IN THE SUPREME COURT OF NEW ZEALAND SC 58/2005

IN THE MATTER of a Criminal Appeal

BETWEEN **PAUL RODNEY HANSEN**

Appellant

AND **THE QUEEN**

Respondent

Hearing 22 February 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel S Vidal and J Taylor for Appellant
T Arnold QC, J C Pike and J M Davidson for Respondent

CRIMINAL APPEAL

10.02 am

Elias CJ Thank you.

Vidal May it please the Court, Counsel's name is Ms Vidal and I appear for the appellant with my learned friend Mrs Taylor.

Elias CJ Thank you Ms Vidal.

Vidal Thank you Chief Justice.

Arnold If Your Honours please, I appear with Mr Pike and Ms Davison for the respondent.

Elias CJ Thank you Mr Solicitor, Mr Pike and Ms Davison. Yes Ms Vidal.

Vidal Thank you Your Honour. As is apparent from the submission filed for the appellant, essentially there are five main points if you like to this appeal. The first is whether or not there has been a breach of the right and here it's the right to be presumed innocent. And in regard to that whether or not the breach can be said to be reasonable and justified in terms of section 5.

The next aspect of the case is whether or not we can give a meaning to the terms in section 6(6) of the Misuse of Drugs Act that would result in there not being a breach of the right to the extent that cannot be justified and also leading on from that is how it is that section 6(6) still has an application and a purpose within the legislation and the Misuse of Drugs Act.

Essentially in terms of how the issue has been analysed in the submissions filed by the appellant, it's been a situation where there has been an examination of section 6(6) of the Misuse of Drugs Act and to see what the wording is in that provision. There is then a consideration under section 5 of the New Zealand Bill of Rights Act and in terms of the New Zealand case law there is discussion about whether or not the starting point is section 6 or the starting point under the New Zealand Bill of Rights Act is section 5.

In this situation, section 5 has been used as the starting point because I think we're in a situation where there is already what's considered to be an ordinary meaning for this provision.

Tipping J You accept that ordinarily read it creates a legal onus.

Vidal In the past that's how the Courts have read it.

Tipping J Yep.

Vidal And so it's a situation now in terms of this Court, how does this Court read it in light of the New Zealand Bill of Rights Act. Because it's a situation where, whilst we have Phillips, Phillips is a decision that's not binding on this Court and now this Court needs to assess how that provision should be read in light of the New Zealand Bill of Rights Act.

The reason why I would submit that we need to start at section 5 is because of what has gone before. We need to go through an analysis under section 5 to see whether what is in there could be said to be reasonable and justified. And the person that needs to establish that is the Crown.

And in terms of why that process I would submit it necessary before you go to section 6 is because when you're in section 6 looking at whether or not there can be other meanings given, you are going to be

blinkered by the meaning that's been used in the past without going through a proper analysis of what that meaning is, why that meaning might or might not be justified or reasonable.

Elias CJ I wonder Ms Vidal whether it is necessarily the case that this could will be blinkered by what's happened in the past. As you've said, Phillips isn't binding on us. For myself, I would have thought that the natural order was to start with the meaning of the provision and then to decide whether it's in breach of the Bill of Rights Act with the section 5 qualification, that justifiable limits are available.

Vidal In terms of that issue, why I say section 5 assists is because at the first part of 5 there's the analysis of what is the objective of the legislation and what is the actual provision itself doing. And within that part you look at the interpretation that's there and what's the meaning.

Under section 6 you also adopt that approach. You're looking at what is the meaning of the words and I appreciate that this Court may not be in a situation where it's blinkered and it cannot see beyond the meaning that is being said to be attributed to prove, that prove must mean on the balance of probabilities. But in terms of the analysis of using section 5, it goes through and looks at why was proved used in the way it was in that provision and analyse is that justifiable and reasonable and then go to, if it's not, go to section 6 and look at the other meanings that are there.

I think you arrive at the same result. It's probably just a different way of getting there.

Elias CJ It's a bit chicken and egg but I wonder whether really it's necessary to start with the layout of the Bill of Rights Act at all. Whether we mightn't however start with the meaning. Now did you say that you accept that the natural meaning is a legal onus? No.

Vidal No. That is, and in the Crown's submissions they've attributed to us, to the appellant that it's accepted that it's the plain and natural meaning or ordinary and natural meaning given to the words. But in terms of the submission, what we are saying is that it's a situation where ordinarily the words have been meant to mean a legal onus on an accused but in terms of the natural meaning we're not saying that that is necessarily the natural the meaning of those words.

Tipping J But you say in your paragraph 1(a).

Vidal Yes.

Tipping J The legal burden of proof also turned a presumptive burden or reverse onus in section 6(6) implied by the statutory phrase until the contrary is proved is prima facie inconsistent etc. I would read that as the respondent has, as you're saying, that that is your starting point if you

like but because it's inconsistent in your submission, you come back and have another look at it and say, well can we properly put another meaning on it. Is that not what you were intending to signal.

Vidal No, what, in terms of that aspect, what is being signalled is that essentially that's what the Courts have implied into the term. And that it's a situation that in terms of the statute, that in the past that is how the statute has been read. But in my submission that's not the only meaning and the only way it can be read. And if can expand that aspect because I can see that this is the bit that everyone's particularly interested in.

Elias CJ So does that mean that really what you're saying is that if section 6 of the Misuse of Drugs Act, section 6(6) is construed as imposing a legal burden of proof, then it is prima facie inconsistent with section 25.

Vidal Yes Your Honour.

Elias CJ Yes.

Blanchard J Is this going to hold good wherever one comes across this formula in a reverse onus.

Vidal No in terms of the authorities and in particular this is discussed in **Lambert** and **Sheldrake**, it's a situation where there has to be analysis of the provision within the legislation that the Court is faced with to determine whether or not the reverse onus, if it is a reverse onus, or the evidential burden, is appropriate in the circumstances. So it's not going to rule out reverse onuses across legislation. It is dealing with it within the Misuse of Drugs Act.

Blanchard J Well is that really saying that there is no ordinary meaning for this phrase in the context of a reverse onus. It will be given different meanings depending upon the application of section 5. For example, I don't imagine you would contend that what I would have in the past anyway thought was the natural meaning in section 20 of the Act should be read down for consistency with the Bill of Rights. I'm referring here to the reverse onus in relation to insanity where the language is exactly the same.

Tipping J I think it's 23.

Blanchard J 23 is it. I haven't got it here.

Vidal In terms of that argument, what is involved is the analysis in section 5 in looking at objectives of the provision within that piece of legislation, the proportionality involved in terms of what is trying to be achieved by the reverse onus, what is at risk for the right or for the accused in terms of how the reverse onus is operating and whether or not in fact that can be justified. So in other words in terms of other legislation,

you need to be looking at and seeing what is the reverse onus assisting with. In terms of with this legislation, the Crown is saying the reverse onus is assisting the prosecution in not having to prove in certain circumstances why the person has the drugs.

So there has to be an analysis of what it is that the reverse onus is doing to determine whether or not it is appropriate in light of sections 5 and 6. It's not a blanket situation where you can say because the reverse onus or the wording has been treated in this legislation in this way, it must therefore be treated in the same way in other legislation where it has been used. There's quite a complex analysis that needs to go on to determine in fact how the clause should be interpreted.

Tipping J Can you assist in what you meant in your 1(b) of your summary when you speak of the prima facie limitation. I understood that to be an acceptance that prima facie the phrase until the contrary is proved creates this legal burden which prima facie limits the right to be presumed innocent. But you then look around and if it's justified then that's the end of it. But if it's not justified as you would argue, you then look to see whether you can give a meaning to section 6(6) that is other than the prima facie one. That seemed to me to be what you were signalling in these submissions and in the summary. But was that a misreading of it.

Vidal In terms of the prima facie limitation again it's a situation where ordinarily the legislation has been read to create a prima facie limit on the presumption of innocence. So in the past ordinarily yes, that is how the provision has been read.

Tipping J Yes. And you're asking us to say don't read it that way any more. Even though it might be the most obvious meaning. You must read it down from that obvious meaning to avoid the unjustified limit. Is that a simple way of putting your proposition.

Vidal Putting my case. In terms of the proposition it's not necessarily the most obvious reading in my submission. And so that is the first aspect. Because.

Tipping J Well everyone, by calling it the prima facie meaning, you were signalling to me that it was the most obvious.

Elias CJ I don't think that it's being suggested in 1(a) that this is the prima facie meaning. It's being suggested that prima facie it's inconsistent with section 5(c) of the New Zealand Bill of Rights Act and indeed the respondent concedes that.

Tipping J But it's only.

Elias CJ And moves to section 5.

Tipping J I thought the submission was that it's inconsistent because it creates this legal burden.

Vidal In terms of.

Elias CJ Yes.

Tipping J That's what I thought. Therefore the Chief Justice and I are really saying the same thing but from a different vantage point. But never mind what I might have read into it. I just want to know what the submission actually is.

Vidal In terms, the submission is that when one looks at section 6(6) and considers prove in the context of the rest of the words within that provision, a different meaning other than saying a reverse onus is established can be found. And in terms of that meaning, what I am saying is that consideration of the word prove has been done in isolation. What has occurred is it's said we have the word prove and we say that that either means beyond reasonable doubt or on the balance of probabilities. Because that is ordinarily a standard that the Court may see imposed.

But what has not occurred has been looking at it in context. Because it's proof with regard to a presumption. So we're in a situation where we have not an actual fact that is to be challenged but a presumed fact that is to be challenged.

And in terms of when we look at the whole definition of the word prove, it's a situation where that word in itself is derived from the Latin test. And so essentially what is occurring is you are saying that what has to be tested is the presumption and that in order to test a presumption one is not required to prove a fact on the balance of probabilities. Because if you said that then you are elevating a presumption far beyond what it actually is.

In order to test a presumption one has to point to evidence that is inconsistent with it.

Elias CJ And here it's the lack of apparatus and so on consistent with dealing.

Vidal In this case it's a situation where there is, yes, no evidence that points to sale. And for this drug it has to be sale. So for cannabis the Crown have to prove that it was in possession for sale.

Tipping J You can rely then on a negative fact, the fact of the absence of evidence from the Crown's case rather than any affirmative evidence that it wasn't for the purposes of supply.

Vidal And you must be able to do that as an accused or else you are breaching the accused's right to silence. So in terms of that analysis,

it's a situation with an evidential burden where one has to look at either pointing to evidence within the Crown case.

Tipping J Well pointing to the lack of evidence within the Crown case if you're going to be consistent.

Vidal Well yes, well it's analysis of their evidence and to show that there isn't particular evidence of sale. And in terms of the current fact situation, that's exactly the circumstances that the accused was in.

Tipping J So a Judge would have to leave to the jury the proposition that the accused had rebutted the presumption or had successfully tested the presumption in the absence of any affirmative evidence from the accused.

Vidal Yes.

Tipping J Is that the consequence of the submission.

Vidal In terms of the impact of it, what we have within section 6(6) is a presumption as to a primary element of an offence.

Tipping J Mm.

Vidal And it should not be considered unusual that an accused doesn't have to bring evidence in regard to that primary element. Because that is not the function of the accused. The accused is not there to prove their case against themselves. It is for the Crown to prove the case. And so in circumstances where the primary element is contained within the presumption, so that is the fact that you've got it to sell it, there can be no disquiet about the fact that an accused is not actually leading positive evidence in regard to that primary element but rather the accused is demonstrating how it is the Crown haven't established their case.

Tipping J But that would mean that the presumption would not shift the onus in any shape or form.

Vidal It does.

Tipping J Whether it be.

Vidal Sorry Sir.

Tipping J You agree with that?

Vidal No it does shift the onus.

Tipping J Well how.

Vidal Because without, in terms of obligations, the Crown is entitled to say that this person was in possession of cannabis.

Tipping J 29 grams.

Vidal This person had 29 grams of cannabis. The law says on a, in terms of a presumption that until evidence is pointed to that is contrary to that presumption, a jury can find that the person is in possession for sale.

And if it may assist Your Honours, I actually have a direction in terms of, because this is the issue that you're going towards, a direction that would be given to a jury that would explain exactly how that.

Tipping J Well that's nicely anticipated if one may say so.

Vidal Thank you Sir. If this may be given to Their Honours. (Handed up).

Elias CJ Thank you.

Vidal So in terms of that direction it sets out in essence how section 6(6) assists the Crown and then how it is a jury is to consider whether or not the charge has been proved.

Tipping J How do you reconcile the direction up to and including then you must find the accused had the purpose of selling with what follows. It's a conditional must is it.

Vidal Yes because in terms of turning their minds to it.

Elias CJ Isn't it better to say then you can find the accused had the purpose of selling cannabis unless on the evidence you accept that there's a reasonable doubt. Isn't that really what you're trying to convey.

Vidal It is. In essence what it is is it's helping to explain why perhaps the jury haven't heard evidence from the Crown on this aspect.

Elias CJ Yes.

Vidal So it's explaining to the jury about that part. But in essence how you've phrased it, that is exactly what it's meaning to the jury.

Elias CJ Yes.

Tipping J So you're really taking the very high ground aren't you. You're not wanting to be satisfied just with an evidentiary onus. You want to knock it out altogether.

Vidal No. In terms of, the section must do something. So in other words if I say that there is absolutely no onus on anyone, then its saying that well

the section doesn't do anything. But the section does do something, it does bring an obligation or if you like a please explain to an accused.

Tipping J So it in your formulation it's just simply a section which excuses the Crown from affirmatively proving purpose was for sale. But the Crown must ultimately prove that. I find it very awkward at the moment.

Vidal In terms of how that works, it's a situation where if we look at possibilities for why section 6(6) might be there. Now the Crown have said it's there so that it can help the Crown in establishing or proving an offence. To make it easier. But there are other purposes for section 6(6). What that provision is dealing with is dealing with an elicit drug. In terms of your ordinary members of the jury, they are not necessarily going to have the knowledge in regard to this type of item, in regard to drugs.

And in terms of the legislation by the way it is phrased, it refers to or gives some guidance to a judge in directing a jury and a jury, in considering a situation, how much drugs is too much necessarily to just be for personal use. When is it that we could start to properly ask questions or have some consideration about why these might be had, why these drugs might be had.

In terms of the meaning that I am giving to, or submitting in regard to section 6(6) is a situation where it's highlighting that there is that need for an accused to point to evidence to challenge the presumption. So an accused cannot just sit on their hands.

Section 6(6) doesn't allow them just to sit on their hands because if they do then so long as the Crown proves weight in cannabis it will secure the conviction.

Elias CJ Ms Vidal you really do have to bring the accused into your direction though. Because that's the meaning of section 6(6). You've jumped, you've made it passive, unless on the evidence you accept. So there's some role under section 6(6) for the accused to play. What do you say the accused's role is under section 6(6).

Vidal In terms of that part of the direction in paragraph 3, that is where it relates to on the evidence that you accept. And so in terms of the ordinary role of an accused or what an accused will do at trial, it's a situation where the evidence that is presented by the Crown is open to challenge by the accused on the basis of cross examination. And so in terms of within the forum of the jury, it's a situation where they have to weigh and consider the evidence. And the evidence may be challenged by the cross examination. It doesn't necessarily have to be challenged by adducing evidence. And so in that regard, it doesn't necessarily have to require an accused to lead the evidence or to bring evidence.

Elias CJ Yes, I understand that.

Vidal So it can be passive.

Elias CJ And indeed I think Lord Cooke said as much in **Kebeline** that the accused could point to evidence. But on your formulation it cannot be the Crown that's being referred to in terms of until the contrary is proved in section 6(6). It must be the accused surely.

Vidal Mm.

Elias CJ Do you accept that.

Vidal Yes.

Elias CJ Yes.

Vidal That is referring to the accused.

Tipping J Proved by the accused.

Elias CJ Yes.

Vidal In terms of that aspect, I don't, and what I want to discuss is the meaning that might then be attributed to proved by the accused. And those words aren't specifically in the statute. So that's one aspect of it in terms of a reading in what is meant. So it doesn't explicitly require an accused to prove anything.

Tipping J But who is to do the proving of which the subsection speaks.

Vidal Who's to do the testing?

Tipping J The testing.

Vidal Who is to do the testing is.

Tipping J Until the contrary is tested.

Vidal Yes. And the testing is therefore done by the accused.

Elias CJ But the accused can do it by pointing to evidence which may have been called by the Crown as well as by calling evidence.

Vidal Yes.

Elias CJ That's your submission, yes.

Vidal Yes.

Tipping J Tested meaning put in a state of reasonable doubt does it.

Vidal It does. Well what, you've got to refer it back to that presumption. And the fact that you're testing a presumption. You're not testing a proven fact.

Tipping J No but I just wanted you to help me with what.

Vidal Yes.

Tipping J With what you meant by testing.

Vidal Yes.

Tipping J It means tested in the sense of creating a reasonable doubt.

Vidal A reasonable doubt. And that is why it is referred to as an evidential burden.

Elias CJ So it could equally be read as unless the accused raises a reasonable doubt as to the presumed intention.

Vidal Yes.

Elias CJ Yes.

McGrath J The argument does require that proved carry the meaning tested does it.

Vidal In terms of if we're not resorting at all to the New Zealand Bill of Rights Act we can succeed, or the argument could succeed on the basis that proved means tested.

McGrath J Yes.

Vidal And that is merely a simple application of the section 5 of the Interpretation Act in considering the words in context.

McGrath J Yes, yes. So you're saying that your argument in fact can succeed on the basis of proved having the meaning that was attributed in Phillips. Because what I'm really wanting to know is.

