR POWELL:
The *White Paper*, yes. I just want to orient myself before I speak.

So the first observation is about replacement in the *White Paper*, so it's at page 107 of the *White Paper*. So it was originally grouped under the section of the *White Paper* dealing with torture or cruel treatment, and it was to be, along with the right not to be subjected to medical or scientific experimentation without consent and the right to refuse to undergo medical treatment, were grouped under section 20, no torture or cruel treatment.

On page 87, the other writer I wanted to draw your attention to in the *White Paper*, is section 14, the right to life. Now that, as the *White Paper* had it, came under Part 5, which was life and liberty of the individual and the legal process, so those two were separate. And if I could now briefly refer you to the judgment of the High Court in this case, that's the case on appeal volume 1…

ELIAS CJ:
So can you just tell us what the submission you're making is so that we know what we're looking for?

MR POWELL:

Well, the original placement of the right in the *White Paper* was with the right not to be tortured or subjected to cruel treatment. In the Justice and Electoral Law Select Committee report they recommended removing the right to refuse medical treatment and the right not to be subjected to medical experimentation without consent, away from the torture provision because the concern was that they would be interpreted against the torture threshold, which is much higher.

ELIAS CJ:

Yes.

MR POWELL:

So that is how they end up in the, and that followed through to the Bill of Rights Act itself, where we have sections 8, 9, 10 and 11 grouped together, which is where you would expect them to be, they are a variant of the right to security.

ELIAS CJ:

So you were taking us to the High Court decision?

MR POWELL:

Yes. Just to make that point, because Justice Rodney Hansen had made reference to it – this is the case on appeal volume 1, page 89 – he quoted the report that the Select Committee, and it does seem likely, as His Honour Justice Hansen said, that the initial placement there was because the specific recognition of this right, particularly the right not to be subjected to medical or scientific experimentation without consent, emerged in the wake of the Holocaust, where there had been a considerable transgression of that right, so it was seen as a variant or the torture right but, as he said, it was on the recommendation of that report that Parliament made clear that section 11 stands on its own or, more correctly –

GLAZEBROOK J:

What do you say about the background as being the Cartwright Report, which is what your friends suggested?

MR POWELL:

Well, I think the Cartwright Report came out in 1988, so it was certainly topical. It wasn't referred to, but that's no – it certainly is part of the context that there was a particular concern there. The Court of Appeal decision makes reference to some of these significant cases about consent to medical treatment that were in the House of Lords around that time as well, particularly I think dealing with the issue of sterilisation of mentally ill women. So I'm sure it is part of the context and simply because it wasn't mentioned – it was certainly there, it was a prominent event in New Zealand. But how much of an impact that had I couldn't say.

ELLEN FRANCE J:

Sorry, did you say the Cartwright Report was 1988?

MR POWELL:

I thought it was.

ELLEN FRANCE J:

So that's after the *White Paper*?

MR POWELL:

It's after the *White Paper*, but it's before the Bill of Rights Act. And of course when we talk about what the frame is of the Constitution means, we don't have founding fathers here because ours is a statutory Bill of Rights, so it isn't what the authors of the *White Paper* wanted it's what Parliament decided when it passed the Bill of Rights Act in 1990. Unfortunately, as the two leading textbooks point out, there was almost no discussion in Parliament about the content of the rights, apart from their response I think to a police submission about one of the powers of detention. But Parliament was preoccupied with what the Select Committee inserted as section 3(a) and which became section 4, that was he issue about preserving parliamentary

sovereignty, what essentially converted what was proposed, which was a supreme law Bill of Rights into a statutory Bill of Rights, and a point that I will develop is there was no return to the content of the rights even after that significant change in its purpose, and I will submit that that was a significant change.

So going back to the right to life for the moment, and very briefly, that reference there that, “No one shall be deprived of life except on such grounds as are established by law and consistent with the principles of fundamental justice,” that's the section 8 right we received.

And if I could ask Your Honours now to look at the Canadian Charter and to Article 7? So that is an example of a generic right to security of the person, it’s all bundled up in one clause and it’s subject to that internal modifier, consistency with the principles of fundamental justice. Now that, the reference to fundamental justice in the Canadian Charter, according to Professor Hogg, was an attempt to avoid what had happened in relation to the 14th Amendment to the United States Constitution, which was where they referred to, “Without due process of law,” and that was interpreted to mean substantive due process as well as procedural due process, which meant that a Court could enquire as to whether or not it was consistent with the right. Fundamental justice, as it happens, the Canadian Supreme Court has said there’s no difference. Now the result of that is, as you can see in the extract from Professor Hogg’s book which I put up – I won’t go through them, there’s no need – that expressing the right to security of the person in those general terms, subject to the fundamental justice qualifier, brings in a great deal of very significant ethical and moral issues, and you can see that in the case law that there has been under Article 7 of the Charter, such things as abortion in *R v Morgentaler* (1988) 1 SCR 30, 44 DLR (4th) 385. There are other cases dealing with the lawfulness of, laws preventing prostitution, there is the other significant one which was addressed in the *Carter v Canada (Attorney General)* 2012 BCSC 886 and *Rodriguez v British Columbia (AG)* [1993] 3 SCR 519 is the right to physician-assisted death. So the ground under Article 7 is very broad.

Now in the context of the *White Paper*, where it was suggesting that it would be a supreme law Bill of Rights to have adopted a broad right to security similar to Article 7 of the Charter, would have meant that legislation that was inconsistent could be struck down. Now I've made reference to the *White Paper*. What may be a bridge too far, so I haven't put it up but I do have it here, is –

ELIAS CJ:
But how does this – just explain to me what you're developing here, how it impacts on the case we're looking at, what's your end point?

