IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2013-443-107

UNDER THE	Judicature Amendment Act 1972 and Declaratory Judgements Act 1908
IN THE MATTER	of an application for judicial review and an application for declaration
BETWEEN	**NEW HEALTH NEW ZEALAND INCORPORATED**
	Plaintiff
AND	**SOUTH TARANAKI DISTRICT COUNCIL**
	Defendant

SUBMISSIONS ON BEHALF OF SOUTH TARANAKI DISTRICT COUNCIL

20 November 2013

Judicial Officer: Rodney Hansen J

Next Event Date: Hearing 25 November 2013

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MAY IT PLEASE THE COURT

Introduction

1. These proceedings concern an application for judicial review brought by an incorporated society, New Health New Zealand Incorporated (**New Health**) challenging a decision of the South Taranaki District Council (**the Council**) to add fluoride to the public water supplies of Patea and Waverley – two towns within the Council's district. The decision was made following a consultation and hearing process conducted by the Council.

Summary – Grounds for Review

2. There are two main grounds for review – ultra vires/unlawfulness and failure to take relevant circumstances into account.

3. The first ground for review raises a matter of general public importance given that many local authorities in New Zealand currently fluoridate water supplies including some water suppliers elsewhere in the Council's district.

4. The Council's response to the ultra vires issue in the first ground of review (paragraph 30.1 of the amended statement of claim) is that the Council has, expressly and additionally by necessary implication, the statutory power to fluoridate water, even if the New Zealand Bill of Rights Act (**NZBORA**) is relevant to the interpretation of the legislation conferring that power.

5. In response to the unlawfulness allegations in paragraph 30.2 to 30.4 of the amended statement of claim, it will be submitted that:

(a) fluoridation of water supplies does not breach section 11 of NZBORA; and

(b) alternatively, the power to breach section 11 has been prescribed by law and the addition of fluoride is demonstrably justified in a free and democratic society.

6. The Council further says that even if the Court finds in favour of the plaintiff in relation to paragraphs 30.2 to 30.4, the relevant statutory provisions cannot be interpreted as excluding the power to fluoridate water having regard to section 4 of the NZBORA.

7. In relation to the second cause of action, the Council's position is that the matters specified in paragraph 32 of the amended statement of claim were not mandatory relevant considerations when the Council exercised its power to fluoridate the water supplies, but even if they were, the Council did have regard to such matters.

Background

8. Decisions about fluoridation of water supplies are taken at local level and follow an appropriate democratic decision making process. The Council's position is that Parliament has given local authorities a discretionary power as to whether or not to fluoridate their water supplies, thereby passing the decisions to individual communities, which are made on its behalf by the elected representatives of a territorial authority.

9. In this case, the Council made its decision to fluoridate the two water supplies after considering the views of its community, advice from health authorities, other information provided to it, and the views of individuals and groups who support or oppose fluoridation. It is appropriate that the decision in question, which involved considering scientific evidence, medical opinion, bioethics, the interests of the community, and other matters, was made by the democratically elected body having jurisdiction in the area.

10. These proceedings cannot be used to debate the merits of fluoridation. This is beyond the legitimate scope of judicial review as we discuss in more detail below.

11. The Council's affidavit evidence includes contextual information about fluoridation and oral health in Patea and Waverley. The plaintiff has also filed a number of affidavits, including substantial affidavits in reply.

12. There are, as will be apparent to the Court, two strongly contrasting views about fluoridation of water supplies. There is a view held by reputable public health authorities and scientific bodies that fluoridation is beneficial and safe. That view is held by organisations such as the Ministry of Health, the New Zealand Dental Association, the World Health Organisation, the New Zealand Maori Dental Association, the US Academy of Science, the British Medical Association, and the Royal Society of New Zealand, amongst others.

13. There is also a proportion of the community and a number of organisations who actively oppose fluoridation for a variety of reasons.

14. Part of the Ministry of Health's role is to evaluate and review scientific studies on fluoridation, as well as commissioning its own studies. It then advises local authorities and communities in accordance with its function to improve, promote, and protect public health, under section 3A of the Health Act 1956. As is apparent from the Council's affidavit evidence, at the present time, the Ministry supports fluoridation and provides financial assistance packages to some local authorities. The Council was entitled to place reliance on the Ministry's guidance in relation to fluoridation.

Council decision making process

15. The Council made its decision after a thorough consultation process. As part of that process, it received and considered submissions and information. It considered the views of: the local community; the Ministry of Health; the Taranaki District Health Board and other health authorities; and groups and individuals that oppose fluoridation. The Council's decision making processes is set out in its Information Report dated 20 August 2012,[1] but is summarised below.

16. The Council agreed to consult the Patea and Waverley communities about the possibility of commencing fluoridation for their water supplies in response to public submissions as part of the 2011/12 Annual Plan process.[2]

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1 Common Bundle of Documents (CBD) volume 8 pages 3217-3220.
2 CBD volume 8 page 3217.