Vidal In Lambert, in Lambert yes.

Elias CJ Lambert.

McGrath J I'm sorry?

Elias CJ In Lambert.

Vidal In Lambert.

McGrath J In Lambert, yes.

Vidal Yes. Yes essentially it's a situation where the argument can succeed simply by saying proved means tested. Tested means raising a reasonable doubt. And that is what the section means.

Elias CJ And that is an evidential burden, not a legal burden.

Vidal Yes, that's the evidential burden.

Elias CJ Yes. The problem with that is that, and I suppose one is driven to doctrine which may not, may or may not be sound on this, but my understanding of the usual writers on evidence is that the evidential, discharging the evidential burden proves nothing. It simply gets you, as I think it might have been Wigmore said, past the judge.

Vidal And in terms of, the Court of Appeal has seized on this also in regard to this case. And it says that an evidential burden does prove nothing. But with respect that does not take account of how the word is used in the context of section 6(6). It's a situation where there is a presumed fact. And so if you raise evidence that challenges that, then you are proving something. You're proving that the presumed fact is not safe. It's not a situation where an accused is facing an actual truth. The accused is in a situation of facing something that's said to be at law true and so what they are seeking to do is point to evidence that challenges that presumption of truth.

Tipping J If it's read this way, do you accept that it's either not a limitation at all or a justified limitation.

Vidal If it is read this way, then it must be a justified limitation because you are encroaching on that right to be presumed innocent.

Tipping J But it's justified.

Vidal It would a situation where in order to give effect to Parliament's intention in section 6(6), and not breach section 4 if you like, that it may be considered to be justified if read in this way.

McGrath J And that's because it doesn't affect either the presumption of proof or the right to silence.

Vidal It does affect both. And this is where the section 5 analysis is involved. It is a situation where if you are saying, Crown you don't need to prove that this person's going to sell the drugs, that the accused needs to come along and point to why that cant just be assumed, you're naturally encroaching on the presumption of innocence and you may also by default encroach on the right to silence. Because it may be that the accused is going to have to either have someone in the witness box

or get in there themselves and explain why it is that it's not a safe presumption. In terms of the analysis then in section 5, it's a situation where you need to look at the three steps. The objective in the legislation, the proportionality of the step that's being taken, the enactment and then whether that's rational with achieving the objective.

McGrath J Yep sure.

Vidal And it's in that type of analysis.

McGrath J But you say on a section 5 analysis it is demonstrably justified.

Vidal Yes. In terms of if you refer to submissions at paragraph 72 of the appellant, that goes through the discussion in Lambert as to how it is the evidential burden doesn't infringe unreasonably the section 25C right.

Tipping J An evidential burden only as we're calling it.

Vidal Mm hm.

Tipping J Results in the ultimate burden remaining always on the Crown doesn't it on this ingredient. If not, well, obviously in relation to the other necessary, but ultimately on this ingredient of purpose.

Vidal Um, not always on the Crown no. Because it's a situation of again, if the accused sits on their hands, the Crown isn't put to the proof. It just relies on the presumption.

Tipping J Well what do you mean by sits on their hands, sort of says nothing?

Vidal In terms of that, in terms of is unable to point to or adduce evidence that raises a reasonable doubt.

Tipping J Yes. Well that means the Crown carries the ultimate onus of satisfying the jury beyond reasonable doubt as to that the purpose was for supply.

Vidal Only in terms of that direction, only in terms of if the jury does not accept that the presumed purpose is safe.

Tipping J Well never mind how you articulate it.

Vidal Mm hm.

Tipping J The end result will be that a Judge has to direct the jury that after having looked at it all and heard what the accused has had to say either in submission or evidence, they must be satisfied beyond reasonable doubt that the purpose was for supply. Because if they're not so

satisfied, your client will have discharged the so-called evidential onus.

Vidal In terms of that aspect, the presumption itself is in there to assist the Crown. The Crown can rely on that as proof. Yes in terms of your proposition, including that the presumption means that the Crown ultimately bears the burden, that is correct. But the Crown still has the benefit of the presumption.

Tipping J But it means that it does not alter, the presumption does not have the effect of altering the ordinary requirement of the Crown having to prove purpose beyond reasonable doubt. Because anything that's said or testified to by or on behalf of the accused is capable of raising a reasonable doubt. Therefore the Crown must always overcome.

Vidal If only everything an accused or their witness said was capable of raising a reasonable doubt, then that proposition may be correct. But in my respectful submission it's not. Because essentially you're in a situation where it's not always possible for an accused to raise a reasonable doubt or.

Tipping J But I'm thinking about how I would have to direct a jury.

Vidal Mm hm.

Tipping J In accordance with your suggested definition of the law. And wouldn't I, unless he's going to plead guilty, he's always going to say it wasn't for supply. It's inherent in the defence. Now am I not always going to have to say to the jury, at the end of the day, when all's said and done, you must be satisfied beyond reasonable doubt that his purpose was to supply bearing in mind the presumption that the Crown starts with a bit of a hand-up if you like. But ultimately you must be satisfied beyond reasonable doubt.

Vidal In a situation where if the accused has called evidence to challenge it then you must direct the jury in that way.

Tipping J But what if he said to the jury, look, it's only 29 grams, not scales, no deal bags, no nothing. I have to say to the jury, you must be satisfied beyond reasonable doubt that it was for supply. I think I have to on your formulation.

Vidal In terms of that aspect, it comes down to the direction of what a reasonable doubt is. And with regard to the argument that's being made, the reasonable doubt is not a fanciful one. So it's in terms of.

Tipping J I think I would probably have said that a little earlier in my directions.

Vidal Yes. I know. But in terms of your proposition that's what it rests upon, is that you're saying that it's a situation where an accused can just say anything, just say look I wasn't going to sell it.

Tipping J No but take my example. He says look members of the jury, it was only 29 grams, just a whisker over the presumptive level, no deal bags, no nothing by way of conventional paraphernalia. If that's his case through his Counsel to the jury, do I not as the judge under your submission have to tell the jury that the Crown must satisfy them beyond reasonable doubt against all that that his purpose was for supply.

Vidal Yes.

Tipping J Thank you.

Vidal In regard to that, I think that it's more than appropriate that that has to be the case. And that is because when we look at the regime of the Misuse of Drugs Act and in terms of the structure of offences that is within that Act, and we start at the level of possession of the drug as an offence, then we have the cultivation or manufacture of the drug as a more serious offence. Then even more serious than that we have possession for supply and then beyond that we have importation.

So in terms of the instrument of the reverse onus, what it would do and why it is inappropriate is it casts its net too widely in whom it captures. It captures the person who is right at that first part, the person in possession of the drugs.

Tipping J Is this an argument that the limit really ought to be much higher than 29, the presumptive level.

Vidal In terms of that, it's not necessarily that the trigger justifies a legal burden being there. That's not accepted. But in terms of how it operates in a proportionality sense and a rationality sense, so is it rational how it is used, it is not rational to say that it requires a legal burden on an accused.

Tipping J But it might be at say 1,000 grams.

Vidal But that's in the realm of the ordinary inference that could be drawn by a jury. It doesn't need a trigger amount. And this goes back to thinking about why there is an amount specified and in terms of why in the past there may have been an amount specified, it's to give the jury the indicator of we're now at a stage where you need to ask questions. We're not just at a stage where you can blindly accept that it's a situation that this is for personal use. It's to avoid naivety within a jury system. It's not a situation where we can sit happily and know that always that amount's going to have to be for sale or for supply.

But it's a situation where the amount helps to give an indication for why it is that evidence should be called for to address that issue of is it for personal use or is it for supply.

Vidal This is in part why the section 5 analysis does assist in terms of figuring out where to start in the New Zealand Bill of Rights Act to look at the meanings. And I think it's because of the whole situation of the paradox between we have an extremely important right but we've got a competing interest in terms of legislation that is there to legislate against the evils of the drug taking. And it's through that section 5 analysis that you help to reach some balance between those two aspects.

In terms of if we go and we look at a scenario where it's a situation where the Bill of Rights does need to be resorted to to look at whether or not it is a legal burden and therefore whether or not that legal burden is unreasonable and unjustified and therefore there should be another meaning attributed, it's upon the Crown to establish that the legal onus is reasonable. So if we say that yes, there's a requirement to prove on the balance of probabilities, there's the obligation under section 5 because the right is clearly breached. I don't think there can be an issue about that. There's the obligation under section 5 for the Crown to establish that it's reasonable and justified.

In terms of that argument, the Crown has looked at issues of the requirement for the judiciary to defer to Parliament. And it's looked at issues of what's called eyes wide open. Or assuming the risk. And in terms of section 5, these are factors that are considered at the level of what's the objective of what is trying to be done by section 6(6) and in terms of proportionality. So in terms of the **Moonen**, it's the second step in there.

The issue of judicial deference to Parliament or basically accepting that Parliament wanted an accused who may be in possession of the drugs for their own use to also be considered to be having them for sale. And that that is reasonable. And the Crown is saying that is reasonable despite the fact that someone may be imprisoned for something that's not true. That is reasonable because Parliament says it is so. It's a situation where Parliament has identified the need to do this. Yes it derogates the right but because Parliament has identified the need, it is not open for the Court to look at the circumstances and determine whether or not that is in fact fair.

And in terms of the basic principles, it's the Court's job to enforce the rule of law. And to look at those basic principles of fair trial and part of that is the presumption of innocence. And the Court is entitled to look at the legislation and assess this aspect of it because what it is doing is it's assessing how section 6(6) operates. It's not saying that we don't accept the objective behind the Misuse of Drugs Act. It's a

situation where the Court is fulfilling its role in looking at how the reverse onus, if that's what it's to be, operates.

And it's because of the Court's function in ensuring the upholding of the rights of the individual and ensuring fair trial that the Court is more than entitled to undertake such analysis. It's not a breach of section 4. It is not the Court looking to see if it can make the section ineffective, if it can look at rewriting the section.

The Court is not being asked to alter a statute or rewrite a statute. What the Court is looking at doing is analysing why has Parliament decided upon a reverse onus. How is that reverse onus operating. So on this side of the scales a reverse onus can be assisting the prosecution in proving the charge because Parliament's said lets have a leg-up. But on this side of the scales in terms of the Court looking at well what does that do to the right, it's a situation where clearly the Court is met with a breach of the presumption of innocence, a consequence of which or an effect of the operation of section 6(6) being that a person can be imprisoned in regard to something that is not true.

Elias CJ Well that is not proved beyond reasonable doubt.

Vidal And our Courts consider that not to be true in the ordinary sense in terms of fair trial. It's a situation where it's not true, likewise in terms of the issue of possession of a drug, it may well be not true that they are going, that the person is going to sell or intends to sell the drug. Because the burden is too blunt to sift out from the mix those who are on the track of selling and those who are on the track of merely using it for themselves.

And why it does that is because it's a situation where it's easier to prove if you like that it was going to be sold than actually being in a situation where you can adduce evidence to show that it was not going to be sold.

And that in terms of the current case is what is demonstrated by the facts. In the current case you have a cultivator. He was charged with both cultivation and supply and that's shown in the Indictment that is in the casebook. So we know that he's growing his own drugs. We have a man who was cultivating a small number of plants. It hasn't been established exactly or wasn't established exactly if it was 8 plants as contended by the Crown or 4 plants as was contended by the accused. But in any event it's a small number of plants.

This man has then harvested the plants and has them back at his house with his friend. They are saying that they are your average do it yourself kiwi blokes who grow their own dope in essence. And that's what they've done. They've grown their plants. It's the end of their harvest season. It was May. The plants are grown outdoors. Down in Glenorchy that's definitely the end of the harvest season. You're not

going to grow anything outside after May. And they've got it at home and it's a situation where they've clipped it, popped it in the buckets. And they're in the process of doing this when the Police arrive. So the Police come and decide that there's going to be a charge of possession for supply. And Mr Hansen says, but hang on, I am here with my friend Mr Hill, we've only grown four plants he says, 8 plants the Crown says, and this is our supply for the year. We've grown it ourselves, we don't want to have to resort to buying it from undesirable people who may be selling it and we smoke it ourselves. It may be that we give some away but that's not an offence in terms of the legislation. Because you can give cannabis away so long as it's to someone over 18. It's a situation where for there to be an offence it has to be a sale.

And so he's in a situation where he's got his drugs and now he's being asked to go before a jury and explain, Mr Hill please tell us, Mr Hansen please tell us why these are not for sale. And the Crown go along and the Crown have got no other evidence at all upon which to establish that they are for sale.

And the Crown can find evidence and it's not hard for the Crown to find evidence of sale. The Crown is able to look at all the indicia that are referred to. There are tick lists, there are bags for packaging, there is packaging, there is excess cash, there is wealth beyond means, there is scales, there are text messages that indicate sales have gone on in the past, there's the ability to use an agent to go in and purchase drugs from a person, there is the ability to wait and observe and see what happens with cannabis in terms of if it's a situation where someone may go on and deal with it.

Elias CJ Is this submission, because in your written submissions you contrast it with the position in respect of the presumption of sanity which is to establish a fact. Do you go so far as to say that a reverse onus on the subject of intent is always disproportionate.

Vidal In terms of that, this is an aspect where the Crown look at the eyes wide open argument. And I will address that point now. With regard to intention, there is a difficulty or an issue in terms of with what the activity is we're looking at. Now there's reference to the copyright case which is the **Johnstone** case in the UK. In terms of saying that whilst the person in that situation, a person can be required to prove their intention. And there are quite severe consequences in terms of penalty if the person isn't able on the balance of probabilities to prove their intention in that scenario.

But what that scenario is is one where there is a regulated process within which to operate. So in terms of the copyright issue, there is a legitimate system within which you should operate.

Elias CJ Well the Crown's submission surely here is that the fact, the level at which the presumption kicks in is known, people want to take the risk of, there is a system.

Vidal Mm. In terms of that, there isn't a system for proof that's easily open to the accused. Whereas in the copyright case there is. Because what you're saying is that look I can do this legitimately, so I can purchase goods, sell them as Gucci and show that I've bought them from a reputable person and they don't breach copyright. I can show them it was my intention to sell only goods that come from reputable people that are consistent with copyright requirements. In terms of drugs, you're sort of stuck without.

Elias CJ Well you're stuck with don't possess more than whatever the limit is or you will run up against the presumption.

Vidal But in.

Elias CJ It does seem to me that the argument does run into a system.

Vidal In terms of that it comes down to the whole aspect of the issues that stand with the ease of proof of the intention. And if you like the preconceived ideas that are in existence with regard to drugs.

Tipping J But the question of intention here is assisted isn't it by the fact that Parliament when setting the levels has the advice of this expert committee which is referred to in the Solicitor General's submissions at paragraph 55 and by no means could it be said that the figures have been plucked arbitrarily out of the air. Obviously there's a considerable amount of care and expert attention goes to fixing the levels at those at which the probabilities are if you like, the high probabilities it might be said, are that it will be across the board for supply. So there's nothing capricious or arbitrary about the levels if you like. And the intention that is ascribed to the person by a fiction, by a presumption has the backing of something pretty solid. And I would have thought that was a major point in the question of whether it's a justified limit etc.

Vidal In terms of that aspect, first of all when Mr Hansen was tried the legislation wasn't as it is now.

Tipping J Well it's a bit like Mr Lambert. Except it may cut the other way.

Vidal In terms of there wasn't the expert advisory committee.

Tipping J We've got to look at the law as it is now. We can't sort of, you're not asking us to ….

Vidal No but in terms of even as the law as it is now.

Tipping J But there was this expert committee earlier wasn't there. It's just that it's been legislatively in effect acknowledged in this very recent 2005.

Vidal In terms of that aspect, what it involves is many assumptions about what the committee has had reference to in order to fix levels. But in terms of looking at whether or not the trigger justifies the transfer of the burden, it's submitted that it's still fundamental to consider how easy is it for the accused to prove that they didn't have the intention of supply.

Tipping J Well my experience is the more they had the more difficult it was. But at 29 grams you probably didn't need a heck of a lot. But it's the sort of, it's a presumption which in practical terms floats with the volume. But you've got to set a trigger figure.

Vidal The issue with the, in terms of the trigger figure and whether or not it justifies the transfer of the burden, my submission is it doesn't. And it doesn't because it fails to address the issue of ease of proof with which an accused can show that they were not in possession for supply or for sale.

Elias CJ The difficulty of proof.

Vidal Yes, well yeah. It's the difficulty of proof.

Elias CJ Yes.

Vidal In terms of increasing the Crown's armoury, what I have submitted is that it's a situation where their armoury does not need to be increased to the extent that it transfers a legal burden to an accused. Because the Crown already have sufficient matters within their armoury to be able to establish the fact if need be.

Tipping J Is this, and I'm sorry to return to this point which I know I raised a little while ago, but is this really an argument that the thing is unjustified because of the low level at which the trigger cuts in. That it would, I'm just having some difficulty understanding. Are you saying it will never be justified, whatever the level that Parliament might choose. Is that your argument or is it an argument for this level being too low.

Vidal It's not in regard to the amount of the level. It's in regard to the impact of the reverse onus.

Tipping J But in practical terms the impact of the reverse onus will vary in my experience enormously with the level. Relatively undifficult to rebut it at 29 grams but pretty impossible to rebut it at 10 kilograms.

Vidal And so it serves no purpose when it's at that level. And so that's part of the aspect is it puts those most vulnerable at the greatest risk in terms of how it operates.

Blanchard J Do we have any information on the processes adopted by the committee and what it takes into account in making its recommendations as to the levels of trigger figures.