MR POWELL:
The end point is that Parliament when it enacted section 11 was seeking to avoid –

ELIAS CJ:
The pitfalls.

MR POWELL:
– those areas of controversy and it enacted the right narrowly to conform –

GLAZEBROOK J:
But where do you get that from?

MR POWELL:
Well, that's the point I was –

GLAZEBROOK J:
Well, because the right to life seems to, the discussion of the right to life is saying we do want procedural as well as substantive, we do want to look at abortion, self-defence, deadly force, controlled disorder, et cetera. It seems pretty broad to me.

MR POWELL:
Well, as far as the right to – although it isn't expressed as a right to life, the Canadian Charter refers to the right to life and the right not to be deprived

therefore, our section 8 only refers to the right not to be deprived of life, but that's an argument for another day.

GLAZEBROOK J:

Well, the heading says “right to life” which we can now use as an interpretative aid at least.

MR POWELL:

Yes, of course.

ELIAS CJ:

Not in the Bill of Rights Act, like not, and is a right not to be deprived.

GLAZEBROOK J:

Sorry, I think it’s, the argument was that the *White Paper* was trying to restrict it, so I was looking at what was in the *White Paper*, it doesn’t seem to, at least in terms of the right to life, be trying to restrict that at all.

MR POWELL:

No, and leaving in that – I’m not sure it’s an internal qualifier – but it means that there are, the moral and ethical issues surrounding the right to life, or the right not to be deprived of life, have been left, that must be taken as a deliberate decision by Parliament when it’s enacting the constitutional protection of the right to life. But it hasn’t kept the right to security of the person in with that and subject to that, instead it has enacted –

GLAZEBROOK J:

But does it say anything about leaving out security of the person? Because security of the person’s dealt with in other areas of – I mean, does it say we’re not having security of the person because that's going to create problems?

MR POWELL:

Well, that’s what I want – the answer to that has been supplied by Sir Kenneth Keith in an article that he wrote that was published in the *New Zealand Journal of Public Law*. But he’s describing what the people

involved in the *White Paper* himself, and Sir Geoffrey Palmer and others, were thinking and doing before the *White Paper* was drafted and –

ELIAS CJ:

But what's all this directed at in terms of your submission here? Because I'm not quite sure. Are you saying that section 11, the refusal to undergo medical treatment, was intended to be a very precise guarantee of right and that medical treatment should be invested with a lot of content, or that it's significant?

MR POWELL:

Yes, that is the point. That there was a clear context for a right to refuse medical treatment in the context of the individual therapeutic relationships that it talked about, because the common law had made that clear. You had the right to withhold consent to medical treatment in that sense, in the way that common law had already recognised it.

ELIAS CJ:

So you're saying that it would not be something that the Bill of Rights has anything to say on if it was decided that a contraceptive was going to be put in the water because our population was getting too high. There's nothing in the Bill of Rights that would speak to that, you say?

MR POWELL:

No, there isn't. Because Parliament, the issue is what did Parliament intend to guarantee and because of the way it approached it Parliament only guaranteed a narrow right. That is not to say that it is legally permissible to do those other things, but that it falls outside what was enacted as a very narrow constitutional guarantee.

GLAZEBROOK J:

It would mean that Parliament, with impunity, would enact matters of that kind and the Bill of Rights would have nothing to say about it.

MR POWELL:

Yes, that's the result –

GLAZEBROOK J:

But why would Parliament think that was okay? Because they couldn't think, they wouldn't think it was okay if a doctor said, you have to take this and I'm going to make you take it, because they would say that has to be by consent, so why would they think it was okay when you didn't have an individualised aspect to it, but it could be just willy-nilly provided to everybody. I just can't see why they would be thinking in that way.

MR POWELL:

Well it's very difficult to impugn any thinking of this nature to Parliament at all because it didn't appear to revisit the content of the rights.

GLAZEBROOK J:

Well, it said medical treatment. It doesn't say medical treatment that's administered in the context of an individual therapeutic relationship, it's just saying generally. I mean it doesn't say medical experimentation that's done in the context of an individual therapeutic relationship, it just says generally.

MR POWELL:

Well, yes –

GLAZEBROOK J:

And it's also just looking at State rights so arguably it doesn't have anything to say about individual therapeutic relationships in any event.

MR POWELL:

Yes, but it is nonetheless true that the nature of bills, or charters of rights is that they tend to express themselves in broad language.

GLAZEBROOK J:

It doesn't bite on individual doctors does it? Because it's State institutions that are covered by it.

MR POWELL:

Well, no –

GLAZEBROOK J:

So why, in that context, would it not be looking at State rights?

MR POWELL:

Well, it is in a sense that any coercion applied by the State, even though inoculation is –

GLAZEBROOK J:

Well, applied by the State in the context of individual relationships as against applied by the State directly. Why in the context of an Act that's only looking at State actions would it say the State can do what it likes, even though you can't be coerced into having medical treatment but the State can't make individual doctors do it.

MR POWELL:

My argument doesn't go that far. What my argument says is that the historical context of what –

ELIAS CJ:

Was that it wasn't going with wide security of the person provision. Can I just ask you in terms, since you actually mentioned it, and I have it in front of me now. Under section 10, the right not be subjected to medical experimentation, would you say that that is only, how is that to be construed consistently with medical treatment. On your argument would you be saying that that is experimentation confined to that adopted in a therapeutic relationship?

MR POWELL:

No, I don't, I wouldn't suggest that –

ELIAS CJ:

So how would you construe medical in that context?

MR POWELL:

Well, you'd have to start, again, at the same point of asking what did Parliament intend by section 10. It's not – the rights can't be approached in an undifferentiated manner.

