

**IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY**

CIV

UNDER the Judicature Amendment Act 1972 and the
Declaratory Judgments Act 1908

IN THE MATTER of an application for judicial review and an
application for a declaration

BETWEEN **NEW HEALTH NEW ZEALAND INC**, an
incorporated society having its registered office in
Christchurch

Plaintiff

AND **SOUTH TARANAKI DISTRICT COUNCIL** a local
authority under the Local Government Act 2002

Defendant

AMENDED STATEMENT OF CLAIM

Dated 5 November 2013

Solicitor

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The Plaintiff by its solicitor says:

Parties

1. The plaintiff is an incorporated society having its registered office in Christchurch.
2. The plaintiff is a consumer-focused health organisation which aims to advance and protect the best interests and health freedoms of consumers.
3. The defendant is a local authority under the Local Government Act 2002 (LGA 2002). Its district includes Waverley and Patea.

More about the plaintiff

4. The plaintiff's purpose includes:
 - 4.1. To provide representation for the consumers of health products and services in New Zealand.
 - 4.2. To ensure that good quality health information is made available to consumers, at all times.
 - 4.3. To ensure that a consumer has the right to select such health services and products as may be beneficial to the consumer in the consumer's opinion.
 - 4.4. To promote sensible regulation of health products and services that maximise the interests of New Zealand consumers and industry.
5. The plaintiff has members throughout New Zealand including members in Patea and the Taranaki region.

Fluoridation of water supplies

6. Some local authorities in New Zealand add fluoride compounds to their water supplies to a total level of between 0.7 and 1 part per million fluoride.
7. The claimed purpose of fluoridation is to improve public health by reducing the incidence of tooth decay.
8. The plaintiff is opposed to fluoridation of water supplies by local authorities for reasons that include:
 - 8.1. Fluoridation removes a consumer's freedom of choice.
 - 8.2. Fluoride is potentially harmful to health.
 - 8.3. Fluoridation of water supplies is not an effective way of providing fluoride for the purposes of preventing dental caries.
 - 8.4. Fluoridation is in conflict with core principles of modern pharmacology.
 - 8.5. The fluoride added to water supplies is sourced from industrial by-products and contains heavy metal contaminants including arsenic, mercury and lead that are potentially risky to health.

The decision

9. On or about 11 December 2012 the defendant voted 10-3 in favour of introducing fluoride into the Waverley and Patea water supplies (the decision).
10. Prior to making its decision the defendant engaged in a consultation process under the LGA 2002 as to whether it should introduce fluoride into the Patea and Waverley town water supplies.
11. Of the 508 submissions received, 345 (or 68%) did not support the introduction of fluoride.

12. One submitter, the New Zealand Fluoridation Information Service (NZFIS), provided several hundred pages of scientific and academic information and research which showed that:
 - 12.1. there is a potential health risk of fluoride including harms of neurotoxicity, heart disease, increased pre-term birth rates with associated increased infant mortality and morbidity, arthritis, thyroid inhibition, G protein interference and osteosarcoma.
 - 12.2. drinking fluoridated water at between 0.7 and 1 part per million fluoride:
 - 12.2.1.1. does not provide topical benefit by washing over the teeth.
 - 12.2.1.2. does not improve tooth enamel by being swallowed during enamel formation.
 - 12.2.1.3. does not inhibit decay-causing bacteria.
13. The defendant made the decision on the basis that the advice from health bodies supported fluoridation and that it was safe, effective and affordable.

New Zealand Bill of Rights Act 1990

14. Section 11 of the NZBORA provides that everyone has the right to refuse to undergo any medical treatment.
15. Fluoridation is a medical treatment for the purposes of s 11 because it has a therapeutic purpose in that it is intended to treat and prevent dental disease in the community.
16. Fluoridation of water supplies removes the right of an individual to refuse to drink fluoridated water.

17. Section 5 of the NZBORA provides that any limit on a right and freedom may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
18. Section 6 provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning.

Ex Relazione Lewis v Lower Hutt City

19. In 1964 the Privy Council in *Ex Relazione Lewis v Lower Hutt City* [1965] NZLR 116 held that s 240 of the Municipal Corporation Act 1954 contained an implied power to add fluoride to water.

20. Section 240 of the Municipal Corporations Act provided relevantly:

The Council may construct waterworks for supply of pure water for the use of inhabitants of the district...

21. Applying a “fair, large and liberal” construction, the Privy Council decided:

Their Lordships think it is an unnecessarily restrictive construction to hold (as did McGregor J) that, because the supply of water was already pure there is no power to add to its constituents merely to provide medicated pure water, i.e. water to which an addition is made solely for the health of the consumers. The water of Lower Hutt is no doubt pure in its natural state but it is very deficient in one of the natural constituents normally to be found in water in most parts of the world. The addition of fluoride adds no impurity and the water remains not only water but pure water and it becomes a greatly improved and still natural water containing no foreign elements.