Vidal In terms of that aspect I believe that that is the part of the submissions that, or the matter that was ruled on last week with regards to evidence. And it's been a situation where the evidence has not been admitted to the Court.

Elias CJ No, there's been no ruling. We'll hear the parties on that.

Vidal Or a direction sorry.

Elias CJ If they want to persevere with it.

Blanchard J And we haven't seen the evidence.

Vidal Mm. But in terms of, if I return back to that point about how the presumption operates, that is the mischief that it creates is that it's at its most lethal with regard to the most vulnerable. It's a situation where those who have enough that could be for their own use are.

Tipping J We get some help don't we from what's set out in paragraphs 56 of the Crown submissions where the advice from the expert committee is set out as to what it's likely to be directed at. The amount that could reasonably be possessed for personal use, including levels of consumption, ability of the drug to create physical or psychological … and the specific effects of the drug. Well perhaps that's not.

Elias CJ This was one month's use or something like that.

Tipping J Yes and there's some other material that I've read, not in the affidavits which I certainly haven't read. But in the submissions.

Vidal Mm.

Tipping J Which I think suggest that sort of thing.

Elias CJ And indeed that cross-references to the submission you've just made to us about this being one years' supply at the end of the growing season for two people.

Vidal Mm.

Elias CJ So there's some cross-reference, cross-check there.

Vidal Mm. That was accepted in the evidence with regard to the quantities of head that were clipped. The amount that a person could smoke per day is discussed with the detective who gave evidence at trial. So that's within the transcript in the casebook.

But in terms of the whole aspect of saying that personal use is one months' supply, it does with respect fail to take account of reality. And it is precisely in Mr Hansen's scenario that that reality comes to light. Because it's a situation where he is a cultivator. And he's growing the drugs for his own use. He's not buying them for his own use off someone else. And so one necessarily wouldn't expect him to pop down and buy a whole year's worth of someone. But it's not unreasonable for there to be a situation of a cultivator being in possession of more than one months' supply.

Tipping J Is it inherent in your argument that the judiciary are going to become in a sense arbiters of where the presumptive level should be set in order not to fall foul of the Bill of Rights.

Vidal No because that is why section 6(6) will still have a purpose if it is given the meaning that I submitted it should be given with regards to evidential burden.

Tipping J Oh yes, I understand that.

Vidal Yes.

Tipping J But the argument we're talking about now is on the premise as I understood it that we thought it was a legal burden. And the issue is whether that's an unjustified limit. I thought we were talking now on the hypothesis. You introduced this section by saying, if there is a legal burden then the rights are breached and it's an unjustified breach. I'm sorry, I've been thinking along the lines of legal burden.

Vidal Mm.

Tipping J If we found it's a legal burden.

Vidal If you find it's a legal burden then.

Tipping J It's unjustified you say.

Vidal It's unjustified and unreasonable.

Tipping J Yeah.

Vidal Yeah.

Tipping J But one of the reasons why it's unjustified is that it's going to catch some people unfairly.

Vidal Yes the net is cast too wide.

Tipping J Yeah.

Vidal Yeah. Yes.

Tipping J The net wouldn't be cast so wide if the level was high.

Vidal In terms of, what it is is it's a situation of making the provision workable. And if you say that we'll just put the level up so that everyone can be satisfied that you're going to definitely be in the selling category with the level up there, then it serves no purpose because you don't need that in legislation, you have that by ordinary inference. And in terms of the submission or the proposition that you put to me that it's a situation where the Judge becomes the, has to decide what's a fair amount not to breach the rights, well that is where the assistance is gained from section 6(6) by having an amount in there and you balance the benefit of having the amount in there with the not requiring proof on a balance of probabilities but requiring the pointing to evidence to challenge it. So yes there is some benefit to be derived from the trigger amount. But you have to temper the impact that that can have.

Elias CJ Now Ms Vidal you've been interrupted a great deal. I wonder whether you can just perhaps indicate to us where you would like to take your submissions now. Bearing in mind that of course we've read your written submissions.

Vidal Yes Your Honour. In terms of that, it's to take some more time to go rationally if you like or in an orderly manner through section 5 and look at the issues of relevance in regard to that section 5. And maybe if we look at, at paragraph 25 of the submission is where we set out the commencement of the Moonen test.

Elias CJ Paragraph?

Vidal 28 of the submissions.

Elias CJ 28, Thank you.

Vidal In regard to the first part, the importance and significance of the objective of the legislation, the objective is not solely the purpose of the Act. The objective is also what is being achieved by the provision in question. And so in terms of when it gets down to questioning the proportionality, what is to be looked at is not the overall purpose of the legislation but rather the actual provision in terms of is it proportional, the benefit that it's giving to the Crown as opposed to the risk that it creates to the accused.

And it's in regard to that aspect rather than the overarching purpose of the legislation. It's with regard to the aspect of the reverse onus itself. What it's doing is it's giving the Crown the benefit of not having to prove something. But it has a far greater consequence in my submission in regard to the impact that it has on the accused. And it's that impact that's not proportional.

Elias CJ The impact being that the accused may be convicted where there is a reasonable doubt.

Vidal Yes. And that's a significant impact when you consider for an offence of possession simplicitor, so for your own use, there is in the legislation a presumption not to be imprisoned. Whereas in terms of possession for sale or supply, there is the real risk of imprisonment. And you go from a three month penalty up to a 7 year penalty.

In terms of again the proportionality, it's the difficulty on the accused to establish the burden. So again we look at what does the reverse onus do for the Crown and how difficult does it make it for the accused to establish evidence to the necessary burden. And again here it's my submission that the burden is too great on an accused.

And why that is is it's essentially a situation where the sources or type of evidence that is available for an accused to call upon will often not be considered to be credible. It's a situation where you can't call an expert from the accused's side of the fence if you like to come and establish why this is an appropriate amount for personal use. Because that witness isn't going to have any credibility.

Elias CJ Well you might be able to extrapolate out from the advisory committee's assessment of how much a moderate user smokes.

Vidal Again that, assuming that there aren't artificial boundaries placed on it. Like we'll say one months' is a reasonable amount when you're dealing with someone who's a cultivator who that rule just doesn't work for. Because a cultivator who grows outdoor plants does them in the summer season. They're not going to be able to grow their outdoor plants again until the next summer season. They're going to have their cannabis for the year.

Elias CJ Well that's why I said you extrapolate out from the rate.

Vidal Yes, yes. And in terms of an argument from the other side that in terms of proportionality it's justified, because it's too hard for the Crown to prove, that in regard to Lambert was a basis that did not hold any weight for the Court in determining if it was an appropriate factor to weigh on the scales against the right.

In terms of saying that there's a voluntary assumption of risk, to say that what is being said is that the purpose of the Misuse of Drugs Act is

to allow someone to be found guilty of selling drugs when they had them for their own use. Because that is the effect of it. You're saying that it's a situation where it's considered reasonable and justified to have legislation that can find a person guilty of selling drugs when they had them for their own use.

McGrath J You say there's no difference between purpose, having them for the purpose of sale and having them for actual sale in the way the provision operates, is that what you're saying.

Vidal Yes but it's more in regard to sentence in terms of what you're doing is you're subjecting a person to a maximum sentence of 7 years with no greater evidence than you would have where you're going to sentence a person to a maximum of three months' imprisonment. And so that is the.

McGrath J I certainly understand that but you're taking it further really aren't you. You're saying they're being sentenced for sale, or that's what I understood you to say.

Vidal Well for possession for supply, for sale. For cannabis.

McGrath J But certainly for possession for sale but I thought you were trying to make a wider point than that.

Vidal Sorry.

McGrath J You're not.

Vidal In terms of, well, that is the risk that Parliament is said to be addressing, is that they don't want drugs to be sold.

McGrath J Yes.

Vidal And so it's a situation where they set it back at catching the person who's in possession for sale and in essence what it's saying is that we're justified in doing that even though it may just be a person who's possessing it for their own use because we think the risk of sale's too great.

Blanchard J What's the maximum sentence for cultivation. It's seven years is it.

Vidal It's 6. One year less.

Blanchard J 6.

Vidal Yes. But in terms of cultivation there is the decision of Turewe that then goes through the, if it's for your own use scenario. And if it's a small number of plants and it's not commercial. Which when you lay that over on the facts of this case, brings about a very interesting result.

And it's that whole problem of the same subject matter being included in two completely different offences and again it helps to highlight the risk and the problem with the presumption.

Another important factor in that proportionality test is what it is that's being presumed in terms of the primary element of the offence. And that's what helps to cause the greatest risk in my submission. It's that whole, we punish people because they have done something wrong. We punish them more severely because they've done something that we consider to be even worse. But we're not in a situation of having proven that factually. Because we're just relying in terms of the gravimen of the offence on a presumed fact. So we're saying something's true when it's not true. Therefore it's justified to give rise to extremely worse consequences than would ordinarily be the case and we're not too bothered if even at the end of the day it does turn out to be untrue. Because we're quite happy for the reverse onus to operate in that way. And we think society would be happy with that. Where in my submission plainly that can't be so.

In terms of the rationale for having the reverse onus, a question that should be asked or should be looked at from is can the offence be effectively prosecuted without the legal presumption. So in terms of why we have, and this goes into proportionality as well, why we have the provision, is it because the offence can't otherwise be effectively prosecuted without it. In my respectful submission that can't be the case with regard to what we're dealing with here in the Misuse of Drugs Act.

Because if it was the case it would be a situation where for instance with methamphetamine, an amount, a trigger amount has recently been set for possession for supply of methamphetamine. But that does not mean that in the past you couldn't secure convictions for that offence. Because quite clearly people were convicted and it was able to be prosecuted by the Crown.

And in terms of part of the analysis from the Crown's perspective, there is no indication as to why the evidential burden is not sufficient.

Your Honours this morning a supplementary casebook material list was provided for you and it should be on your desks. They are some journal articles that have actually been provided electronically and are available that look at these issues that we've been discussing in regard to section 5. In terms of the first article.

Tipping J Just pause would you. I haven't caught up with this. Not supplementary cases. Just this single sheet of paper is it. And they're, oh they're now up on the screen thank you.

Vidal I wonder if, I've just noticed the time Your Honours, if rather than delve into this now, if you wish to take the morning adjournment and we'll.

Elias CJ Yes, yes thank you. We will take the morning adjournment now. Thank you.

Court adjourns 11.27 am
Court resumes 11.49 am

Elias CJ Now Ms Vidal you've taken us to the supplementary casebook material. I should apologise for the fact that the message that I received, yesterday I think it was, was a little bit cryptic. It didn't indicate which party wanted to put material in front of us and it didn't indicate that it was authorities or text material. And if I'd known that I would have simply asked the clerks to reproduce it for us so I'm sorry I had thought it was more legislative fact material from the Crown. Thank you.

Vidal Yes Your Honour. The documentation has actually been reproduced so there is hard copy of it also.

Elias CJ Ah Thank you. That would be.

Blanchard J Because it's quite hard to read on these screens.

Vidal Now the reason for providing these to you at this time is because the Crown have referred to in their submissions what is the role of Parliament, what is the role of the Court. And in my submission the position taken by the Crown is not correct. And that is borne out by the documents in the articles that I have provided to the Court today. In particular the first document that I would like to refer the Court to is the report in the Criminal Law Reports, that's number 1 on the supplementary casebook list. Reverse onuses and the presumption of innocence in search of principle. The reason for referring you to this is it helps look at the issue of under section 5, the objective that is relevant for consideration by the Court.

In particular if I could take Your Honours to page 910. And this is at the first full paragraph. However the further question whether the imposition of a reverse onus is proportionate to the achievement of the policy goal of the offence is not a question of the substance of the policy but of the procedure to implement it.

And in regard to the Courts they have a valid claim to be the guardians of the principles of procedural justice. A claim founded partly on their expertise in procedural justice and partly on their constitutional role in upholding the rule of law which includes key constitutional principles of due process such as the presumption of innocence.

And then further down in that paragraph, a strong principle of deference would seem to be inappropriate in resolving these claims. Certainly if there is no evidence that Parliament gave thought to the presumption of innocence when it enacted the reverse onuses. If the argument about proportionality appear to be balanced, then it's suggested that the issue should not be resolved according to principle of deference but the importance of the right, and that's article 6-2, should prevail. It is for the state to justify a derogation from the presumption of innocence and justifying arguments should be compelling if they are to succeed.

Blanchard J I notice footnote 52 suggesting that Courts should look at Parliamentary debates in a case of doubt about whether Parliament had given thought to the presumption of innocence. I don't think in the materials we've got anything from the Parliamentary debates.

Vidal No Your Honour you haven't.

Blanchard J Do you know whether there's anything in them that assists one way or the other.

Vidal I know Your Honour that there has been reference by the Crown to the section 7 opinion that was presented to Parliament. I note that it wasn't concluded.

Elias CJ Is that in respect of the 2005 Act.

Vidal Yes the recent amendment.

Elias CJ Yes.

Vidal And that that isn't included.

Elias CJ It's not in front of us that, no.

Vidal No but I have a copy available Your Honour if that would assist.

Elias CJ Yes Thank you. (Handed up) I can't remember, the Misuse of Drugs Act, what date was it. '85?

Vidal '75 Your Honour.

Elias CJ '75, yes thank you.

Vidal In terms of when that opinion is reviewed and if you look in particular at paragraphs 18 and paragraphs 25. Without a full analysis, what it is saying is that there's the strength of connection between the proven fact of possession and the presumed of fact purpose to supply.

Tipping J This discussion was particularly directed to methamphetamine wasn't it. But of course there would be some difficulties in saying that the presumption was valid in relation to some drugs and not others wouldn't it. I mean it's almost an all or nothing situation isn't it.

Vidal Mm, mm. Because the same right is at risk. And if it's determined to be sufficiently at risk for cannabis it must be the same for the other drugs.

Tipping J Yes well the strength of the connection between the proven fact and the presumed fact might differ as between different drugs. And the level that are thought, the trigger levels.

Vidal Mm. And to develop that further, if you look at the cultivator that we've been looking at, the weight of what they've got includes the stalk, the branches, the leaves, the whole lot of the plant. And in terms of the safety of or the connection between the possession and the purpose for supply, when you're saying that weight helps to establish it, that's clearly unfair when you're looking at that situation of a cultivator.

Tipping J You see they say in 24 apropos of methamphetamine, that the triggering amount is set high enough that the possibility of an improper conviction, that presumably means a conviction that wasn't, wouldn't have occurred if the onus had been on the Crown beyond reasonable doubt, is negligible.

Vidal In regard to that aspect it takes me back to a matter that I wish to go through with you in regard to those trigger amounts. In terms of the point of the trigger, is that it says that you're allowed to leap to a conclusion if you like at this trigger point. So at the trigger point you can leap to the conclusion that it's for supply. The point of an accused then having an evidential burden is to be able to come back and say, well actually in these circumstances you shouldn't leap to that conclusion and that what is really needed to establish it is for the Crown to prove it beyond reasonable doubt. So what the evidential onus does in that situation is, has an accused proved that the presumption isn't safe. That it's not a situation where the conclusion can be jumped to but rather a situation where the Crown needs to prove beyond reasonable doubt that supply was going to occur.

And in terms of the discussion that was had earlier about, well say the accused does raise that reasonable doubt, it doesn't necessarily mean that the case is lost at that stage. Because what is to occur is that the Crown at that stage has only looked at the presumption. And now the Crown is able to draw upon the other evidence and indicia that support possession for supply.

So it's not a situation where by changing it to an evidential burden that it could be said the Crown aren't ever going to be prove the offence.

Of course they're going to be able to prove it. And there are other matters that they can rely upon to assist them in proving it.

And in terms of that aspect, in the Crown's submissions there's some suggestion that the Glanville Williams article agrees that an evidential burden is proof of nothing. And with respect that is not what is said in the article. The article is contained in the respondent's authorities under Tab 3. And in terms of referencing it against the Crown's submissions, that's at paragraph 38 of their submissions.

The footnote that's relied upon at the Crown can be located at page 265 of the article.

Elias CJ What page?

Vidal At page 265 of the article.

Elias CJ Right.

Tipping J The reference to Hunt's case.

Vidal Yes, in footnote 10. This is the, in the Crown's submissions where they've referred to the fact that Glanville Williams accepts that an evidential burden proves nothing.

Elias CJ But that is the usual use of these concepts. I can't remember, I think it was the, it was Morgan I think who followed Thayer who wrote that people come to presumptions with dismay and leave it in tears or something to that effect. But one of the real problems is that the concepts aren't sufficiently defined. And Glanville Williams quite rightly is pointing to how the evidential burden is customarily understood. And I don't really understand Glanville Williams to be dealing with an evidentiary burden so much as simply the standard of proof which may be the same thing as the onus of proof beyond reasonable doubt but it may not. I mean it may be the same as the presumption of innocence but it may not. When I mentioned to you before that Wigmore said the evidential burden is the burden of getting past the Judge, here you're talking about a persuasive burden. That's a legal burden. All the analysis, all of the submission you have been directing to us is on that basis, that this does impose a persuasive burden. The critical thing is what is that burden. And most of the discussion is really in terms of how do you factor in proof beyond reasonable doubt. But on conventional analysis, it can't be factored in. As soon as you describe an onus of persuasion, you have to at least go to the balance of probabilities or you may go to proof beyond reasonable doubt. But you have to persuade, you have to get over the balance. That is what an onus is. I don't understand your use of the term evidential onus. Because it doesn't seem to me that that is what we are talking here.