ELIAS CJ:

Well we have to start, really, with the text, and one would have thought that "medical" in section 10 is probably comparable to the use of "medical" in section 11.

MR POWELL:

I would say so. Probably what brings in the question of the individualised relationship is the notion of treatment, taking into account the point that Your Honour Justice Glazebrook made that that's not necessarily the only way to look at it, that treatment could be broader.

GLAZEBROOK J:

Well it's just not directed at individuals, it's directed at the State. So it's State actions.

MR POWELL:

Yes, but the –

GLAZEBROOK J:

So it's not looking at whether Dr Blogg says this is really good for you and I'm just sticking this injection into you whether you want it or not.

MR POWELL:

No, the common law deals with that. It's a battery if the –

GLAZEBROOK J:

Exactly, but all I'm saying is that this has absolutely nothing to do with it.

MR POWELL:

No it doesn't –

GLAZEBROOK J:

If the State said we will allow individual doctors to do that then that's the case, but then in that case, if the State says we'll do it directly, would it not be part of the Bill of Rights.

MR POWELL:

Well, that's going back to the philosophic underpinning –

GLAZEBROOK J:

It's not philosophical underpinning, it's looking at the statute, the statute is saying the State can't do this. Why would it only be where the State allows individual therapeutic relationships to do this as against where the State does it directly. What on earth would Parliament say, well the State can do it directly but it can't allow it to be done by a doctor.

MR POWELL:

Well, I hope I'm not splitting hairs but what Parliament would be saying is we are not constitutionally guaranteeing that right.

GLAZEBROOK J:

But why?

MR POWELL:

Well as –

GLAZEBROOK J:

What on earth would be the difference between saying the State cannot do it directly. Can do it directly with impunity but it can't do it indirectly via a therapeutic relationship.

MR POWELL:

Well, the only point I'm developing here is that in terms of the historical underpinning of the right and asking ourselves what Parliament was intending to do. Parliament had veered away from –

ELIAS CJ:

I really – there is a strong school of thought, as you know, but really starting with looking for what Parliament intended is the wrong place to start. It's just too large an inquiry and that you should just simply start with the language of the provision, the purpose of the provision and the context in which it is set in the statute, and that you're there to discover the meaning.

MR POWELL:

Well, certainly the argument that I've presented to you is that the historical context is broader than that –

ELIAS CJ:

It illuminates.

MR POWELL:

Illuminates that.

ELIAS CJ:

Yes, and it's the context in which you look at it, but you would then, in answer to my question, you would treat the reference to "medical" in section 10 and the reference to "medical" in section 11 as different, importing different notions?

MR POWELL:

May I refer briefly back to the *White Paper* before I answer that question?

ELIAS CJ:

Yes.

MR POWELL:

There's nothing – although there's a reference of course to Article 7 of the International Covenant. What they say is the International Covenant was particularly directed at inhuman and degrading medical and scientific experimentation. The authors of the *White Paper* said there's no reason to limit it like that.

ELIAS CJ:

To limit it to that, no.

MR POWELL:

Well, so, yes, the use of the word "medical", I can't see a reason why it would be used differently between one and the other.

ELIAS CJ:

Any different.

MR POWELL:

No, none that I can think of.

WILLIAM YOUNG J:

Mr Powell, around 60 years ago Professor Hart said that there are some expressions which have a core settled meaning about which there can be no doubt but around which there's a penumbra of other meanings, of other cases, to which they may or may not apply and you can't just say a priori, well, obviously it's in or obviously it's out. And, I mean, that seems to me to catch medical treatment, obviously it catches what the doctor does to the patient, what the nurse does to the patient. But there will beyond that be a range of circumstances to which it's possible to say, "Well, of course it's medical treatment because it's something that's being done for a therapeutic purpose," or to which you might say, "Well, I don't think it is medical treatment because it doesn't look like medical treatment to me in the ordinary sense of the word, even if you can get there with a dictionary." And your argument really is this is in the penumbra and that in fact it's not a medical treatment for the purposes of the Bill of Rights.

MR POWELL:

Yes…

GLAZEBROOK J:
Well, that you're trying to get there by saying public health measures aren't medical treatment, which I just think can't possibly be right under the Bill of Rights.

WILLIAM YOUNG J:
Possibly.

ELIAS CJ:
That is the argument, and that it has to be in the context of a therapeutic relationship, which would be seriously limiting of not only section 11 but also section 10.

WILLIAM YOUNG J:
Well, this is probably the only public health measure which engages this issues, isn't it? Is there…

MR POWELL:
So far. I mean –

ELIAS CJ:
So far, well…

GLAZEBROOK J:
Well, potentially there could be other ones.

MR POWELL:
Well, I –

WILLIAM YOUNG J:
So if you say that the context is informed by the *Lower Hutt* case et cetera, it's quite a narrow issue. It's not putting contraceptives in the water or –

GLAZEBROOK J:
But that's not the argument that's being made.

WILLIAM YOUNG J:

It's an argument I'm postulating.

MR POWELL:

Well, yes. What I was, as far as I was trying to go was to supply the historic context. Now I accept what Your Honour the Chief Justice has said about the extent to which that's limited, and if it takes you too far away from what was actually said then it must be wrong. But –

ELIAS CJ:

Well, it really does seem to me that if you read this provisions it's about medical experimentation and medical treatment, it's got nothing to do with who is providing it, whether it's a doctor or someone else…

GLAZEBROOK J:

And as it's to do with State action it seems quite odd to limit it just to a doctor as well.

MR POWELL:

Well, perhaps if I –

GLAZEBROOK J:

I mean, it wouldn't of, if it was in the Health and Disability Act you could say, well, yes, it's looking at a therapeutic relationship.