22. Section 240 was replaced by an identically worded provision, namely s 379 of the Local Government Act 1974.
23. Section 379 was repealed by the LGA 2002 and no similar provision was enacted.

Defendant's powers under the Local Government Act 2002 and Health Act 1956 do not authorise it to add fluoride to the drinking water supplies for therapeutic purposes

24. The defendant is empowered to provide drinking water under Part 7 of the LGA 2002 and this must conform to the drinking water standards made by the Minister of Health under s 69O of the Health Act 1956.
25. Section 69O(3)(c) of the Health Act provides that drinking water standards must not include any requirement that fluoride be added to drinking water.
26. The defendant has no express or implied power under the LGA 2002, Health Act or any other Act to add fluoride or any other chemical compound to its district's water supplies for therapeutic purposes.

Adding fluoride is a breach of the NZBORA

27. Adding fluoride to the defendant's district's water supplies for the purpose of preventing dental caries constitutes a breach of s 11 of the New Zealand BORA.

Adding fluoride in breach of the NZBORA is not prescribed by law

28. A power to decide to add fluoride for the purpose of preventing dental caries in breach of s 11 of the NZBORA has not been prescribed by law.

First cause of action: Ultra vires

29. The plaintiff repeats paragraphs 1 to 28 and says.
30. The decision is unlawful because:
 - 30.1. the defendant has no statutory power to add fluoride to its district's water supplies for therapeutic purposes; and/or
 - 30.2. Adding fluoride to water supplies constitutes a breach of s 11 of the NZBORA; and/or

- 30.3. A power to breach s 11 of the NZBORA by adding fluoride to the water supply has not been prescribed by law; and/or
- 30.4. Adding fluoride to the water supply in breach of s 11 of the NZBORA is not demonstrably justified in a free and democratic society.

WHEREFORE the plaintiff claims:

- (a) A declaration that the defendant has no power to add fluoride to its water supplies for therapeutic purposes; and/or
- (b) A declaration that the defendant's decision to add fluoride to the water supply constitutes a breach of s 11 of the NZBORA; and/or
- (c) A declaration that the defendant's decision to add fluoride to the water supply in breach of s 11 of the NZBORA is not prescribed by law; and/or
- (d) A declaration that the defendant's decision to add fluoride to the defendant's water supplies in breach of s 11 of the NZBORA is not reasonably justified in a free and democratic society.
- (e) An order quashing the defendant's decision.
- (f) Costs.
- (g) Such other orders as the Court deems fit.

Second and alternative ground of review – failure to take into account relevant considerations

31. The plaintiff repeats the allegations in paragraphs 1 to 28 and says:

32. If the defendant is empowered add fluoride to its water supplies in breach of s 11 of the NZBORA (denied), such a power is discretionary and the defendant when making the decision failed to take into account the following mandatory relevant considerations:
- 32.1. That fluoridation limits the right contained in s 11 of the NZBORA.
 - 32.2. Whether the objective of dental health promotion and protection is sufficiently important to limit that right.
 - 32.3. Whether fluoridation is reasonably necessary to achieve the objective.
 - 32.4. Whether fluoridation is a proportionate response to the objective.
 - 32.5. Whether there are other ways of achieving the objective without limiting the right in s 11.
 - 32.6. The costs and benefits of adding fluoride to the water supply versus other ways of achieving the objective which do not limit the right in s 11.
 - 32.7. That the fluoride added to water supplies is sourced from industrial by-products and contains contaminants that are potentially harmful to health.
 - 32.8. That there is a body of credible scientific evidence that shows that adding fluoride to water supplies to achieve a level of 0.7 to 1 part per million fluoride is potentially harmful to health.
 - 32.9. That there is no credible scientific research to show how drinking fluoridated water at between 0.7 and 1 part per million fluoride can reduce tooth decay.

WHEREFORE the plaintiff claims:

- (a) An order quashing the defendant's decision.
- (b) Costs.
- (c) Such other orders as the Court deems fit.

THIS statement of claim is filed by Jonathan Gillard, solicitor for the plaintiff, whose address for service is at the offices of Wynn Williams Lawyers, Homebase, Unit B 195 Marshland Road, Shirley, Christchurch.

Documents for service on the abovenamed plaintiff may be left at that address for service; or

- a) Posted to the solicitor at P O Box 4341 Christchurch; or
- b) Transmitted to the solicitor by facsimile on 03 353 0247 with a confirmation copy to be sent by post.