Vidal In terms of the use of the term, it's a situation where the onus on the accused is being said to be one of balance of probabilities. So in terms of a reverse onus, what occurs is ordinarily it's said to be a legal standard that's imposed. In terms of section 6(6) and what it is doing, it is my submission that it is a situation where it's trying to achieve a pointer towards a level of evidence from which a conclusion can be drawn. It's a situation where.

Elias CJ What's that level?

Vidal Well in terms of the, in the door at the first stage what you're being told is that it's presumed at 28 grams that it's being possessed for sale. What is that level that it's proved to, well we don't know because it's a presumption. And so that's part of the difficulty is that when we get in the door at the first stage, we're not able to say what the standard against which, what is the standard we're challenging against. Because we're dealing with a fiction rather than an actual fact. So it's a situation where you have got.

Elias CJ But it's a presumption of fact. I did not understand I must say your distinction between attacking a presumption and attacking a fact. If the presumption is as to a fact, how can you question it except by attacking the fact.

Vidal In terms of that, the presumption is there to help a conclusion be drawn. You must be able to attack it by proving or providing actual evidence that is inconsistent with the presumed fact. The fact of whether you establish actual evidence that is up to the level of the balance of probabilities or short of that to being evidence that raises a reasonable doubt, nonetheless in my submission challenges the presumed fact. So the fact that there is reasonable doubt about what can be presumed must test that presumption.

Elias CJ There's not reasonable doubt about what can be presumed because that's enacted. And if there is a requirement of proof I find it very difficult to understand how that can be discharged by raising a doubt. That seems, as Glanville Williams says, to be not proof at all.

Vidal In terms of that aspect, it's a situation where a presumption is not said to be something without reasonable doubt. Because it's a situation where it is merely being presumed. It is not something where there is evidence to establish it but it's simply a factor that's being presumed. In terms of proving something in contradiction to that, or testing it, it's enough in my submission that there be evidence, actual evidence of a fact contrary to the presumption that then proves, challenges it, tests it.

Elias CJ Some contrary indication is sufficient.

Vidal Yes.

Elias CJ I see. Alright I think I understand.

Tipping J I think I must draw attention to the fact that in the **Siloata** case where the reverse onus point expressly was not taken there are some observations by members of the Court which I think don't fit very conveniently with what you're now advancing. I draw attention in particular to paragraph 36 of the judgment in Siloata. That's a decision of this Court, and I don't know whether you're familiar with it, where the Judges that were party to that particular set of reasons said if the Crown proves fact A, the context being possession of more than the presumptive amount, the jury must regard fact B, that's that the purpose was for supply as established until the accused has proved in inverted commas the point being what the word proved meant in that context visa vis unanimity, until the accused has proved the contrary. Now I find it very difficult to understand the concept of proof as meaning anything other than establishing in a sense to some level of satisfaction, not just pointing to something that might raise a reasonable doubt if the onus was the other way. I just don't think what you're arguing is really consistent with the way the Court looked at that aspect in Siloata.

Vidal In terms of that aspect of it, what is being said by an accused is that the accused will lead evidence or point to evidence that.

Tipping J I know what your argument is.

Vidal Yes but I'm trying to, yes.

Tipping J I just need you to just tell me how it can be reconciled with what was said in Siloata or are you really saying that those of us who were party to the statement I just read didn't quite get it right in Siloata.

Elias CJ Well we didn't have this sophisticated argument.

Tipping J We didn't have this point before us.

Elias CJ Which to be fair to you I think is derived substantially from the reasoning of the House of Lords in Lambert and in Kebeline. But I'm indicating, and I suppose it's indicated in that passage from Siloata that

there are some conceptual difficulties it seems to me with that approach.

Vidal In terms of that issue it's all about, as I opened at the beginning, the context within which you consider prove in section 6(6). And so in terms of context, what we're doing is we're looking at a direction that has been given to a jury about when they can jump to a conclusion.

And in terms of, in response to that, the accused has to be given a chance to say well, no hang on, whilst you might ordinarily be able to jump to a conclusion, in the facts of this case, it's not right to jump to

that conclusion. What you need to do is go through and determine the matter beyond reasonable doubt. And in that regard, the requirement to have to do that on the balance of probabilities it's submitted is not something that necessarily has to be read into that section. In terms of what the section is saying is it's saying that that's when you can normally jump to this conclusion but there has to be an opportunity for an accused to say well no, the conclusion is not correct. And how the accused does that is to adduce evidence that raises the reasonable doubt.

And in terms of a measure or a standard, if we're worried about certainty for the Courts, it's a situation where by raising that reasonable doubt, the case is not lost for the Crown. Because it's only the doubt in regard to the presumed fact. It has to be remembered that the Crown is still able to point to the other evidence that is generally available to help prove the supply or the sale.

And so in terms of the overall context, you're not saying that the case is won or lost on the challenge to that presumption. It's a situation where the Crown is then in the ordinary sense needing to produce or point to the other evidence that establishes the actual sale or supply.

Elias CJ Well that really sort of goes back doesn't it to the beginning about what the meaning of section 6(6) is. Your further argument, your fallback argument is that if it is a legal onus, if it can't be read to permit the threshold to be passed, the rebuttal to be passed, if you raise a reasonable doubt, then it's inconsistent and it's not saved by section 5. Is that right, that's the direction, yes.

Vidal Yes, that is, yes.

Elias CJ Yes.

Vidal And so that's, yes, when you then look for the alternative meaning and in terms of as it's been expressed a reading down in regard to that. But in my submission even in terms of the other meanings that are available for proof, it doesn't necessarily mean a reading down. Because it's quite apparent from the plain usage of the word. And here I have copies of the Concise Oxford and the most recent Shorter Oxford version and they both first of all refer to proved meaning to test. That is the first definition if you like or meaning that's given to that word.

Elias CJ Given the ink that's been spilt over questions of proof in law, are we really going to be assisted by dictionary definitions.

Vidal In regard to that, I think that it's a situation where because Parliament didn't specifically refer to a standard or the actual requirement of how prove is to be met, that it is open for the Court to look wider in terms of what other meanings can be given to the word. Because if it was a situation where the Parliament wished to ensure that what was to be done was to prove on the balance of probabilities then it was open and

available to Parliament to actually state that specifically in the legislation. And again, in terms of issues of judicial deference or the constitutional role of the Court, if the Court does find that prove means to adduce evidence or point to evidence then it's a situation where Parliament is free to look at the provision again and if it wishes to, to clarify what was meant.

In terms of that aspect of it, the submission from the Crown appears to rely on the basis that the explicit meaning of the word prove is on the balance of probabilities. But with respect, that is not so when you look in the wider context of that provision.

Elias CJ That's fair enough, the Crown does say proof means proof. And if you've got another meaning, perhaps we'll take in those dictionary definitions.

Vidal Thank you Your Honour.

Tipping J Don't we have to remember before we do take in the bare dictionary definition, the fact that the whole phrase is prove the contrary.

Vidal But what is it contrary of? It's contrary of a presumption.

Tipping J Well it's the contrary of the fact which is the result of the presumption.

Vidal In terms of that aspect, if the Court is saying well therefore the only onus that can be in place is a legal onus, then it is a situation where that is clearly in my submission both unreasonable and unjustified.

Tipping J Oh yeah, well that's your other.

Vidal Yeah, I know that's my fall ball. Back into the Bill of Rights. .

Tipping J That's your fall back. And I fully understand there's force in your fall back. But I would take an awful lot of persuasion that prove the contrary doesn't mean establish the contrary to at least some standard of proof.

Blanchard J Well that of course is what Parliament was being told in the section 7 report. They were in fact engaged in an exercise which did involve re-enactment of section 6(6).

Tipping J Paragraph 7.

Blanchard J And a couple of times in the section 7 report Parliament are being told that it's a reverse onus on balance of probabilities.

Vidal With regard to the opinion, if I can refer you to paragraph 42. I would submit that there hasn't been a full analysis before Parliament because what is said in paragraph 42 is that the rights are not inconsistent, sorry it's not inconsistent with the fundamental rights and freedoms. When clearly it is inconsistent.

Tipping J Well I think they mean are a justified limit on them. I think that's just a linguistic slip if you like.

Vidal In terms of the justified limit, there is no actual setting out of how that is achieved through section 5.

Tipping J But that's what they've been talking about for the last five pages.

Vidal In terms of the actual analysis of it, it doesn't in my respectful submission go through a full analysis of that aspect.

Elias CJ I hadn't understood that the Misuse of Drugs Amendment Bill 2004 was concerned with re-enactment of section 6(6). Is it simply the mechanism for keeping under review the limits.

Blanchard J There was a substitution subsection 6.

Elias CJ Was there?

Blanchard J Yeah.

Elias CJ Oh thank you.

Blanchard J ...and slightly amended.

Elias CJ I see.

Blanchard J They were technically re-enacting it so this report was dealing with.

Elias CJ I see, yes. Well not explicitly. Yes thank you.

Vidal And in terms of that aspect, there is reference in the opinion that the meaning given to the words is one that is consistent in Phillips. And so it's been a situation where Parliament in my submission has been aware that it's a Court derived definition applied or supported in the legislation and it does therefore continue to make the section vulnerable to consideration by the Court. And it doesn't put it beyond the reach of the Court to consider what the meaning and effect of 6(6) is.

Tipping J But we're talking about meaning, not its validity at this stage. How can you really argue that against all this background that it didn't mean a reverse onus on the balance of probabilities. What may be the consequence of that is quite a different matter. But I mean that was the legal interpretation of it, that was what the advice was. How can we possibly hold that this is not what Parliament's purpose was in reaffirming if you like section 6. I don't want to sound unhelpful. It just really is, it's not pushing it. It may be that we'll have to read it down to accommodate your concerns. It's the starting point I have difficulty with.

Vidal Mm, mm.

Tipping J It just seems to me you're going to the ground that's higher than you.

Vidal Than I need to.

Tipping J It would be nice for you but it's just unrealistically high.

Vidal In that regard I think it is a matter that perhaps arises from Lambert where there is consideration that there isn't a need to necessarily read down legislation but the meaning's available within it.

Tipping J Well section 6 is premised, that's of the Bill of Rights, is premised on the basis that there may be more than one possible meaning.

Vidal Mm.

Tipping J That doesn't mean to say that you're not looking to see which is the prima facie meaning.

Vidal Yes.

Tipping J But you may then have to say well no, we can't go with that meaning because section 6 requires us not to.

Vidal Mm, mm.

Tipping J But it doesn't alter the fact that that is the, if you like, the prima facie meaning. I just think we're getting ourselves into a tangle if we start sort of trying to pretend that the meaning, the meaning, because s.6 implies that there is more than one possible meaning.

Vidal Yes.

Tipping J All I'm saying to you is that the more likely meaning is such and such.

Vidal Yes.

Tipping J But you're asking me to read it down.

Vidal Yes.

Tipping J To accommodate your client's other concerns. That I can fully understand. But to suggest that there's only one meaning, it doesn't fit with section 6.

Vidal Yes, yes.

Tipping J Which conceptually implies there's at least two meanings.

Vidal Yes. In terms of where my argument's addressed in that regard, it is

the whole point that you can find two meanings to it and that whilst there may have been one preferred meaning, that another meaning is possible.

Tipping J Look I fully understand that. It's this hammering of the fact that this has to be the meaning.

Vidal Yes.

Tipping J That I find difficult.

Vidal Yes and that's.

Elias CJ Did you want to pass in the dictionary definition.

Tipping J Well that's not a very helpful prelude. But just so you could at least see where I'm coming from Ms Vidal.

Elias CJ It's inescapable.

Tipping J Inescapable as the Chief Justice says. And maybe wholly wrong. But.

Vidal In terms of that aspect, it's a situation where my submission is that the Court isn't fettered because Parliament took the ordinary meaning in terms of when it was using it. And that doesn't fetter the Court. The Court's still able to look under section 6(6) for other meanings.

Tipping J Look, I agree with that.

Vidal Yeah.

Tipping J We're not bound by what you might call the more likely meaning.

Vidal Mm. I have, I'm sorry Your Honours, I don't have full copies, I only have one copy of the dictionary reference.

Elias CJ Which dictionary are you referring to.

Vidal It's the beautiful Volume 2 dictionary that the library here has.

Tipping J I shall not feel offended if you don't hand me one Ms Vidal.

Elias CJ It's the Concise Oxford is it.

Vidal It is.

Elias CJ That's fine, we can obtain that.

Vidal It's in Volume 2 of the Concise Oxford. We don't have such resources in Queenstown.

Tipping J You have other resources.

Vidal Now I was referring to the journal articles. So I think I might go back to those if I may and just take you through the other points that I wish to make from those.

Again with the article that we are already looking at, the reverse onus is in the presumption of innocence. If I may refer you to p.918. And under the heading, in search of principles about proportionality. And the third sentence, the aim of a statutory provision which reverses the onus will generally be one of evidential efficiency in furthering the statutory purpose. The statutory purpose will be the achievement of a particular social or economic goal, say the prevention of a certain kind of harm risk such as terrorist outrages or death and injury resulting from drunken driving. It will generally be constitutionally appropriate for the Courts to defer to the decisions of democratic legislature as to the proper goals to be achieved by criminalisation. These aims are legitimate because the legislature's authority to decide them derives from democratic process. From a law enforcement stand point it seems self evident that the chances of achieving these goals are increased if the task of the prosecution is eased by transferring some of their normal burden. In a sense implementation of the statutory policy through reverse onuses is the ancillary part of the legitimate aim. This will be particularly apparent in cases where proof of the relevant matter would cause difficulties for the prosecution. Lord Steyn acknowledged this point in Lambert when he said that the sophisticated techniques of smuggling drugs in containers raised real difficulties for proof by the prosecution that the person in possession of the container was aware of its contents. In his view this proves some objective justification for the interference with the burden of proof in such cases. Accordingly we can then say that the debate is about the degree of justifiable interference. Specifically whether a legal burden goes beyond what is necessary in the circumstances. And that's the part about who does the presumption capture.

Tipping J Is there any importance in the fact that the reverse onus in this situation involves a fact peculiarly within the knowledge of the accused.

Vidal That, yes.

Tipping J You haven't really touched on that yet.

Vidal Yes and that.

Tipping J And that is a significant point in my view against you.

Vidal Well I will deal with that now. In terms of a matter that is peculiarly within the knowledge of the accused, it means that to establish it relies on an acceptance of the credibility of the accused. Because it's only

that person who knows it. In regard to a matter of a drug case, your accused is already on the back foot. Because what they've done's illegal to start with. They're in possession of drugs. And so it's a situation where you're saying that because they are in possession of the drugs they therefore have to prove because they knew what they were going to do with it, that they weren't going to sell it. And in terms of fairness to the accused, it's submitted in those circumstances that the accused is on the back foot in terms of the ability to try and prove what their intention was. It's different if you're within a situation where the activity is ordinarily lawful but you suspect on this occasion that the person has stepped outside the lawful bounds and done something that was unlawful.

The matter is ordinarily lawful then your ability to prove your belief is more readily available. And this is in the copyright, the Johnstone type scenario. In that type of scenario there is a way of proving by extrinsic evidence that what you were doing was okay. You were buying goods from a legitimate source, you can prove by producing invoices and so on, of the fact you believed it was from a legitimate source and here is the documentation and this is how it's ordinarily regulated and controlled. From the point of view of a person who's in possession of drugs, they're not in the same luxurious position where there's some credible extrinsic evidence that helps to assist them with their peculiar knowledge.

It's been likened to the situation of fraud matters. Or showing that a person obtained a pecuniary advantage dishonestly and without colour of right or without belief that they were entitled to it is always a matter for the Crown to establish even although it may be within the peculiar knowledge of the person. And the reason for that is because it is too difficult for the accused to be able to establish that peculiar knowledge.

Because it rests quite fairly and squarely on issues of credibility. And I would submit that in terms of looking at the peculiar knowledge justification is quite different.

Tipping J Translating that into a sort of more practical approach, is your submission, the effect of it, that the jury are already going to have a bit of a downer on the accused so you can't, it's not really fair to expect him to go into the witness box and say what was going on. Is that it fairly bluntly?

Vidal In one sense yes, it can be put that jury trials shouldn't be about beauty contests. It's not a matter of the jury thinking your persons', they accept, I'll rephrase that. It's a situation where all the juror does, all the individual does have is saying please believe me, this is what I intended to do. Whereas in terms of the Crown, what they can do is they can say, well look, there are all these other extringent pointers as to what the person was going to do. Whereas on the please believe me basis, there is going to be nothing else to point to to assist with that.

Blanchard J Balanced against the scourge of drugs and bearing in mind that although this case is about cannabis, the principle applies to much more dangerous drugs than that. I must say I don't really find that argument of great weight.

Vidal That it's too difficult for the accused to establish what their intention was?

Blanchard J Yeah. I mean the accused's already behaving illegally. Why should the accused get sympathy because of that fact.

Vidal Because of the consequences to the accused. If the accused is merely possessing the drug for their own use, the consequence and the risk that the accused is taking on board is a possibility of a maximum of three months' imprisonment but more likely the imposition of a fine. What by means of the reverse onus, you're saying it's okay then for the accused to be deemed to also be taking on the risk that they're then subject to a 7 year maximum imprisonment sentence and a real likelihood of jail. And that's where the maximum penalty in regard to the offence is relevant in terms of considering the justification for your onus.

Because the ordinary member of the public I would submit would find that quite troubling that yes you knew that you shouldn't have drugs for your own use, but to say in those circumstances that you also accepted you might go to jail for a long time because people might think you were going to sell them is not acceptable, is not reasonable, is not justified in a fair and democratic society.