MR POWELL:

Yes, well, perhaps if you'll allow me to complete the point. I'm not sure it's a complete answer but as far as the Crown can take it, that the historical context is that in the context admittedly that, where the authors of the *White Paper* were talking about a supreme law Bill of Rights where provisions that were contrary to these rights would be struck down, that they recoiled from guaranteeing the rights in the broad form and settled for very specific rights, and the only underpinning for that was the existing common law, and there was no prior recognition of a right to refuse medical treatment in that broader penumbra. Now I accept that that may be because –

GLAZEBROOK J:

But I don't know what you mean by, "The only matter was the existing common law." Because didn't the existing common law say, to the extent it did, that you had to consent to medical treatment, and why would that just be limited to a context where a doctor was providing it rather than it being provided generally?

MR POWELL:

Well, I don't believe –

GLAZEBROOK J:

I mean, if you're looking at the Holocaust, they were probably experimenting in many cases, but with a therapeutic purpose supposedly in some of those experimentations.

MR POWELL:

Yes, well, the International Covenant didn't refer to medical treatment, it was only concerned with scientific experimentation, but the –

ELIAS CJ:

But it was concerned, was it, with the security of the person, or was that only the Canadian Charter?

MR POWELL:

No, the Article 7 I think of the –

ELIAS CJ:

But, look you might be entirely correct that the authors, conscious of the significant effect of striking down legislation, were not going to go with security of the person because that would be too wide, but they did stick with medical experimentation and medical treatment.

MR POWELL:

Yes.

ELIAS CJ:

So that's really the area of dispute as to what they mean. You say that they have to occur, both of them would have to occur in the context of provision of services by medical practitioners, and what's being put to you is why.

MR POWELL:

Well, that part isn't clear, I would say, because the commentary to the *White Paper* makes clear that they were specifically in relation to medical treatment wanting to talk about any relationship they talk about, it's not just medical, it's also psychiatric, psychological treatment.

ELIAS CJ:

Yes.

GLAZEBROOK J:

But it doesn't say who it's provided by, it doesn't say a word about it.

MR POWELL:

No, it's silent as to that.

GLAZEBROOK J:

It's just looking at the treatment. So why do you graft on it by somebody?

MR POWELL:

Well…

GLAZEBROOK J:

And especially in the context of something that's looking at the State action, why do you say they were excluding State action from their consideration?

MR POWELL:

Well, I'm in danger of repeating myself, which is not…

ELIAS CJ:

Just one more point, in terms of the interpretation, is that section 10 of course is medical experimentation or scientific experimentation, which also suggests that it's the effect you're looking at rather than who's doing it.

MR POWELL:

But on that basis you could say that – well, what about something like the Otago study? It's not – you could say that that's a scientific experiment. I mean, obviously it was conducted with the consent of the people concerned, but the issue is –

ELIAS CJ:

Well, that's the whole point.

MR POWELL:

Yes, but was Parliament seeking to provide a constitutional guarantee?

ELIAS CJ:

Well, it seems to be there. Anyway, I think we understand the point that you're making in support of your contentions that this has to be understood in the context of a therapeutic rep and that a public health reason is not caught.

GLAZEBROOK J:

Well, it's very difficult to say experimentation was limited in intention to a therapeutic relationship because they say they're not limiting it in any way, at the end of 10.164. They were certainly not limiting it to bad experimentation, it's just any old experimentation.

MR POWELL:

Yes, they specifically said that.

ELIAS CJ:

All right. Where do you want to take us next?

MR POWELL:

Well, the other intervention point, if you like, was what "prescribed by law" means.

ELIAS CJ:

Yes.

MR POWELL:

I don't have a great deal to say beyond what is in the written material, but when it comes to a discretionary power or an empowering provision, that it's sufficient that it has the authority of the law, if that is found, the underlying values, as my friend Ms Scholtens said and I've acknowledged, accessibility and certainty, given that it's acknowledged that those can't always be achieved without interpretation, they're not absolutes. But provided there is sufficient authority in the provisions that you were discussing with my friend, Mr Laing, if you find that there is an authorisation to add fluoride to water then that is sufficient for prescribed by law and the real issue is whether that is demonstrably justified.

ELIAS CJ:

In application do you mean?

MR POWELL:

Yes, but taking the point that was made earlier, if it's been considered at the stage of construing the statute and the argument is it could never be demonstrably justified, it's incapable of demonstrable justification, then it would be a matter of, you would say, well, the section, the empowering section, would have to be construed as not allowing the addition of fluoride, because if you were satisfied that it could not be done without infringing the right to refuse medical treatment in a way that was not demonstrably justified.

GLAZEBROOK J:

I didn't think that was the argument.

MR POWELL:

Well, I thought it was put to me earlier that that's what they were saying.

GLAZEBROOK J:

No, well, they're saying that – well, I didn't understand that to be the argument.

MR POWELL:

Because I always thought that they were presenting the case on the basis that the decision –

GLAZEBROOK J:

They were presenting the case on the basis it's not prescribed by law because you would have to be very explicit, and it's not explicit, that was the prescribed by law point.

MR POWELL:

Yes.

GLAZEBROOK J:

So because it's not prescribed by law you can't have it at all.

MR POWELL:

That would be the conclusion of that argument, if that's correct, yes.

GLAZEBROOK J:

But it's only because it's not explicit, because Parliament hasn't said local authorities can if they want to add fluoride to the water.

MR POWELL:

And if that degree of specificity is required, no, of course it's not present, but I say –

GLAZEBROOK J:

But I thought that was the limit of the prescribed by law argument, that was all.

MR POWELL:
Well, if that's as far as they were taking it, yes.

GLAZEBROOK J:
I might be wrong but…

MR POWELL:
But if they're saying that, well, even if the conclusion is it does authorise you to add fluoride to water but only if it is done in a manner which is demonstrably justified, then there would be an issue as to whether the particular administrative decision made pursuant to that empowering provision was consistent with the Bill of Rights Act, which is what I thought, certainly in the High Court, was the issue. Thus is was the Council that was called upon to justify its decision to add fluoride rather than justifying Parliament's decision to empower councils.

GLAZEBROOK J:
Yes, I think that's probably right, in the High Court, and actually possibly right here as well.

MR POWELL:
But both matters, I mean if –

GLAZEBROOK J:
But I think they're saying Parliament isn't even authorised to allow the addition of fluoride because the science isn't good enough.

MR POWELL:
The only other matters to address are the two matters upon which the Attorney-General is the respondent, addressed in the argument with my friend, Ms Hansen.

Now on the question of what's been called the Medicines Act appeal, Ms Hansen is correct, there are no specific submissions addressed as to the merits of that appeal and that represents possibly a misunderstanding on my

part. But the Court of Appeal did not deal with the Medicines Act appeal substantively, the only decision it made was to decline to hear it. And so I thought the issue before this Court was whether the Court of Appeal was correct to decline to hear it. But if I am mistaken in that the issue is very narrow on the decision of Justice Collins, my friend got almost all the way there but at the final hurdle His Honour said, "This is a case where the context otherwise requires in the case of fluoride," and I would simply rely on that reasoning as correct, if this Court is going to resolve, substantively resolve that appeal.

GLAZEBROOK J:
Well, if we say they were wrong to decline to hear it, surely you'd want us to substantively look at the appeal.

ELIAS CJ:
Or would you want us to send it back to the Court of Appeal?

MR POWELL:
Ma'am, I'm sorry that – I had proceeded on assumption that generally this Court doesn't substantively consider appeals that haven't been considered in the Court of Appeal because it doesn't have the substrata of what the Court of Appeal said about it, and so I had perhaps too quickly assumed that that's what would be done.

GLAZEBROOK J:
That we would send it back?

MR POWELL:
Yes, but if –

WILLIAM YOUNG J:
I mean, it's a bit odd here because it is a dead issue. Whether it's strictly moot or not may be another question, but it is a dead issue, and the argument a pretty straightforward one.

MR POWELL:

Yes, well, it is, and I don't have anything to add, I'm happy for Justice Collins' reasoning to speak for itself in terms of what can be said about that. So if it is convenient for the Court to resolve that issue as well, my only regret is that I haven't come to Court with any specific submissions but I don't think –

ELIAS CJ:

But as you say, it's a fairly narrow argument.

MR POWELL:

It seems to be.

ELIAS CJ:

And have you said everything you want to say on that?

GLAZEBROOK J:

Do you want to say anything about the mootness issue?

MR POWELL:

I did have a plan to, but only briefly.

Well, the point I want to make is following the *R v Gordon-Smith (on appeal from R v King)* [2008] NZSC 56, [2009] 1 NZLR 721, there seem to be two distinct questions, and this only affects an intermediate Court of Appeal that hears appeals as of right.

The first issue is whether the appeal is moot, that is in the context of that proceeding that is before the Court is there a living issue, will the answer directly affect the interests of the parties in that proceeding? The second question is, even if it is moot, should the Court nonetheless hear the appeal anyway? In the notice of application for leave to appeal the appellant said the Court of Appeal was wrong on both counts: wrong that it was moot and wrong not to hear it. That's conflated in the written argument for the appellant where they are only saying, well, it's conflated or possibly narrow, they're only saying that the decision wasn't moot. In my submission –

ELIAS CJ:

Well, it depends whether it's moot as between the parties in the particular case or whether there is some utility in hearing it. So it's understandable that it be run together really.

MR POWELL:

Well, yes, and –

GLAZEBROOK J:

Because there's a general and public importance argument thing to be directed at, possibly directed at both.

MR POWELL:

Yes, I wasn't seeking to foot-trip them but –

ELIAS CJ:

No.

MR POWELL:

But there did seem to be an important distinction for an intermediate Court to actually assess whether the appeal is moot, because of course if it's not moot the Court, and it's properly constituted, the Court has a constitutional duty to hear it, unlike this Court, which only hears matters by way of leave. So the only question is whether the leave criteria are satisfied, but it is important in an intermediate Court, or it could be the High Court hearing an appeal from the District Court, to actually turn its mind to whether the appeal is moot. Because if it's not moot then it has to be heard, regardless of the merits. It's only once it is moot the Court can say, "We are not required to hear it. The question now is even though we're not required to, should we do so?" This does seem to me like a "should we do so" case, because if you resolve the appeal in our favour we can then use that argument in relation to the other matter. But the answer to that is the one the Court of Appeal gave, which is the regulation, the power to make substances, either medicines or not medicines, is not predicated on what their existing status is or was, so it doesn't really matter.

GLAZEBROOK J:

But it's actually a different matter isn't it, because the mootness, doesn't that come from, the regulation doesn't take away because it's only prospective, what the situation was at the time?

MR POWELL:

Yes, if there was still a living issue in the historical position if the answer –

GLAZEBROOK J:

But isn't there a living issue in the historical position? It's not one that is going to have any –

WILLIAM YOUNG J:

They will be in a moot case.

MR POWELL:

Sorry?

WILLIAM YOUNG J:

They almost always will be in a moot case. The case has been settled but there might still be an issue as to who was in the right.

MR POWELL:

Yes, and my friend made reference to two cases involving prisoners where there does appear – well, the High Court at least has said that, in relation to prisoner rights, that it will go on and grant a declaration even when the situation has been made moot, and we get this all the time with things like decisions about security classifications as to whether they were rightly done, by the time the case gets to Court the prisoner's security classification is being reviewed again and this time it has gone down to what they said it should be and the Crown has said, "What is the point of hearing this now that it no longer affects them?" but the High Court has been resistant to doing so on the basis that a declaration does have some value to the prisoner.