McGrath J Would it be reasonable to expect a person who has been found in possession of cannabis higher than the stipulated amount to be frank as to the source of supply to the extent that if the person claimed he'd grown it himself, he was quite open as to where it had been grown and for fresh leaf cut cannabis taking the police to where that was. Rather than simply saying it was in the South Island.

Vidal Okay, the issue with that is a person may be concerned with the implications for the land owner on which the cannabis was grown. What it may do is open the net or widen the vulnerability of the land owner to some claim that they've permitted their land to be used for the illegal activity. And in those circumstances a person may have had no knowledge whatsoever that this was happening on their land but it could give rise to a risk to them. And so in terms of that aspect, explaining why that might occur, I would submit that that's a real consideration for a person.

McGrath J So even though there might be a situation in which there was credible extrinsic evidence that an accused might be able to call and be put in the position of having to call, we should take into account that it would be dishonourable if you like for, dishonourable to be that open.

Vidal In terms of that, I think it needs to be taken into account 1.) that it's encroaching on that right to remain silent so there's that aspect of it.

And 2.) the fact that it can be understood why a person may not necessarily want to have to lead that evidence in terms of the wider risk for someone else or the risk to someone else involved in the matter. It all goes to that whole issue of it being.

McGrath J Or the risk to himself.

Vidal Well a risk, potentially a risk to himself.

McGrath J If in fact there was, the plantation wasn't just four plants or eight plants or whatever it was.

Vidal In terms of that aspect, then it's too much guesswork and it's unsafe to then have assumptions flowing from that that well perhaps there are more out there but a conviction should never be secured on a perhaps or on a maybe. It's a situation where there really should be evidence there of the purpose rather than evidence of a lack of purpose.

In terms of the next article that's contained in the Public Law Journal of Judicial Deference and Democratic Dialogue, the legitimacy of judicial intervention under the Human Rights Act 1998. The relevant part of that document is contained on page 1 in the right hand column.

Elias CJ Have we got this one.

Vidal It's an odd heading Your Honours. It's got at the top West Law. And then it.

Elias CJ No I don't think that we've been given it.

Blanchard J We've only been given the first article.

Vidal Oh, you only have the first article.

Elias CJ We're being drip fed. Madam Registrar, do you have any more hard copy of articles for us? Are you going to be referring Ms Vidal to all of them because we might as well get everything at once.

Vidal The whole lot at once.

(Documents handed up)

Vidal In terms of the first page, the relevant reference is to the second column, third paragraph, refers to the fact that.

Blanchard J Sorry, where are we?

Vidal We're on the document headed West Law Judicial Deference and Democratic Diaglogue, the Legitimacy of Judicial Intervention under the Human Rights Act.

Blanchard J Which page?

Vidal The first page, the second column where it refers to rights may be trumped by proportionality principle and the fact that Parliament can legislate to derogate from charter rights. It goes back to the whole idea of proportionality. And that being the area where the Court is entitled to examine whether it's appropriate for a right to be derogated from by the provision.

And then at page 4 in the second column it refers to four points that are relevant to consider when looking at proportionality and the consideration that needs to be given to the interface between Parliament and the Court.

In terms of the Rishworth article that is noted there at number 4 Interpreting and Invalidating Enactments under a Bill of Rights, that article is provided generally for its discussion of section 6 and also the fact that it contains a discussion about section 3 in the Human Rights Act and compared with section 6 in the New Zealand Bill of Rights.

And in particular at page 252 of the article the second last paragraph. Because he was looking at Kebeline and why it is that Lord Cooke said I can decide this differently now because section 3's different to section 6. And it says one says possible, the other one says can. Jeffrey Marshall well makes the point for their identity quite incidentally because he was speaking only of section 3 and it was not his intention to demonstrate its congruence with our section 6 where he says, if it is possible, it can be done.

If it is impossible, it cannot. What cannot be done is impossible to do. No more need be said about the essential similarities between section 3 and section 6.

The fifth one on that list is the Marshall paper that is referred to in Professor Rishworth's paper.

Elias CJ Is this Jeffrey Marshall is it.

Vidal Yes it is. Whilst it doesn't look like the start of a journal article, it is. It's got the heading Public Law, and then the title, The Lynchpin of Parliamentary Intention. That is actually where the article starts, it's just the way it's been set out in that journal.

In regard to that article I would like to refer the Court if I can to page 239. And at the bottom under the heading ambivalence continued. And it's the judicial application of section3, and that's the Human Rights Act in the UK, since 1998 has displayed a general concurrence in the proposition that the new interpretative obligation enables statutory provisions to be broadly and sympathetically and generously interpreted or reshaped so as to secure convention compatibility except when they cannot be. This indeed may be inferred from section 3 itself.

And then it's, if it's possible, it can be done. If it's impossible it cannot. What cannot be done is impossible to do.

And that author goes on to analyse Lambert.

Tipping J Wasn't there some significance in the cases of the fact that the English Parliamentary process saw them expressly disavow the concept of reasonableness. Wasn't it in an earlier draft it was if it could reasonably, possibly be done or some word involving the concept of reasonableness and there's a brief reference to that on page 240 in this Marshall article. Parliament had rejected the legislative model of requiring the interpretation to be a reasonable one. So I'm not sure we have quite the same provenance in New Zealand.

Elias CJ Well it's only judicial determination that inserts reasonable I think into ours.

Vidal The final additional document that is there is the case in comment on Sheldrake. In terms of.

Elias CJ Sorry, are you taking us to something else.

Vidal Sorry Your Honour yes. The 6th item on that list which is case in comment, attorney-general' s reference number 4 of 2002 which is Sheldrake.

Blanchard J We don't seem to have that.

Vidal Perhaps if I can just read to you from it and then a copy will be made available.

Elias CJ Just give us the reference. Oh you've given us the reference. Yes carry on.

McGrath J Yes, 215 to 220.

Vidal And it's available electronically also in amongst the documents you have there. Lord Bingham expressly rejected one of the less satisfactory principles and this is in terms of proportionality. The presumption that Parliament would not have made an exception to the presumption of innocent without good reason. This was criticised as it gives too little weight to the presumption of innocence and the Court's obligation under section 3 of the Human Rights Act to interpret statutes so far as possible in conformity with the convention.

So it's not a situation where you can immediately defer to Parliament by saying whoops, they must have known what they were doing when they were stepping on the right. It's a situation where the Court's got to go in and examine it because the right deserves some protection. And that's the role of the Court. And it's appropriate for the Court to do that.

I note that it's.

Elias CJ Well where are you heading now Ms Vidal. I'm just conscious of the fact that the respondent needs an opportunity to be heard too. What did you wish to cover in addition.

Vidal I think that the matters that I would want to cover in addition are fairly matters that are responding to the Crown case. And that I may be able to deal with in my response. But I would.

Elias CJ It would be better if you dealt with them before the Solicitor General, yes.

Vidal In terms of.

Elias CJ So there are some points you want to make in response to the respondent.

Vidal Yes Your Honour.

Elias CJ Are there any other matters you want to enlarge upon.

Vidal There is a matter that I thought the Court may wish to have some information on and that's in regard to what is the implication if the Court does find that there is this reading down of the provision, how does it affect matters that have gone before. And I have a Privy Council decision that addresses that issue of if there is a change essentially in the direction to a jury and therefore a change to the basis upon which a case would proceed under section 6(6), what is the wider implication of that. And I have an authority to refer to the Court in that regard. And it's the decision of the Privy Council from 6 February this year that looks at the issue of does it open the door for everyone else who's gone before the Courts before.

Elias CJ What's the name of the case. We may be familiar with it.

Vidal The name of the case is Rudy v The Procurator Fiscal and its citation is [2006] UKPC D2, 6.2.06. And essentially that decision deals with the fact that a person who has been tried earlier has acquiesced in the position as the law was and if they haven't raised the issue then it's not open to them to relitigate it. And it deals squarely with that aspect.

Elias CJ Thank you well that strikes me as very much a reply point.

Vidal Yes.

Elias CJ If any issue is taken as to that. So perhaps we wont need to hear you enlarge upon that at this stage.

Vidal Yes.

Elias CJ But after the lunch adjournment we'll hear you in terms of the points you want to make in response to the respondent's submissions.

Vidal Thank you.

Court adjourns 12.59 pm
Court resumes 2.16 pm

Elias CJ Yes Ms Vidal.

Vidal Thank you. I just have some very brief points to make finally in regard to the matter. The Crown have referred to a quote in their submissions at paragraph 12 from Lord Hoffman. And it would seem that some reliance has been placed on it to say that under the law of law there's really no call for the type of section 5 analysis that I've submitted should be gone through here today. Because in terms of the last sentence of that quote it says, in those cases which the answer does appear clear and certain and which there have been gross violations of what everyone would recognise to human rights, Courts, lawyers and professors seldom have an effective role to play. In my submission that hasn't borne to be true. Especially in the last few years when it's been a situation where the Courts have had to enter the fray, where there has been the involvement of fundamental rights and legislation, and the type of legislation that we're talking about is like the Sheldrake terrorism legislation and also in terms of the New Zealand context, the Zaoui case.

It's respectfully submitted that the Courts, lawyers and professors have a definite role to play in regard to these types of issues.

Elias CJ Well indeed the fit includes in the case of New Zealand, the New Zealand Bill of Rights Act so I'm not quite sure really what that submission is directed at.

Vidal In terms of the situation with the current legislation it's been considered that one of the evils of drugs is the current one that everyone's concerned about at the moment which is methamphetamine or P. In a situation when you look at how widely the net's cast with the inference in terms of that type of offending it's a situation on simple possession of a consequence of a penalty of six months' jail as opposed to possession for supply where the penalty is life. And without any additional evidence, it's said to be acceptable to society that a person can be subject to a consequence of being found guilty of that more serious offence where there's a definite outcome of imprisonment once found guilty. As opposed to a situation where it's recognised in the legislation that simple possession is something that's ordinarily not imprisoned for. And that can't be just.

Finally if a meaning can be given to the provision that is consistent, then it's not a situation of rewriting the legislation and it's not a matter of engaging or effecting section 4.

Thank you Your Honours.

Elias CJ Yes thank you Ms Vidal. Yes Mr Solicitor.

Arnold Thank you Your Honour. What I was proposing to do Your Honours is

to spend what will be a relatively brief period at the outset talking about the Act, Misuse of Drugs Act and then the submissions that I have are really directed at the principles underlying the relationship between sections 4 and 6 in particular but 5 to some extent of the Bill of Rights Act.

The question of justification under section 5 in the particular context of this legislation my learned friend Mr Pike will deal with. And that's the matter to which the additional affidavit evidence was directed.

Your Honours, I should start with the Misuse of Drugs Act. Your Honours have not been taken to it in any methodical way at this point. And there are several points about it which should be made. Some of which have emerged in the interchange between my learned friend and the Bench.

First we're dealing with section 6 and in particular section 6(6). As Your Honour the Chief Justice noted, that provision was, or the original section 6 and section 7 were repealed and replaced by section 6(6) in the 2005 amendment. Now section 6.

Elias CJ What's the change Mr Solicitor. Is it, I'm sorry I should have looked at this. But is it simply the reference to section 2(1)(a).

Arnold Yes, what the effect of it is that if you go back to 2(1)(a), 2(1)(a) set up a mechanism whereby amounts or levels of quantities that were the subject of presumptions were to be set in schedule 5.

Elias CJ Yes.

Arnold And of course it's the special, the expert committee that does the setting of that as we've seen. So that's what this was, one of the purposes of the amendment.

Elias CJ So the amendment, but the actual amendment to section 6(6), am I right in thinking it's simply the reference to section 2(1)(a).

Arnold Yes, but also subsection (7) was also there.

Elias CJ Yes, yes.

Arnold Yes.

Elias CJ Thank you.

Arnold Now in the written submission reference is made to section 6(1) which of course provides the basic prohibition. And then the presumptions which are set out in section 6 subsection (5) and section 6 subsection (6). So in subsection (5) of subsection 6 it's provided that the purposes of paragraph (e) of subsection (1) paragraph (e) of subsection (1)

makes it an offence to sell or offer to sell any class C controlled drug to a person of or over 18 years. For the purposes of paragraph (e) of subsection (1) if it is proved that a person is supplied a controlled drug to another person he shall until the contrary is proved be deemed to have sold that controlled drug to that other person. And then subsection (6) the provision we are discussing in this proceeding.

I've made the point in the written outline that there are further provisions which look like traditional reverse onus provisions, that is provisions which transfer the legal onus in section 9. And in the 2005 amendment there were several others. Section 37 which sets out a defence to a charge of selling a restricted substance to a person under the age of 18. And it says it is a defence to a charge in respect of a contravention of section 36(1) if the person charged proves, and then it sets out what has to be proved. And section 40 to similar effect.

Elias CJ A reference to the person charged proving which is absent from section 6(6).

Arnold Yes, it doesn't contain that language but has precisely the same effect because the Court in Phillips long ago pronounced on the effect of that and all Parliament has done is re-enact that provision with that language in the light of that interpretation. But by contrast to that.

Elias CJ You have another argument as well?

Arnold I do.

Elias CJ On that point. I mean you're not simply saying that are you. You would also contend that read fairly, section 6(6) means that the onus is on the accused person.

Arnold Oh absolutely.

Elias CJ Yes, yeah.

Arnold I mean I think with respect, if the debate this morning has revealed anything, it has revealed first that Parliament knew precisely what it was doing when it enacted these amendments and there was a clear intention to transfer the legal onus. That with respect is beyond dispute. The issue really is where to next.

Tipping J I thought it was beyond dispute until I heard Ms Vidal. But apparently it's not beyond dispute any more Mr Solicitor. In that, I know what you're saying, but it is now a matter we have to wrestle with isn't it. Because the argument against you is that that's not the clear and natural meaning.

Arnold Yes I'm attempting briefly to address that.

Tipping J Mm.

Arnold But I really don't want to spend too much time on it.

Tipping J No.

Arnold Because of the other matters that have to be covered. When one looks at the 2005 amendment one must look also at section12AC. And I've referred to that in the written outline. But that is interesting because it provides or creates an offence of without reasonable excuse importing into or exporting from New Zealand any precursor substance. And then in subsection (3) says the requirements of section 67(8) of the Summary Proceedings Act relating to proof of any exception, excuse or qualification do not apply to an offence under subsection (1). And then subsection (4) is the explanation. By way of explanation, the effect of subsection (3) is that in order for a prosecution to be successful, the prosecution must negate beyond a reasonable doubt any reasonable excuse in dispute being any matter raised as a reasonable excuse by the defendant.

Now that seems to be directed precisely at the sort of approach that my learned friend argues should be taken in relation to the words, unless the contrary is proved. That seems quite clearly to be saying that the accused has got to raise a reasonable excuse, obviously by reference to some evidence or other. But that having occurred, the obligation on the prosecution is to negate it beyond a reasonable doubt.

EliasCJ Like self defence.

Arnold Yes.

Elias CJ Using that sort of approach.

Arnold Yes, just. But the point for referring to it of course is here in the same amendment are these two different formulations which quite clearly show that Parliament understood the difference between the legal reverse onus and simply placing what we will describe as an evidentiary burden on an accused, leaving it ultimately to the Crown to establish on the balance of probabilities that there was no excuse.

Elias CJ Yes I really wonder how much weight you can put on that since it was simply a re-enactment in the one case with no substantial or no material change on this point. I would have thought that more significant is that in the modem statute, the 2001 new provision, clearly in the light of the Bill of Rights Act Parliament has chosen not to impose a legal onus of proof.

Arnold Well with respect that's though where the two earlier provisions that I referred to come into place. Section 37 and section 40 which are also part of the 2005 amendment.

Elias CJ Yes.

Arnold Which on their terms quite clearly transfer the legal onus.

Elias CJ Yes.

Arnold So, and that does go to my point Your Honour that this Amendment Act contains a number of provisions which deal with onus, whether legal or evidential. Parliament by the terminology that it has used, clearly understands the difference and has selected as between them in a way that it considers to be appropriate.

So in other words, there is a coherent scheme here in that sense. There's different language being used for different purposes. Which leads to the proposition of course that the language matters. At this stage. I mean we're just looking at what is the ordinary, natural meaning of the language. Looking at that in a conventional way.

Now the other element of this that does need to be emphasised is the point that emerged this morning in relation to the expert advisory committee. Because in section 5AA of the Act, subsections 1 and 2, the powers, functions and so on of the expert committee is set out. But again in the 2005 Amendment Act there was a substitution of certain provisions in relation to that. It's found in section 7 of the Amendment Act but it's section 5AA subsection 2 paragraph (b) of the principal Act. And that again is quoted in the written submission but that is the provision which gives the function or the responsibility to the expert advisory committee to fix the levels at which the presumptions kick in.

And Your Honours will I'm sure be aware that first under section 5AA of the Act the Minister must establish the committee. It's not a matter of discretion. The functions of the committee are to make recommendations about these various things including the amount, level or quantity. And the Act sets out who are or how the membership of the committee is to be comprised.

And firstly they must be five people having appropriate expertise in pharmacology, toxicology, drug and alcohol treatment, psychology and community medicine. There must then be up to three people employed in the public service who have between them expertise in public health, safety of pharmaceuticals and their availability to the public and border control. In addition to that there's to be one member of the Police, one member of the MOJ who has appropriate expertise in matters relating to the justice system. And a person representing the views of consumers of drug treatment services. So that's the body which is charged with looking at these issues and recommending to the Minister what the appropriate levels are at which these presumptions should kick in.

Now the point of referring to that of course is simply to say that this is not like the situation that existed in **Oakes** where the Supreme Court of Canada was addressing a presumption that applied, that kicked in as soon as you were found to have possessed a narcotic and one of the reasons or the principal reason that the Court struck it down was that there was a lack of rational connection between the possessing of any amount and the presumption. And this is set out by His Honour the

Chief Justice, Justice Dickson, at page 142 of the report or page 20 of the printout of the report that Your Honours have in the appellant's bundle of authorities under Tab 2.

And His Honour said in my view section 8 does not survive this rational connection test. As Justice Martin of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words it would be a irrational to infer that a person have an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under section 8 of the Narcotic Control Act is over- inclusive and could lead to results in certain cases which would defy both rationality and fairness.

In light of the seriousness of the offence in question which carries with it the possibility of imprisonment for life, I'm further convinced that the first component of the proportionality test has not been satisfied.

And so the importance of the committee structure is that that characteristic if you like that was the principal consideration for Their Honours on the Supreme Court of Canada in Oakes does not exist in New Zealand.

And then if one looks at section 5 then the various amounts are set out there. Schedule 5 to the 2005 amendment.

Now it's the Crown's submission that when one looks at this language, unless the contrary is proved, as a matter of ordinary interpretation it is clear beyond argument what it means. And that is supported by the context. That is, the fact that in other provisions Parliament has clearly reversed the legal onus but in at least one, it has simply said that an accused must raise a reasonable excuse and once that occurs, then it is up to the Crown to negate it. In other words Parliament was aware of the issue. And you've seen that in any event from the Bill of Rights. .. that Your Honours saw this morning.

Now if that is so, if it is the ordinary and natural meaning that the phrase reverses the legal onus as found by the Court of Appeal in this case, as held by the Court of Appeal in Phillips, the question is well what happens.

Now my learned friend says well one cannot justify that limitation upon the right contained in section 25C, the right to be presumed innocent until proved guilty according to law. One cannot justify that under section 5.

As I understand my learned friend's argument, it is first that it's unfair because it is possible that a person whose intention to supply could not be established beyond a reasonable doubt may nevertheless be convicted of possessing for the purpose of supply. That the presumption has the potential to achieve that outcome. And of course I accept that that is possible.

It is possible that a person about whom a reasonable doubt would exist as to the intention to supply may nevertheless be convicted. That is a possible outcome.

Now I say of course that there are a number of mechanisms that reduce the likelihood of such an outcome. The way the police charge and all that sort of thing. But at the end of the day, one cannot deny that as a possible outcome.

The second reason as I understand it that my learned friend advances to say that the placing of the legal onus upon the accused cannot be justified is that of as I understand it practical reality. In other words, here is a person who is in a sense already guilty of a criminal offence, possessing the illicit substance, who then has the further difficulty of trying to show that he or she did not possess it for the purpose of supply. So that the practical considerations that my learned friend talked about earlier as I understand it are really the second element of the argument.

As I say Your Honours, I hadn't proposed to go into detail into the section 5 justification for the reverse onus, the legal onus in this particular context. My learned friend Mr Pike will do that. And there will obviously be a question for Your Honours as to whether you wish to receive the affidavit evidence because that is what it is directed at.

Elias CJ Why is it sought to be put before us in the form of affidavit evidence as if it were directed to a judicative fact.

Arnold I'm not quite sure in what other way one might have put it before Your Honours. Some of the material could be put before Your Honours in another way because it is publicly available material.

Elias CJ Yes.

Arnold And one could just, and indeed one or two of the affidavits are just a page long saying I annex all of these things.

Elias CJ Yes.

Arnold But some of it goes further than that and describes the if you like the structure of, let me refer to it as the sort of drug industry or drug dealing in New Zealand. It sort of outlines what the issues are from the perspective of those who are involved in trying to address the problem.

Elias CJ Yes well for myself I have some doubts as to whether that material in that sort of form is properly to be received by a Court such as this as legislative fact which I imagine is what you're seeking to put it before us for. Particularly as I understand some of the material is information in respect of which confidentiality is asserted. It's just that the whole issue of what background contextual material is admissible in a case like this is quite a significant issue for the Court. And we're not really, it may be that Mr Pike's going to address it, before admitting evidence from officers in the field of their experience I think we would want to

be assured that this is appropriate material to fit within that legislative fact context.

Arnold Yes, well with respect Your Honour of course one understands the concern. But putting if you like the other side from the Crown's perspective, the Crown is criticised from time to time on the basis that when it seeks to justify something under section 5, it has not put forward.

Elias CJ Yes.

Arnold Material other than by way of argument or things being said from the Bar. And with respect I think that is a fair criticism. But what it does mean is that when these issues reach this Court, then the Court in my submission must be willing to receive material which goes to that question of the balancing that the legislature saw itself as achieving. Now this ties into the.

Elias CJ That's not a matter that I would pick you up on. It's the type of material and whether it's receivable in the form that is being put forward here.

Arnold Well the reason for the affidavits is simply to, I mean I'm not sure on what other form one could put forward a.

Elias CJ Well published material for example.

Arnold Well some material, and you'll understand in an area like this, I mean there will be material that wont be published.

Elias CJ Well then should the Court receive it. That's really my question. And I don't have any preconception on that but I would have thought that getting these principles sorted out is quite important. And would expect the Crown to be able to address us on what is appropriately received by us for the purposes that you are identifying. And I would imagine that this has been addressed in other jurisdictions where such material is routinely admitted. But you're talking really about matters which may be controversial but are matters of notorious fact to a certain extent which is why getting affidavits from people of their experiences may not fit the bill.

Arnold Well perhaps I'll.

McGrath J Mr Solicitor could I just add a brief comment that the concern I think in this legislative fact material when given by affidavits is how is it tested. It's coming in hugely and properly at appellate level. It's not usually the sort of material that can be the subject of effective cross examination because of its nature. I wonder however whether it wouldn't be a good practice for this material to be put in by the Crown at the Court of Appeal level so at least there can be the testing in that judgment. It's if you like analysis of the merits of what's put in. And then the usual period of reflection before submissions are presented coming to this Court that can also allow defence Counsel proper opportunities to research what material is available for arguing it. So I

guess that what all this comes down to is I wonder whether it's inappropriate in this case for us to admit some of the affidavit material, I'm not referring to other united nations reports or matters of that kind. Given the late stage at which it's brought, whether it is wise for the Court to take in material that can't really be fully tested in that context.

Arnold Well the alternative for Your Honours then is to, I mean to the extent that Your Honours decide to conduct a section 5 analysis is to proceed on the basis of one can ask what. One's impressions? After all, it is a pretty fundamental issue of social policy that Your Honours would be addressing. As to the suggestion of putting this material in in the Court of Appeal, I mean in this case there was a decision of the Criminal Appeal Division, there was the Phillips case which would have been binding on it. If one would going to mount a full scale argument of the sort that one might have in this Court, I suppose one might have to look at having the permanent Court deal with it and deal with it in a different way, perhaps five people or something.

McGrath J I can see this might not have, reasonably might not have occurred at the time. But Phillips was under challenge in the Court of Appeal was it not.

Arnold Yes it was. Mm. That was basically all there was to it.

McGrath J Well I'm really looking to the future because the whole question, as the Chief Justice says, it's quite a profound question as to how this Court should receive legislative fact material. And just one factor from my point of view is that there is a need to consider how it can be reasonably tested by the other side. Acknowledging it's not often, not effectively the sort of material that's the subject of cross examination.

Tipping J I can say for my part that I would be hesitant, very hesitant to come a conclusion that something wasn't justified without hearing anything within reason that the Crown wanted to put before me to suggest it was justified. Because that would seem to be punching to a large extent, or to a significant extent in the dark. And I wonder whether, not being as versed as others in this idea of legislative facts, whether we don't have another category of material which we're here talking about, that is to say material that the Crown wants to put before us. Not so much as to the legislative environment but it may overlap, but as to the reasons why it is argued that this was a justified limit. And that's really what you're endeavouring to do here Mr Solicitor.

Arnold Yes.

Tipping J As I understand it.

Arnold Yes.

Elias CJ Well that's what's understood by legislative fact.

Tipping J Is that what's understood by legislative, oh it's a sort of shorthand for that sort of thing.

Elias CJ Yes.

Arnold Yes, yes.

Elias CJ Yes, it's quite a misleading label really.

McGrath J When it comes in, how it comes in.

Elias CJ Yes.

Tipping J But I mean, for example if in some of this material there is an elaboration on how difficult it would be to prove certain things and how the experience has shown that in the field, then I would have thought that was something that was very important to know about.

Arnold Yes.

Tipping J But I'm not sure that we're going to reach it in this case.

Arnold No. Well.

Elias CJ Well that's a matter we can explore with Mr Pike.

Arnold Yes, yes.

Elias CJ Because I too doubt whether it's necessary here.

Arnold Yes.

Elias CJ But it was a good opportunity Mr Solicitor to raise with you the fact that I think we are going to have to confront how this material is properly received and I would have thought there is some assistance to be obtained from other jurisdictions in terms of reliability, whether things are notorious and so on. And once you go beyond published material which could be put before the Court in the form of a ...brief and you are talking about expert evidence then I think you have to qualify the experts pretty well and we would be a little concerned if we get, as I imagine, the affidavits which we haven't looked at do rehearse some of the material that is often sought to be put before juries in terms of criminal organisation in this country and matters of that sort. It's just not, it's just not general or general enough perhaps.

Arnold Thank you Your Honour. And I must say obviously that for its part the Crown is very conscious of the problems as well. I mean in a sense we're all grappling towards a workable methodology that assists the Court but equally is fair to those on the other side. But, and I do have to say that one of the things that Your Honours have been asked to do is to give a declaration of inconsistency. That wasn't sought of course in the Court of Appeal at all. It emerges for the first time in this Court.

And so there are issues of that sort as well.

Elias CJ Yes.

Arnold Which really do need to be thought through.

Elias CJ Yes.

Arnold In any event, Mr Pike has had a look at some of the practices in other jurisdictions.

Elias CJ Yes.

Arnold And can assist on that. For my part, what I'd proposed really to do at this point was to say that if it is accepted that the wording of section 6(6) does have a plain and ordinary meaning, and in my submission it's clear both from that meaning and from the surrounding material that Parliament intended to achieve this particular outcome that it reversed the legal onus, then the question arises where to from here. And in particular whether the Court really does in this case have any capacity to interpret section 6(6) in some other way by relying on section 6 of the Bill of Rights Act.

And the issue there as Your Honours will be aware, is that the Court of Appeal has said now on numerous occasions that the application of section 6 depends upon there being, on the particular wording, a meaning that is fairly open, that was Justice Hardie Boys in Nord, a meaning that is tenable, Justice Tipping in Moonen, a meaning that is not a strained interpretation, Lord Cooke in Nord and of course Justice Thomas in Quilter making the point that the role of the Court is one of interpretation and not legislation.

Now when one looks at the decision in Phillips, Your Honours will see there that again Lord Cooke uses the language that the other interpretation must not be a strained one.

So the New Zealand Courts have looked for an alternative that is as I say fairly open or tenable, reasonably, not strained, things of that sort. As Your Honours well know, the House of Lords has gone further than that and has taken its equivalent of section 6, section 3, as giving a broader power, I think with respect one could say, to modify or change or amend the statutory language.

Now to date that really has not been the approach of the New Zealand Courts.

Tipping J Do we reach this if, and I emphasise if, we are of the view that the clear limits from a shifting of the legal onus, the clear limit on the presumption of innocence, is justified. If we were to go at it that way and reach that conclusion then we wouldn't be looking for another meaning.

Arnold That's absolutely right Your Honour. In my submission the approach would be first to look at the section under challenge on ordinary principles of interpretation to see what meaning it would bear. If, as in this case, there is an ordinary and natural meaning, one then takes that meaning and asks well thus interpreted, and accepting that prima facie limits a right, is it nevertheless justified under section 5. If the answer is yes, that's the end of the story. If the answer is no, that then gets you into a section 6 analysis which says, well is there another interpretation that is tenable or reasonably open or not strained and artificial, whatever the language that would remove the inconsistency. And if there is and it is as I say reasonable in terms of the interpretation, then the answer, well that interpretation is to be preferred. If however there is no other tenable or reasonably open or interpretation which is not artificial or strained, then the answer is section 6 does not assist.

Tipping J Well the answer's then mandated by section 4.

Arnold Yes. Precisely. So in my submission that's how the structure and the relationship would work.

Elias CJ I know there's a lot of, again, ink been spilt on this.

Arnold Yes.

Elias CJ But I wouldn't want you to think that I think that order the natural order. Because I would have thought you start with the meaning that takes you to section 6. And it's only if you cannot escape from a limitation on the right recognised that you look to see whether it's justified. That seems to me the natural order. But I know there are many other ways of looking at it.

Arnold Yes, yes. Well yes Your Honour.

Elias CJ Well there is another way of looking at it.

Arnold Certainly the scheme that I've just outlined for Your Honours is the scheme that the House of Lords seems to have settled upon. The difference being that their lordships do regard section 3 as carrying with it a wider interpretative scope than to date anyway the New Zealand Courts have. But that can perhaps be explained by the particular context. As Lord Stern says in the Ghaidan case, the Bill of Rights in England was very much about bringing rights home. And in a sense trying to head off the Court at Strasbourg. And therefore logically one had to give the Courts a considerable power because if you didn't the Court at Strasbourg would do it for you. And that provides part of the context in which quite obviously their lordships are viewing section 3.

Elias CJ Not a very noble approach perhaps.

Arnold Oh well it's entirely noble. No, no, it is entirely noble. And this with respect goes to the quote from Lord Hoffman that Your Honour expressed some doubt about. The point being made by Lord Hoffman is that the analysis of rights and the particular balances as between rights and limitations are certainly informed by the international dimension but ultimately they are a matter of the particular forces and context and environment in the particular domestic jurisdiction under consideration.

Elias CJ Yes, yes. That was extra judicial and it wasn't referring to the Human Rights Act. My point was simply that we have a New Zealand Bill of Rights Act which is part of the context.

Arnold Yes. Yes.

Elias CJ So to say that you're looking at an international context is an inadequate reflection of the fact that the New Zealand Bill of Rights Act is, as Lord Cooke says, part of the fabric of New Zealand society and law now.

Arnold Absolutely and that's in a sense that reinforces the point I'm trying to make that the assessments that are carried out must be carried out within the weave of that fabric.

Elias CJ Yes, yes.

Arnold And that is the reason for, for example, looking carefully at this particular piece of legislation and the way it works. Because Oakes is not a direct analogy. Lambert is not a direct analogy because of course there what the presumption, where the presumption was operating was on the fundamental point did you know what you had was a drug. A much more fundamental issue than faces this Court. There the Crown had to prove that you were in possession of a container and had to prove that the container in fact contained cocaine and then the presumption was that you knew it was cocaine. Now we're a long way away from that here in New Zealand. We simply do not operate in that way.

So again, when one looks at the context of these particular decisions, the discussion of reverse onus must be looked at against the background of the particular problem that the Court is dealing with.

McGrath J Mr Solicitor, just before you move on. When you said to us that the approach you contend for would see us looking at the section on ordinary principles to see the meaning it bears, does it bears really mean which is tenable in accordance with those various formulations you were previously mentioning. We're not looking for the actual meaning so much as a spectrum of possible meanings on ordinary principles are we not.

Arnold With respect no. I mean that may be the result one gets to, that there are a range of meanings, some of which are more or less tenable. But in a case like this, what emerges is that there is in my submission an ordinary and natural meaning that is there. Now one then looks and asks oneself, well interpreted in that way, is that limitation on the right justifiable. And if the answer is no it is not, one then might think about the other ways in which those words could be interpreted without artificially straining them. But nevertheless, and maybe not linguistically the most obvious answer, but nevertheless a meaning that the language will bear. So the first stage of the process is asking, well is there basically a plain and ordinary meaning here. In some cases one will say, well know. I mean there is a genuine old traditional ambiguity and that then leads into another analysis.

McGrath J Yep, right. Just coming looking at the, doing that then on ordinary principles, should the Court be taking into account the importance of the rights at stake. In other words, does part of the fabric of ordinary principles that forms the context in which the Court's considering the meaning of the words include in this case the presumption of innocence.

Arnold One of the difficulties in this case is of course that, I mean these words have such a well established meaning, so one in a sense has to try and put it to one side and think about it in the abstract. But in my submission the first step must always be to attempt to assess the ordinary meaning on ordinary principles. The considerations then of the way in which that meaning interacts with the Bill of Rights fall to be worked through in sections 5 and 6.

McGrath J That's undoubtedly so but are you saying that the Bill of Rights isn't one of the ordinary principles by which we assess the ordinary meaning with which we start our approach on your analysis.

Arnold Well in the particular case it may have a part to play. The reason I'm being a little hesitant about this is that it depends very much on the way in which one attempts to use the Bill of Rights in that initial interpretative process. Because if it pushes you to straining the language, with respect that in my submission is going beyond what is the appropriate first step. If Your Honour is simply putting to me the proposition that generally and traditionally in interpretation through maxims, presumptions and various things fundamental rights have had a part to play in defining meaning, then obviously in my submission that is correct. I couldn't dispute that.

McGrath J Particularly when those common law presumptions have been affirmed in their importance by statute.

Arnold That's right but the real, I'm just a little hesitant with respect to agree to a blanket proposition without understanding how it plays out in a particular case or argument.

Elias CJ But when you're trying to ascertain a meaning you must start with the principles of interpretation and section 6 is one of them.

Arnold Yes.

Elias CJ Which is why I said you must start with the meaning and you must go to section 6 in ascertaining that meaning. And it's only then it seems to me you go to section 5. But it's back on that sort of merry go round really isn't it.