WILLIAM YOUNG J:

As I understand it, the only utility in relation to the appeal that was advanced was that it would help with the regulations appeal.

MR POWELL:

Yes. But again, it's not – I'm not trying to split hairs – but that's something that occurs in a different proceeding, albeit one that was also before the Court.

WILLIAM YOUNG J:

Yes, well, I said it rather dismissively actually because I didn't see it as actually – I mean, I think we can deal with the regulations appeal anyway.

MR POWELL:

Yes. Which brings me to the regulations appeal, and I didn't have anything to add except the question was raised in the course of argument about the question of validity of subordinate legislation, and the submission I wanted to make on that in my submission I thought that the law as to the validity of subordinate legislation was at least one area of administrative law that was relatively uncomplicated, the regulation must fall –

WILLIAM YOUNG J:

We live and learn don't we.

MR POWELL:

The regulation has to fall within the scope of the empowering provision. If it doesn't nothing can save it, it's invalid. But if it is within the scope of the empowering provision then it is valid.

WILLIAM YOUNG J:

Well, are there any cases on that?

ELIAS CJ:

No, there are many New Zealand cases where subordinate legislation has been held to be invalid as unreasonable.

WILLIAM YOUNG J:

Bylaws.

ELIAS CJ:

Yes.

GLAZEBROOK J:

There is.

MR POWELL:

Bylaws, yes.

WILLIAM YOUNG J:

But apart from bylaws, are there cases dealing with specific regulations?

ELIAS CJ:

I think so.

MR POWELL:

Delegated legislation. I'm sorry, I couldn't find any…

GLAZEBROOK J:

And I can understand the submission that if it's on a misunderstanding of the law, even if it's within the provision, it would be invalid as well. But to be honest I don't know that we made submissions on that in this particular case, ie there's not a misunderstanding of the law it seems to me in this particular case but…

MR POWELL:

No. And moving on to the other point, I was satisfied with the position that was fully ventilated during my friend Ms Hansen's argument, and I didn't have anything to add to that. If you are clarifying the law then you are by that reason accepting that there is something to clarify and, given the interest at stake here there were people that were currently doing things which somebody was now saying may not be legal, and so it is appropriate in those circumstances to move with alacrity to say, "Well, definitively what you are

doing is legal," subject to these other arguments. So while it's true that the purpose was to render the appeal moot, as Your Honour says, the Court decides whether or not the appeal's moot not the Crown, but the intention was to bring argument and therefore uncertainty to an end, so it was a case of an incidental thwarting of the appeal, and I didn't have anything further to say about that.

The only other issue I wanted to –

ELIAS CJ:
I should say by the way that what I said about subordinate legislation is subject to section 4 in terms of inconsistency with any provision of the Bill of Rights.

MR POWELL:
Oh, yes, and I accept that, I mean in the case of bylaws there's a specific statutory provision that says they must be compliant, but even absent that no, Parliament doesn't not authorise the creation of inconsistent regulations, so –

ELIAS CJ:
No, no, but the Courts on one view of section 4 can't hold subordinate legislation to be invalid because legislation is, enactments are broadly defined in the Interpretation Act 1999. Anyway…

MR POWELL:
I thought we lost that argument very – in *Drew.*

ELIAS CJ:
Well, yes – this Court hasn't considered it.

GLAZEBROOK J:
But in fact you're not doing them invalid, you're actually saying that you interpret the power itself as saying that it's subject to the Bill of Rights.

ELIAS CJ:

Yes, that's right.

MR POWELL:

Yes.

GLAZEBROOK J:

So it's not that you're saying it's invalid because of the Bill of Rights, it's that the power to make the regulations as interpreted as being – that's how I would put it.

MR POWELL:

Yes.

GLAZEBROOK J:

That you don't assume that they are making a power that says you can make regulations that are inconsistent, however broad that power is to make regulations.

MR POWELL:

Well, the only other matter I wanted to brief mention was the question of costs and –

GLAZEBROOK J:

And actually probably deals with that to a degree.

ELIAS CJ:

I don't know.

GLAZEBROOK J:

Well, it says that you have to interpret that broad rule-making power as being subject to the Bill of Rights when you're making the rules, so this Court probably has dealt with that.

ELIAS CJ:

Yes, surprisingly actually.

GLAZEBROOK J:

But not in a sense of declaring them invalid just per se.

ELIAS CJ:

No.

MR POWELL:

On the question of costs, this is another complication of the appeals being joined together.

ELIAS CJ:

Yes, all held…

MR POWELL:

While the respondent, the Attorney-General was respondent to the two other matters, isn't entitled to costs if it's successful on those matters, a substantial amount of time for this has been –

ELIAS CJ:

Has been in the appeal in which you're the Intervener.

MR POWELL:

Yes, and I don't suggest that the Crown should be entitled to any costs simply because we are no longer an intervener, we are in it still an intermeddler if you like, but that's not, I'm not suggesting that simply because we have –

ELIAS CJ:

But you're seeking costs in the other appeals?

MR POWELL:

Yes, I'm obliged to seek costs in respect of the, if the other two appeals are dismissed, but I have nothing further to say about what that should be and of course if the appeals are allowed then costs would go the other way, subject to the Court's discretion.

ELIAS CJ:

Yes, thank you, Mr Powell.

MR POWELL:

I'm obliged, Your Honour.

ELIAS CJ:

Yes, Mr Laing, did you want to fill in?