Arnold Yes, yes, yes. If I can just make one observation about that. And Your Honour may say that this is entirely a legitimate outcome. But one of the difficulties in my submission with that approach is that there will be times when, well let's take, excuse me, let's take the current case. It's accepted by everybody that reverse onus provisions are not inherently unjustifiable. The international jurisprudence and the English and Canadian jurisprudence all support the idea that you can justify reverse onus clauses. So it's a matter of looking at the justification. Now if one has a form of words that let us say is genuinely open to an interpretation that it reverses a legal onus or it simply places an evidential burden on an accused. Let's say there's some form of words that somehow is sort of genuinely ambiguous on that. One of the dangers certainly from a Crown perspective of Your Honour's approach is that you may end up removing the opportunity for the Crown to argue that the more restrictive interpretation is nevertheless a reasonable one in terms of section 6. Because you've gone through the interpretative exercise through, sorry in section 5, you've gone through the interpretative exercise through the section 6 lens.

Elias CJ Mm.

Arnold You've identified these two meanings. You've said this one is more consistent, therefore that's it.

Elias CJ Mm.

Arnold But the Crown might have had a perfectly sensible argument that the stricter one was in this context a reasonable limitation. And that with respect is the difficulty because one ends up.

Elias CJ You're up against though, you're up against the language which I don't think has been paid sufficient attention. You're up against the language in section 5 and section 6. Because section 6 requires you to give the interpretation that is consistent with the rights and freedoms. The right and freedom here in issue is a presumption of innocence. There's no question but that a legal onus is inconsistent with the rights and freedoms. Therefore if it were tenable to interpret this as an evidential onus surely that is what you're directed to. By contrast section 5 is talking about limits on the rights and freedoms. It's after, it

seems to me it's quite clearly after you have identified what the tenable meaning is that is consistent with the Bill of Rights Act. It's quite different language. Maybe subject to such reasonable limits. Now in this case of course what you're contending for is something that's not just a limit, it actually excludes the right in the Bill of Rights Act. Now that may be a justifiable limitation but that seems to me the sequence that you must go through if you're being asked to come up with a meaning that is consistent. Otherwise you'll just have progressive erosion of the rights through too ready recourse to section 5 that will be used to mediate the rights downwards. And that doesn't seem to me what section 6 is requiring.

Arnold Well with respect Your Honour I'm not sure that the last part of the, well obviously with respect I couldn't accept the last part of the proposition that the effect of the approach which I've suggested to Your Honours would lead to a, well to mediating the rights down. Because at the end of the day they still have to be justified as a reasonable limit in this particular society. And obviously notwithstanding section 4, that's an issue on which the Court is going to express a view. And it's clear that that view is going to be an influential view. But Your Honour is saying that what I described as the effect of Your Honour's approach is right. That is that it really does remove the ability of the Crown to argue that the greater intrusion is in fact a justified limit in this particular class of case.

Tipping J Would it not also have this effect Mr Solicitor that if one took the view that there were two possible meanings, one was more probable than the other, and that probable meaning was an entirely justified limit, this is really putting your point I think in a slightly different way. The more probably meaning is an entirely justified limit but you have to go down to the less probable meaning.

Arnold Yes.

Tipping J Under the edges of section 6. Even though you're pretty sure that Parliament is much more likely to have meant the first thing than the second.

Arnold Yes Your Honour that is the effect of it, yes.

Tipping J I mean it's seldom that if when you have two meanings open, they'll each be of equal persuasiveness if you like.

Arnold Yes.

Tipping J You're almost certainly going to be faced as a matter of common sense with something you think is more likely than another. On any principle of interpretation. But apparently a way of reading section 6 means that you've got to go straight to the less probable one.

Arnold Yes, that is the.

Tipping J Now I don't know, this is all subtle stuff. But it doesn't feel entirely right to me.

McGrath J Well section 4 provides some control of the extremes.

Elias CJ Absolutely.

McGrath J Yeah.

Elias CJ Yes, I'm sorry that we labour this but of course it is very important. And it's valuable to have your argument on it Mr Solicitor.

Arnold Yes. Well it's certainly very important from a Crown perspective too.

Elias CJ Yes.

Arnold So with respect the time's well spent.

Tipping J If we get to the point, having heard Mr Pike that we're of the view that this limit is not justified, is it your case that there is no other possible meaning than the legal.

Arnold It is. And when one sits down and goes carefully through as I'm sure Your Honours have already and probably will do again, but when you work carefully through the opinions of the House of Lords in the reverse onus cases, so Lambert, Johnstone and the other one I've forgotten the name of, was it Sheldrake, that's right. What's very interesting about them is that by the end of the trio, Their Lordships seemed to accept that the ordinary meaning of this language is obvious. And whereas in Lambert Their Lordships talk about being able to read this language as imposing an evidentiary burden without doing any violence to the language and without straining the language, in my submission it becomes clearer in the later cases that they really see themselves as modifying or amending the statutory language.

And indeed when one looks at the Caribbean death cases, Matthew and, oh I've forgotten that one too. But the trio that came out last year with the nine Law Lords sitting and the very strong difference of view. That really was a difference of view about the scope that one had to interpret and it really was a difference of view about the role of the Court. But interestingly, in the, I'll just take a moment here to get the case out. Yes the two cases were Boyce and Matthew. There's another one in the trilogy, Watson. But it's Boyce and Matthew that are perhaps the more interesting. But what's interesting about the Minority judgment in the Matthew case is the way in which Their Lordships in the Minority describe section 3 and section 6. Section 3 of the English Act and section 6 of the New Zealand one. And I'm just turning up the particular passage.

You'll remember Your Honours that in both Matthews and Boyce, the constitutions contained the normal protections against cruel and unusual punishment and inhumane treatment and so on. But also had a provision in them which said that none of this applies to any existing law.

And both those Caribbean states had a mandatory death penalty for murder. The question was how that mandatory death penalty sat within this constitutional structure. All nine of Their Lordships agreed obviously that this mandatory death penalty was fundamentally a breach of human rights norms, it was cruel and unusual punishment, inhumane on all possible ways of looking at it. So there was no dispute about that. The question simply was whether these two laws which pre-existed, predated the coming into force of the constitution were protected by this provision which said these protections don't apply to existing laws.

Now when each of the constitutions was introduced, they were introduced in one case by statute and in another case by order and in each case the statute or the order had a provision in it which gave the Court the power to modify, amend or change laws to meet the constitution. So the dispute was about the interaction between all of those provisions.

But what is interesting about the Minority, and I'll see if I can turn up the precise language. The Minority said that this power to modify or amend which had been given under the order or the statute was similar to the power that the Court had in New Zealand under section 6 or the power that the Courts had in England under section 3. And what is interesting is that the Court equated what's been described as an interpretative provision with a provision in the documents of those two Caribbean states. Which is much more explicit about amending, modifying and doing things like that.

And it seems then that so far as some of the Law Lords are concerned, the interpretation that is being given to section 3 is really an interpretation which does involve modifying the language of provisions. And that certainly goes further than what the New Zealand Courts have been prepared to go thus far.

Oh yes, the paragraph is 54 in the decision in Matthew which is [2005] 1 AC 433 and it's in the dissenting judgments at paragraph 54. We find nothing strange in a provision which requires a Court to construe an existing law with such modifications, adaptations, qualifications, exceptions as may be necessary to bring it into conformity with a human rights instrument but prohibits it from annulling the law. It's not dissimilar from the approach prescribed by sections 4 and 6 of the New Zealand Bill of Rights Act, sections 3 and 4 of the United Kingdom's Human Rights Act.

So Their Lordships certainly see those powers as quite wide ranging. Which is slightly odd because again, as Your Honours know, several of Their Lordships have drawn a distinction between the New Zealand provision and the English provision, saying that the New Zealand provision is much narrower, or narrower than the English one.

Elias CJ Are you arguing for that on the language of the statutes. I know it's been said.

Arnold Yes, it's not so much on the language but more on the context. One has some pretty good authority and Lord Cooke, Lord Steyn have both made this observation on a number of occasions that an interpretation under section 6 must be a reasonable one whereas under section 3 there is no such limitation. And that is consistent with what the New Zealand Courts have said for some time.

So there's a pretty clear body of judicial opinion which says yes, there is a difference. But I have to accept Your Honour when you look at it as a matter of linguistics.

Elias CJ Hard to see.

Arnold One says can.

Elias CJ Yes.

Arnold The other says to the extent that it's possible.

Elias CJ Mm.

Arnold There are other differences of course. Our section talks about meaning. The English section talks about provisions being read and given effect. So there are differences like that. But the real difference is the difference that I mentioned earlier Your Honour that the context is very different. I mean the Human Rights Act in England came in, well I don't need to go through all the background again, but it has at the top of it the Court at Strasbourg and its powers.

And the reality is that in a sense the enactment of the Human Rights Act in England was an exercise of sovereignty. They were trying to make sure that it was Parliament or their Courts that made the decisions for England rather than Strasbourg. And to achieve that, the Courts have been willing to interpret section 3 as conferring on them a pretty broad power.

And notwithstanding that Lord Hope and others have said, you know, we have the power only to interpret, not to legislate. As I said earlier, Their Lordships do use the language of modifying and amending when they insert words. And Ghaidan is a good example. If one reads Their

Lordships opinions in that case, several of them say we need to modify the language. We need to amend the language. With respect, the environmental factors which drove the House of Lords to that view simply do not exist in New Zealand.

Elias CJ Just because, I'm sorry, but these things are very important. It does occur to me looking at the text again that, I wonder whether we are right to treat section 5 quite as we do sections 4 and 6. Because I wonder whether it is principally directed at the judicial branch of government. The Bill of Rights Act of course applies to all branches. And while there's reference to the Court in section 4 and while one would have thought that an interpretative provision such as section 6 has very much the Courts in mind, section 5 is also directed at the other branches of government.

Arnold Yes.

Elias CJ And it is more, it more stands as a marker. And therefore again, I wonder whether section 6 isn't the more important provision for the purposes of the Courts in ascertaining the meaning of statutes.

Arnold Well again with respect no, because in my submission Your Honour's observation with respect I think must be right, reinforces my earlier point. I mean the Bill of Rights as Your Honour rightly says, is a document for the whole of government. And part of it is section 5 which is a direction to the public service when it's developing policy and all that sort of thing.

Elias CJ And those prescribing by law limitations.

Arnold Yes. That's right so.

Elias CJ Which the Courts may do but not when they're interpreting legislation, not when they're interpreting and applying legislation.

Arnold But Your Honour this is the point. Let us say the policy makers go through the development of a piece of policy which does have an impact on rights. And they work very carefully through that limitation. And they get advice and look at the other ways of doing it and decide that yes this is a limit but we're satisfied that it's reasonable, that we've got to do it for these reasons. And let's accept for the sake of argument that you know, those considerations are legitimate. So Parliament goes ahead and enacts the law or does whatever and there's appropriate section 7 vet and so on. The matter comes to this Court for interpretation. Now we get back to the proposition that we were arguing about earlier. If Your Honour goes straight to section 6 and uses that as the mediating principle, the result may well be that the decision that the policy makers have made after all of that work is never considered as a justified limit for the reasons that His Honour Justice Tipping gave. That there are in fact two possible meanings of

this provision. One more tenable than the other certainly. But they're there. And on Your Honour's approach one would be, the Courts would be obliged to go for the less restrictive, even though it might be perfectly possible to justify the more restrictive meaning.

Elias CJ But on one view, the role of the Courts is not to decide what is a reasonable limitation in a free and democratic society. On one view of this sequence the Courts must interpret consistently with the Bill of Rights Act and then they must apply the legislation. And except perhaps in terms of some common law defences and things like that there's maybe an argument as to whether that's prescribed by law.

Arnold Mm.

Elias CJ It's only in respect of that action that the Courts are called upon because they're the actor in that. They're the ones prescribing by law what is justifiable in a free and democratic society. Anyway, I'm sorry, I've taken up too much of your time on that.

Arnold So if I can just stand back and summarise, the submission has been that when one looks at the Act, and applies conventional principles, there is an ordinary and natural meaning that the reverse onus when one looks at the statutory context is part of a scheme. That scheme involves the experts committee. There are other reverse onuses and there's one example of an evidentiary, what's called an onus. And as we saw from the material this morning, it was put to Parliament through the Attorney-General's report in a particular way.

So that then is the ordinary and natural meaning. It is certainly argued that there is no other tenable or reasonably open or non-strained and artificial meaning available under section 6. And I really don't need to develop that. Your Honours raised the points this morning.

But at the end of the day, in a legal context, proof involves more than raising a reasonable doubt. And that is just if you like part of our being as lawyers. It's a part of the legal baggage. To raise an issue is not to prove that's the truth of whatever it is that you've raised. And Glanville Williams himself accepts that in the material that you were referred to earlier.

So having come to that conclusion, the Court is really left where the Court of Appeal was in Phillips. And that is to, and indeed in this case, and that is to interpret the clause as it has been understood for some time.

I had intended to take Your Honours through the reverse onus cases in more detail but I'm not proposing to do that now. Your Honours I think I'll ask Mr Pike to deal with the section 5 issues.

Elias CJ Yes, thank you Mr Solicitor. Yes Mr Pike.

Pike Yes may it please the Court. On the apparently somewhat vexing question of the materials to be put before the Court, essentially the position of the Crown was this having regard to the … or actual constitutional importance of this sort of case, was avoid situations where the Court might be drawn into criticising the legislation as being in breach of the Bill of Rights Act. Even if it did not see it as necessarily going so far as to make a, to take the jurisdiction and make a declaration of inconsistency.

It was thought better, even although we might debate the powers of the Courts in New Zealand as against the UK and Canadian and of course the US Courts to change legislative meaning in dramatic ways, but nevertheless it was an important feature of the Crown's appearance in this Court that it should bring before the Court as best it's able cogent and well validated information as to why a right which we've accepted prima facie is plainly breached, because there is no question as you've heard between 25C and 6(6) of the Misuse of Drugs Act, that prima facie there's a clash, that the information before the Court can be seen as such that to avoid the situation of criticism by the Court or to avoid the situation that the real issue is the slamming down of the staff and to say that section 4 prohibits anything.

These are confrontational sorts of issues. They're difficult and they are to be avoided as best one can. Section 4 is a very real issue. And of course the Solicitor General has made that clear to the Court in his submission. But the intention was at any event to put before the Court what you would call, and has been called in shorthand, the legislative background or legislative material or evidence. Which of course it isn't. In a sense it is evidence that is relied on, if it can be put that way. It is evidence that is relied on by those whose job it is in the government to advise Parliament on how the Misuse of Drugs Act should be changed, enacted or amended, having regard to social issues with respect to drug taking.

That is the real point of the evidence if the Court can see that distinction. It's not necessarily the fact that all of the information before the Court would have been deliberated on by the government. Indeed, or by Parliament. And in a sense of course it isn't. I mean select committees received a wide range of evidence but they might not necessarily receive everything that can be put forward by the Crown to show that section 5 which we do say is part of the Court's mandate, that section 5 can be drawn in aide to reasonably reshape the scope of the right, in this case to say that a partial limitation, it's partial but important and I don't want to, because it goes to the most serious part of the charge, but the limitation on the right that is protected by 25C is justified because of a particular social and legal context.

Now that, and I mention such because this is done in Canada routinely. And I mention also that the US Supreme Court appears quite plainly by

its practice and by its judgments and holdings to accept evidence, indeed dig it out itself from a wide range of sources. And I do rely on a case which I'll immediately have to apologise about, I've only got an unacceptable printout version. But it's well known to the Court, it will be well known. Of Leary v US and the infamous.

Elias CJ It was Timothy Leary wasn't it. In 69 or something.

Pike The famous Timothy Leary, that's right. Exactly, it was 1969 on how nice LSD is in a tasting situation. But anyway Leary v US is recorded at Volume 69, it's volume 395 of the US at page 6. But I refer to it only for this matter. There was a strange presumption as to the fact that marijuana found on a person in the USA in those days was deemed to be foreign and that was because the Americans didn't do that sort of thing and grow cannabis. So it was certainly all presumed to be from Mexico. And that was the presumption. And it was further presumed that not only was it from Mexico but that a person who had marijuana in the US knew it was Mexico and this apparently had some significance with respect to if you declared it and paid $100.00 or something you were allowed to have it under one statute but of course you'd be prosecuted under another. So it was quite a nonsense.

But with respect to that I just wish to point out that the US Supreme Court in upholding the validity of the first presumption, that's not the second one, they upheld the validity by their own researches, they were still satisfied that almost all of the marijuana in America must have come from Mexico. But they weren't satisfied that the presumption that Mr Leary, Dr Leary knew it was Mexico could be constitutionally sustained and so that part of it was seen as irrational under those line of cases like Tott and others which said there had to be a real substantial connection between a presumed fact and reality. So they'd struck that down.

But what they said in the case is important. They talked about the material they'd looked at. And if I can just, I can't take you to the part, but read the part. They found that the legislative record was unhelpful and so they looked at the legislative record and they said, since the importation question is subsidiary, we take it up beginning with the legislative history of section 1676A. And the House and Senate Committee Reports and … rates are relatively unhelpful. More informative are the records of extensive hearings before the House and Senate Committees near the outset of the commission. And then they talk about the equally famous and reviled Harry Anslinger who was a problem to drug takers in America in the early days. Estimated that 90% of all marijuana seized by Federal authorities had been smuggled via Mexico.

And then they went on from there that that took them so far. Then they said on the other hand the Court went on to write, written material inserted in the record of the Senate hearings including former

testimony of an experienced Federal Customs Agent who before another senate committee in turn to the effect that high quality marijuana was being near the Texas cities of Lorado and Brownsville was also taken into account along with written reports of the Attorney-General received that marijuana may grow unnoticed along roadsides and vacant lots in many parts of the country.

Nevertheless the Court went on to examine various books, publications, journals and yet more senate testimony and formed the view that the balance of the authorities still favoured the fact that the marijuana in America came from Mexico.

Elias CJ Is this submission don't be fooled or don't fool yourselves. Is that.

Pike The submission is Your Honour, it's really to the point that I think it's extreme limits of what the Court looked at, the US Supreme Court plainly takes a vast range of material and does routinely from affidavit or affiants as they call them there in the field and elsewhere.

Elias CJ Oh I see.

Pike It's consistent with its practice. And it's also apparently consistent with the practice too in Canada. And I mention there, there's various cases that indicate that that is so and one of them's the well known case of Chaulk which is Chaulk which is reported in the 1990 volume 3 of the Supreme Court Reports at p.1303. And there what was adduced by the Crown was evidence from the intervening Attorney-General's belated affidavit again which in turn drew on the experience of provincial prosecutors who said how difficult it would be and how trials would be completely warped if the presumption of sanity was found to be unconstitutional and read in another way.

And the Supreme Court by majority agreed that the. Interestingly Madam Justice Wilson in dissent had noticed that if this was to be a conventional section 1 argument, the government would have to produce evidence of some guilty persons going free in numbers. That had to be the pressing social problem. Not the impossible burden placed on the prosecution. So that was interesting that she was obviously calling for the fact that the State would have to adduce quite substantial evidence which could only come, well I would presume, from affidavit from officers in the field, from Federal or local prosecutors. And the Police for that matter as to the social consequences, the pressing social consequences that many, many people are feigning, I mean the point was, they're feigning insanity and they're getting away with murder literally. There has to be a significant social data about that said Madam Justice Wilson before she would be engaged on the section 1 debate and find that it could be a justified limit.

Her colleagues weren't of that same mind. They saw the, they did take into account the fact that trials would be unduly skewed because of a number of tactical, problematic issues such as the Crown not being able to get compulsory psychiatric interviews of accused and so on without upsetting other charter values.

But I just point those cases out because the Court there did take reasonably wide ranging evidence. And it also appeared in Irwin Toy, I think it was another well known case of course.

Elias CJ You're sort of giving us example from cases that you're aware of. Have you in fact checked to see whether there is any writing on this topic of what should be received.

Pike There's not very much. All I've been able to do is talk to Federal prosecutors who appear routinely in the Supreme Court of Canada.

Elias CJ Yes.

Pike And the Canadians, they confirm what one can glean from authorities, other texts such as Martin which has a short passage on it.

Elias CJ Does it.

Pike And the cases such as Bonnin to which they referred me, (1989) 47 Canadian Criminal Cases 3rd edition at page 230 where there was a complaint there that the government had adduced evidence for the first time in the Court of Appeal. And the Bonnin Court upheld that as being legitimate. And pointed out that however it was subject to two things. One is that it had to be obviously notified to the other party in the case in timely fashion. And also indicated that it would be subject to countervailing testimony which is the practice Canada. Strangely, well not strangely, the routine as I understand it in Canada is that charter, section 1 charter claims arise, or issues arise at trial. They are treated as collateral civil attacks, as is all their constitutional law or their charter law, on the particular process, and usually the trial process. And so there is often extensive evidence and it may be cross examined depending on what it is. And therefore a record and a narrative comes forward which is what Justice McGrath was concerned about. That comes at that base level having a long and dragged out hearing sometimes in the Courts of further high Court or first instance Court, provincial high court. It comes right through then mixed up into the Supreme Court of Canada. But there are cases, and certainly there are references to cases and I think Chaulk is one of them itself, and Irwin Toy v Quebec appears to be another, and that's in 1989 in the volume Supreme Court reports at 927, of material being actually introduced at Supreme Court level. And I understand, as I said, from my contact in Vancouver, he's about to argue a case in the Supreme Court very soon where the other side is putting in fresh evidence. There has been a section 1 fight. They're putting in fresh evidence into

the Supreme Court. The Supreme Court will receive it. The rules of the Supreme Court of Canada allow cross examination and my colleague has moved to be allowed to cross examination.

Elias CJ It all sounds horrifying really and it does sound as if there's a need for some caution in the admission of this evidence and that perhaps we're going to have to look at that on a case by case basis. Can you.

Pike Well I can, sorry I'm.

Elias CJ Well that's helpful. I don't know whether you'd finished on that. That's in response to the query we had as to what happens in other jurisdictions is it.

Pike Yes it is and by and large that.

Elias CJ Yes.

Pike The appellate Courts will routinely in a constitutional level admit a range of information.

Elias CJ Yes.

Pike To decide issues. Now I think one of the critical points is it is not a judicial review in that sense where you're looking at what was before Parliament at the time or a select committee. It really is a much wider inquiry it appears and so the state or the Crown can move for a justified limit on a right and that's made very clear by Leary. And not Leary along, by the empirical data.

Elias CJ Yes.

Pike And other grounded information which indicates that the particular impugned law does work in a manner that is not incompatible with the appellant's or the accused's rights in a particular case. The issue here with respect is that the sort of evidence put before the Court we accept must be done with care and it must be done with great responsibility. We submit the Crown has done that. What it has put before the Court is something to found an argument that in fact from publicly available and not publicly available information, the presumption of dealing is not irrational. That there is in fact a body of empirical data to support the proposition that people with relatively small amounts of both cannabis and other harder narcotics routinely sell or give that material to their friends.

Tipping J Wouldn't it be extremely difficult for someone to argue that it was irrational where the presumptive level had been set in the light of this expert committee.

Pike It would be difficult but we have accepted the burden Sir.

Tipping J This is a sort of belt and braces approach is it Mr Pike.

Pike Yes it is because the Court, we would submit that the difficulty, I'm sorry I think I interrupted the Chief Justice.

Elias CJ No, no, I interrupted you, you were finishing you.

Pike Not at all. The point really at stake is here that this sort of material we would suggest, and I don't know that my friend has got any particular basis on which she would like to cross examination or put countervailing evidence, what we say is that we have information from a gentleman, Mr Currin for instance, oh sorry, Dr Wilkin, get it right, who is a drug researcher. We've put the affidavits in from him because he is a person who feeds information through to a man called, well initially to Mr Webb in the police national headquarters whose task is as a head of a large research unit. That information in turn gets transmitted to policy making organs which eventually gets before the expert committee on drugs as the police position. There is a police member on that committee as well as a member from the Department of Justice and so on, who looks after rights and responsibilities and Bill of Rights issues indeed. So that is the trail.

So what we've tried to do is to validate the fact that there is cogent evidence which is it rational to rely on. Now it could be cross examined and somebody might say it's all wrong. But the issue for the Court with respect is that that may be so, but is that justiciable. And we say no. What is justiciable is that there is information, it is cogent, it comes from proper sources, it goes through a proper process, it is seriously evaluated and it's therefore rational for Parliament to say that the presumption is a justified or it's rational to argue it is a justified limit because it is a rational presumption. And that's what the evidence is all about. It's not really to do anything more than that. It's to satisfy the Court.

Elias CJ Well can you perhaps just tell us the propositions that you wish to rely on. Because I would doubt that many of them are in contention. And therefore on that basis it wouldn't be necessary to receive the information.

Pike Yes. The propositions start with this may it please the Court. The first thing in that we were trying to validate in terms of that formulaic Oakes approach which perhaps is quite helpful at times, that the pressing social concern. Now it is an issue for a Court that there is a pressing social concern. And of course the Court will take judicial notice immediately there is a pressing social concern as to narcotics in New Zealand.

Elias CJ But surely nobody's going to take issue with that.

Pike No they're not Your Honour. But it appears also that the extent that, there's not a clear division between how pressing is the social concern and the methods that the Parliament or society through Parliament is taking to combat them. And so part of the Crown's task has been to take on itself to say, the starting point, one of the starting points is that the enforcement of the narcotics laws in New Zealand is highly dependent still on detecting criminal offending in this area at a very low level. That is at what's called street level. That despite the sophisticated border controls that we increasingly have, that sadly still the vast majority of hard narcotics brought into New Zealand slip through the barrier.

Elias CJ Well I would.

Pike Sorry.

Elias CJ Sorry, I would doubt that that can't simply be put to us as a submission. That enforcement depends on street level detection.

Pike Well coming from the Bar, I certainly thought with respect Your Honour it requires the Crown to give a little too much from the Bar I would have thought in ordinary circumstances. You might make that in a submission sometimes depending on its context. But here there's a solemnity I think about the issue as to where it's going and how you might, what you might point to as the Crown.

Blanchard J It might have been necessary to put this sort of material before the Privy Council but we live in New Zealand.

Pike I understand.

Blanchard J Most of those propositions are blindingly obvious.

Pike Well with respect Sir they're probably not. I mean Judges know from their experience on the Bar that a lot of drugs get into New Zealand and they get distributed and they've got an idea that organised crime cartels exist for no other purpose but to move them, such as the motorbike gangs that are referred to in the Maxwell affidavit. But the exact mechanism is that these, the point is, sorry, that these people carry small amounts of drugs. What we want to be able to validate for the Court is that the presumption is really much more important as a drug control measure than my friend for the appellant would have the Court believe. It is not simply a matter of getting, of 6(6) popping up and getting life when it is a trial time. It infests or infects the whole of the drug enforcement effort in New Zealand and is to be seen in that context. And I couldn't with respect sort of bowl that up from the Bar without some validation. That's what the affidavits do.

Tipping J You mean it has a purpose and an effect beyond the immediately forensic.

Pike Very much so Sir yes.

Tipping J Is that the key point that all this is really about.

Pike Yes. It affects how drugs are carried by gangs, it affects the amount they carry, how they do their business. And how therefore they become vulnerable to detection at street level but not at higher levels and so on. And so that is the purpose. And that is the very purpose behind the legislation. There's no question of that. And so it's that wider purpose and that issue which the Court is invited to look at the government's, into its treasury so to speak, of information just to satisfy itself that this is not some alarmist, some Counsel or the other for the Crown, simply firing in articles that have no particular context or making alarmist comments from the bar. And in particular the important point is to show a track that this information is the information used by ultimately the drugs expert advisory committee on drugs and ultimately, Governments in passing laws. And so it lays that foundation and invites the Court to take a look and also we accepts it's a look that is a harder look than it might in other forms of social policy. So it's as if we were arguing abortion law or something else. It is criminal justice. The Courts need more assurance in criminal justice and we accept that burden.

Elias CJ So we've talked about two propositions. The third one I've noted down setting a presumption at a low level is important as a drug control measure.

Pike Yes.

Elias CJ And that certainly would be the experience of the Judges of this Court from the appeals that they've seen coming through and also from their experience at trial level as to who distribution takes place. And then the fourth proposition is that the advisory committee acts on information obtained from the Police as to the distribution of drugs in New Zealand. Well I don't think anyone would assume that the advisory committee would simply be imagining the position. One would expect that it would obtain information and it sets the levels in the light of that information.

Pike Yes I understand that Your Honour. Perhaps with respect unduly stubbornly, Counsel's response is that a lot of this will be public knowledge but because, I mean the Crown might be wrong about this and that's fine, we'll take that on board, but because you are dealing where the Court is here asked to look at the denial of quite an important trial right without question, we're taking the view, as I think we seem to be on common ground and I'm sure Mr Solicitor made exactly the point, we do accept the burden that in the criminal justice area as the judges and lawyers accept, the Court will look harder or go lower the judiciability bar or lower it rather as to what they might look into and

the cogency of what they look at as against other forms of social data where the Court would be more inclined to leave matters to Parliament, such as the idea of what a marriage is or the adoption of children or something like that that tend to be more socialogical, tend to be more said as less justiciable.

In the drugs area we understand our burden is that it is the Courts see justiciability … quite some way into the government's reasoning processes. And hence we put this information before the Court.

Mindful of that burden, that's the point I'd like to make.

Elias CJ Thank you. Those are the full propositions you sought to put.

Pike I think I've said all I can about the point Your Honour.

Elias CJ Yes, yes. I think we may just confer briefly about this but first I'd like to ask the appellants whether, you've heard the propositions that the Crown wishes to rely on that drugs are a pressing social concern, that effective enforcement depends on street level detection, that setting the presumption at a relatively low level is important as a drug control measure because of the way distribution takes place and that the advisory committee operates on information as to the scale of drug dealing and so on in New Zealand. Do you have any problems with those propositions.

Vidal The proposition in particular that I have an issue with is the presumption having to be set at a low level in order to be able to combat the drug problem. And in particular the nature of evidence that often is called in regard to that matter is more operational type evidence with regard to police officers and how presumption works and what occurs. And it's that type of evidence that needs to be tested in my submission and it's not a situation where the principle can just be drawn. It's an issue that has to be looked at and that's part of that section 5 analysis when you're not dealing at the high level of the policy.

Because we all know what the policy is or what the overarching purpose of the legislation is. It's down at that level of why is the reverse onus having to be used to help achieve it. And I think it is in that type of area that it is more contentious and there are more issues that have to be properly considered to enable an appellant or this appellant to be able to respond to that aspect.

Elias CJ The discussion in the texts that I've looked at about so called legislative facts which are not really directed at the legislature but are part of the context in which legal policy questions are addressed, is that the material which is received by Courts, particularly higher appellate Courts, may well be contentious. It's not trying to resolve conflicts or arrive at the actual position, make an assessment of the material. Is this

proposition that's been put to us one that you would seek to put material before us on.

Vidal I think that that is the important aspect of it, is that the appellant actually has to first consider what the material is that is being placed before the Court and that opportunity hasn't arisen. To then enable the appellant to then consider what other material the Court might receive. It may well be that it's not material that is cross examined on and it's accepted that it may put forward contentious viewpoints on either side. But it's to balance that information. And that's the area of concern for the appellant.

Elias CJ Alright. Well I think we might take a short adjournment and see where we're going on this. We'll take afternoon tea for 15 minutes and resume then. Thank you.

Court adjourns 4.08 pm
Court resumes 4.31 pm

Elias CJ We're satisfied that this is a case where we would not be assisted by receiving the additional information. We can envisage that in a number of cases it will be extremely helpful and necessary for the Crown's case to be properly understood to receive information of this type. If that sort of case arises in the future we'd hope that the material could be provided at an earlier stage so that some sort of orderly assessment of it could be made if the other party doesn't, seeks to be heard on that. And preferably in the Court of Appeal. So that we have the benefit of Court of Appeal consideration of the point. But thank you.

Pike As the Court pleases.

Elias CJ Did you want to be heard further on the section 5 thing.

Pike No, there's nothing more to be said.

Elias CJ Thank you. Do you wish to be heard in reply.

Vidal Yes Your Honour. In terms of the essential issue in this case is the fact that the legislation can be given another meaning. It's a situation where I'm not just saying this, it's something that has come from the House of Lords in the decisions of Lambert and Kebeline and in Sheldrake. And the important factor that this Court must consider is the fact that the legislation involved, especially in Lambert, is the same legislation that we have adopted and used in New Zealand. And that's the Misuse of Drugs Act. In terms of how it's considered, it's considered against a Bill of Rights foundation that is similar and taken from the foundation we have here in New Zealand.

And so it's the situation where I would submit that the cases cannot be distinguished and cannot be dismissed out of hand as being something that is relevant for the UK jurisdiction only and not for New Zealand.

It's a situation where in terms of the meanings that can be given to the word prove, their law Lords have looked at it and determined that yes, you can give it the meaning that equates to raising an evidential onus on an accused.

And that is clearly and reasonably open on the interpretation of the words in regard to that whole point that prove is about testing.

It's not a situation where the Court has to sit and look only at the judicial interpretation that has been given. That's not what section 6 is about. What it's about is natural meanings, ordinary meanings. Meanings that society would understand. It's not a situation where you're fettered by a legal meaning. Because that legal meaning in my submission is not the natural meaning, it's a meaning that's stepped up outside of the natural meaning and has been advanced ahead of it. The natural meaning does involve a meaning of test.

And so it's in that regard that the Court must have due consideration to the authorities that have been placed before it and the fact that under section 6 you can give another meaning. You can give a meaning that is consistent with the rights and that should be the meaning that's preferred.

In regard to that aspect there has been discussion about the Glanville Williams article and I do wish to go back to it and I'm actually going to read that footnote out that's at 265. Because I think it has been misconstrued. In Hunt Lord Atner objected to this proposal on the ground that the discharge of an evidential burden proves nothing. It merely raises an issue. This is the orthodox view and I agree that as a matter of desirable use of language, it is better not to speak of evidential burden of proof. But the question now under consideration is not whether particular use of language is proper or undesirably lacks but the meaning that our legislators, that is to say the framers of our legislation actually intend by the words they use. If where an evidential burden lies on the defendant, the jury acquit. This is because they feel at least reasonable doubt whether the defendant is guilty. It does not appear to be wholly discordant with ordinary language to say that in such a case at least a reasonable doubt as to guilty has been established and if established why not proved. It may not be the best use of words, but if there is a reasonable possibility that is how the words prove and proof have been intended and if this interpretation diminishes the likely miscarriage of justice, we should accept it.

And that's the footnote that the Crown have relied on to say that Glanville Williams accepts evidential burden proves nothing. In my

submission clearly the footnote doesn't say that at all. It says something quite different.

Thank you Your Honours.

Elias CJ Yes Thank you. Thank you Counsel, we'll reserve our decision. Thank you for your assistance.

Court adjourns 4.37 pm