MR LAING:

Before I come on to the statement of claim, or rather the amended statement of claim, I do have some more copies of the Health Act which had the relevant section 23 in them, if that's helpful to the Court.

ELIAS CJ:

Thank you.

MR LAING:

There is a statement of claim and an amended statement of claim in the *South Taranaki* case. The amended statement of claim is case on appeal, volume 1, tab 7, if Your Honours can turn to that. So it's case on appeal, volume 1, tab 7, and when you have found that I would take you to 171, page 171, and just by way of explanation there were two causes of action pleaded. The first appears two-thirds of the way down 171, "First cause of action: ultra vires," "The decision is unlawful," it's at 30, "because the defendant has no statutory power to add fluoride to its district's supplies for therapeutic purposes; and/or adding fluoride to water supplies constitutes a breach of s 11," and then over the next page, 172, "A power to breach section 11 by adding fluoride to the water supply has not been prescribed by law," and then, "Not justified in a free and democratic society." But if I could just go back to 171, those two paragraphs 30.1 and 30.2 in my submission appear to be quite general, it goes to the heart of the Council's power to fluoridate water, no statutory power, so it's very general, so that would come back to the interpretation point. And 30.2, "Adding fluoride to water supplies," so I take that as being a

very general pleading, constitutes a breach. So it's not simply the Council's water supply but, the way I interpreted that it would be any water supply.

And that is probably reinforced by the second ground for review, which is at 172 at the bottom, going on to 173, and that is, at 32, "If the defendant is empowered to add fluoride to its water supplies in breach of section 11 (denied), such a power is discretionary." So those are then, there's a whole lot of allegations there that the decision failed to take into account, relevant mandatory considerations.

GLAZEBROOK J:
And you say those aren't before us?

MR LAING:
They're not before you – and I will defer to my friend if she has a different view, but that's the way I read it.

ELIAS CJ:
So the whole second cause of action's not before us?

MR LAING:
No. So the focus is –

GLAZEBROOK J:
It's an in principle, it's against a specific.

MR LAING:
Yes, so it's the vires arguments that are before you, which is the first cause of action. So that really does suggest to me that it's, you know, can the legislation be interpreted as putting of fluoridation in water and whether it does breach the Bill of Rights Act and so what the consequences of that are. But I think that's quite consistent with the national focus rather than simply the Council focus.

ELIAS CJ:

Yes, thank you. Yes, Ms Scholtens.

MS SCHOLTENS QC:

I haven't seen the extract from the Health Act that's just been handed up, but we have prepared extracts ourselves, I wasn't able to catch my learned friend's eye when he was talking about them. But I wanted to take the Court to the context surrounding that section 23 provision, so I've got here pages that go up to section 35 of the Health Act and I wondered if I could hand that up and I apologise for the duplication.

ELIAS CJ:

Yes, thank you. So we've got going up to 25, or some of 25 anyway, of the whole of 25 – no, we haven't got the whole of 25. And what are you giving us?

GLAZEBROOK J:

Up to 35.

MS SCHOLTENS QC:

Up to 35.

ELIAS CJ:

Thank you.

MS SCHOLTENS QC:

So I'd like to address the question of section 23 of the Health Act and how it ties in with the interpretative argument, and can I just begin by noting, because it may have little relevance, but the *Hutt City* case, you might have noticed, did consider section 23, or at least the Privy Council said they didn't need to, but the High Court and the Court of Appeal did, and in neither case did they consider that section 23 assisted in providing any power to fluoridate.

ELIAS CJ:

Do you have references to the High Court and Court of Appeal? It doesn't matter if you haven't got them handy.

MS SCHOLTENS QC:

I know the Court of Appeal is footnoted in our submissions and is in the authorities.

ELIAS CJ:

That's all right. We'll find it.

MS SCHOLTENS QC:

Sorry, I'm just – so if I could start, well, if I could take Your Honours to section 23 itself and my learned friend – so you'll see it's under the heading of "Sanitary Works" and – sorry, that's not 23.

WILLIAM YOUNG J:

It's under the heading "Powers and duties," isn't it?

MS SCHOLTENS QC:

Sorry, so the powers and duties, yes, and I think my learned friend accepted that in response to a question by Your Honour, Justice France, that subsection (c) was at least part of what was relied on and it's submitted that if anything can be relied on it probably has to be subsection (c).

WILLIAM YOUNG J:

But what about the general duty?

GLAZEBROOK J:

That was the main argument made.

MS SCHOLTENS QC:

Well, in terms of – yes, sorry, yes. There's a general duty and for that purpose they are specifically empowered and directed, so yes, I accept he was arguing a general duty, to the extent section (c) provides any powers, when you're looking at, effectively at nuisance.

ELIAS CJ:

Or condition likely to be injurious.

MS SCHOLTENS QC:

Yes, or condition. Well…

WILLIAM YOUNG J:

What's absence – why isn't absence of naturally occurring fluoride a condition?

MS SCHOLTENS QC:

Well, it could well be, but on that point can I just clarify that the evidence on the extent to which there is an absence of naturally occurring fluoride, if I can just give you the reference to volume 3, page 515, Mr Atkin has indicated the natural level of calcium fluoride in New Zealand is typically 0.01 parts per million to 0.2 parts per million, can be up to 0.3 parts per million but this is not – and this is common or typical level of calcium fluoride in water around the world. So it's a – that's the typical. We're not unusual here, and that evidence hasn't been contradicted anywhere.

So section –

ELLEN FRANCE J:

I'm right, aren't I, there are higher levels in some parts of the world?

MS SCHOLTENS QC:

Yes, in some parts of the world. I think parts of the United States there's reference to that in the evidence.

So if one does look at the powers that exist in relation to nuisance, there's a duty there to abate rather than just a power or a duty to remove the condition, so if the condition is in the health area I would have thought the condition might be the incidence of tooth decay that they might be seeking to remove, so there'd be a duty to do that.

WILLIAM YOUNG J:

Well, there's a power to do that. There's a general duty and then under that heading, "For that purpose every authority is hereby empowered and directed," but it can't say, "We've got to do something irrespective of the cost," for instance, can it? I mean, that must be a power to do something.

O'REGAN J:

Well, also it has to be satisfied. It has to be satisfied that the condition is injurious.

MS SCHOLTENS QC:

Yes, but it does have to cause all proper steps to be taken.

WILLIAM YOUNG J:

Yes, but it must have a decision as to what's proper.

MS SCHOLTENS QC:

Yes. I accept that. The context though. I starting point what I'm submitting it's difficult to shoehorn into this context a public health initiative such as medicating the water because of tooth decay, and that is effectively what the Courts found in the *Hutt City*, and in terms of nuisance, there are, the proper steps that are to be taken are set out. My learned friend I think in the written submissions had suggested that this, that this provision might apply, but the proper steps that are to be taken in this case –

ELIAS CJ:

Where are they set out?

MS SCHOLTENS QC:

Section 29 begins the sections relating to nuisances. So you've got an ejusdem, a list of what might be, a long list of what might be nuisances.

O'REGAN J:

But nobody's suggesting it is a nuisance here, are they? They're suggesting it's a condition injurious to health.

MS SCHOLTENS QC:

Well, that's not as I understood the submissions of my learned friend but if that is so then I don't need to go beyond the points that I have made. If it is a nuisance, or if that is what we are talking about there, well, then there are plainly, plainly you have to read it ejusdem generis and then, secondly, you have to take the steps that are set out there and they don't go anywhere near suggesting something like putting in a medicine in the water. It is there for your consideration.

My learned friend for the Crown in relation to the Medicines Act appeal submitted that he relied on His Honour, Justice Collins' analysis and, in particular, that the context otherwise requires in this situation, and it's submitted that a close reading of Justice Collins' decision will show that the context was not the basis of his decision or, to the extent it was, it was his misunderstanding of the context, and as my learned junior took the Court through the argument yesterday

WILLIAM YOUNG J:

In the Court of Appeal judgment, though, it says that they asked you what the point of this appeal was and that you were not able to advance any convincing reason to support the submission that it was desirable to have the appeal determined. Now as I read the submissions, the only purpose advanced for hearing the Medicines Act appeal is that it will inform the result of the regulations appeal.

MS SCHOLTENS QC:

It will also inform, perhaps, the way…

WILLIAM YOUNG J:

Well, just pause so we take it step by step. Was there anything that you did tell the Court of Appeal in terms of the public utility of hearing the appeal that we've, they've missed out?

MS SCHOLTENS QC:

I'm sorry, I can't remember at this stage what I might have, what I would have said in answer to that question.

WILLIAM YOUNG J:

All right. Well, just going to the submissions, am I wrong in reading them as referring only to relevance to the regulations appeal?

MS SCHOLTENS QC:

Yes, I think you are, Sir. I think we're also arguing that there is a public utility in knowing .

WILLIAM YOUNG J:

I'm looking at 128 and 129. Are there any other reasons advanced in the written submissions? I may have overlooked them.

GLAZEBROOK J:

Well, in the oral submissions it was certainly the requirement to make a declaration that there hadn't been adherence to the law on the importance of ensuring that there was adherence to the law by public authorities even if prospectively the law had been changed, is my understanding of the submission made.

MS SCHOLTENS QC:

Yes, thank you, Ma'am.

WILLIAM YOUNG J:

So that's the proposition, that we should hear it for the purposes of making a declaration as to how the law should have been applied before the regulation came into effect?

MS SCHOLTENS QC:

And that there is public interest in understanding whether as a matter of law this would have been a medicine.

WILLIAM YOUNG J:
Why?

MS SCHOLTENS QC:
I suppose for the same reason, that if something – on only two occasions have substances been taken out of the Medicines Act, and this is one of them, it's not something that happens every day. And I guess the public perception of fluoride – to be frank, the public understanding of water fluoridation certainly isn't, they're not thinking in terms of medicine in the water generally. And the appellant is concerned about that, concerned to ensure that people think about the fact that they're actually getting medicated for a reason when they drink their water. And we know, we say they're getting medicated because we know it's been put into the water for a therapeutic purpose. The fact that it might also be a medicine under the Medicines Act, unless the Executive's taken the step of removing it from the Medicines Act, is a relevant matter in the public interest, and I guess that's been the focus of the argument about whether the regulation's amendment was made on a proper understanding of the law or for a – whether it was vitiated by an error of law. And certainly the status of these particular chemicals prior to the regulations is a matter that is of concern and interest, the appellant would say.

I'm not sure that there's much more on my list that might be usefully put to the Court, I think, matters, as I said in the principal argument, you know, the primary, in terms of, to the extent that the Court's going to be looking at the merits of fluoridation we simply, there's a lot of evidence and we accept that this Court's not in a position to be able to assess the merits of all the evidence, and of course it's not all the evidence on this sort of issue anyway. But we say that at least the Cochrane Report and the York Report are neutral and authoritative and can safely be relied on.

WILLIAM YOUNG J:
Does the Cochrane Report refer to the survey of children in Wellington and Christchurch?

MS SCHOLTENS QC:

I don't know – I don't think so. They did look at it but they rejected it for – it didn't meet the standard.

So unless there's anything else, Your Honour, thank you.

ELIAS CJ:

Thank you. Well, thank you, counsel, we will take time to consider our decision in this matter.

COURT ADJOURNS: 12.51 PM