17. The Council wrote to the residents of Patea and Waverley on 26 September 2012 and informed them that the Council was going to consider fluoridating their water supplies.[3] The letter set out that the Council's consultation programme, and attached a "Frequently Asked Questions" document, that provided factual information about fluoridation. The letter also encouraged residents to attend the two information evenings that the Council held on 8 and 9 October 2012 in Waverley and Patea respectively.

18. At the information evenings, two primary presentations were provided: one in support of fluoridation, and one against fluoridation. The presentations were followed by a question and answer session.[4]

19. Written submissions were accepted by the Council between 8 October and 9 November 2012. The Council received 508 written submissions, all of which have been reproduced in the common bundle of documents. The submissions were from:

(a) members of the community;

(b) a broad range of health authorities and health professionals including:

(i) the Ministry of Health;

(ii) Taranaki District Health Board;

(iii) New Zealand Maori Dental Association;

(iv) Local dentists and doctors;

(v) The Chief Advisor Maori Health;

(vi) Tui Ora Limited;

(vii) Children's Commissioner and Paediatrician;

(viii) National Hauora Coalition;

(ix) Local iwi; and

3 CBD volume 8 pages 3236-3240.
4 CBD volume 8 page 3236.

(c) organisations who oppose fluoridation, including:

(i) The New Zealand Fluoridation Information Service (as distinct from the National Fluoridation Information Service described in Dr Haisman-Welsh's affidavit);

(ii) Fluoride Free Hastings; and

(iii) Fluoride Action Network New Zealand.

20. The submissions and accompanying material covered fluoridation in considerable detail. The submissions covered the science and merits of fluoridation, ethical issues, legal issues (including NZBORA), and further topics. Some of the submissions, particularly those by the New Zealand Fluoridation Information Service and Taranaki District Health Board attached a number of primary reference materials in their entirety.

21. Additionally, the Council held a hearing on 26 November 2012 where submitters could present their submissions to the Council. The councillors had pre-read the written submissions before the hearing.[5] The hearing began with two 20 minute presentations, again one in support of fluoridation and one in opposition. Every submitter who wished to be heard was then given an opportunity to speak.[6] Forty two submitters spoke to their submissions.[7]

22. After the hearing, Council officers prepared a report which analysed the submissions. The report summarised the key issues arising out of the submissions and made a neutral recommendation.[8]

23. On 10 December 2012, the Council held a Special Meeting at which the councillors debated the fluoridation issue and voted 10-3 in favour of fluoridating the two water supplies.[9] The Council considered all of the submissions, both written and oral, before making it decision.[10]

5 CBD volume 8 page 3241.
6 Minutes from the hearing are at CDB volume 8 pages 3241-3259.
7 CBD volume 8 page 3261.
8 CBD volume 8 pages 3260-3264.
9 CBD volume 8 pages 3265-3269.
10 CBD volume 8 page 3241.

Affidavits

24. The Council has filed affidavits from:

(a) Professor John McMillan, Professor of Biomedical Ethics at the University of Otago. Professor McMillan discusses whether fluoridation is "medical treatment" and concludes that it is not. Professor McMillan's view is that medical treatment must involve treatment provided by health care professionals to a patient. Professor McMillan states that the consumption of fluoridated water can be refused and to do so amounts only to an inconvenience. Professor McMillan also provides a discussion about the ethics of fluoridation and section 5 of NZBORA.[11]

(b) Dr Robin Whyman, Clinical Director Oral Health at Hawkes Bay District Health Board and specialist in public health dentistry. Dr Whyman describes how fluoridation works, its benefits and its suitability as a policy response to poor dental health. He indicates that the most reliable scientific studies indicate that fluoridation to the levels permitted in New Zealand is safe and effective.

(c) Dr Gregory Simmons, public health physician and currently the Chief Medical Advisor to the TDHB. Dr Simmons provides evidence about the inequalities in oral health faced by Maori and lower socio-economic groups. Dr Simmons describes the oral health issues in Patea and Waverley and summaries the potential benefits of fluoridation in the two towns.

(d) Ms Sandra Pryor, dental surgeon based in Patea and Hawera. Ms Pryor records her observations of the poor state of oral health in Patea through her 18 years of practise in the area. She briefly describes two informal studies she carried out.

(e) Dr Robyn Haisman-Welsh, Chief Dental Officer of the Ministry of Health. Dr Haisman-Welsh describes the Ministry's position

11 The plaintiff's reply affidavits express a different view.

on fluoridation and its role in local authorities' decisions on fluoridation. Dr Haisman-Welsh records the Ministry's role as advisor on health issues, how it reached its position on fluoridation, and how it monitors and researches issues about fluoridation, including the role of the National Fluoride Information Service (**NFIS**).

(f) Mr Howard Wilkinson, Engineering Assets and Planning Manager at the Council. Mr Wilkinson describes water treatment processes, particularly those used by the Council. He describes how fluoride would be added to the water and options people have to obtain non-fluoridated water in Patea and Waverley.

Principles of judicial review

Statutory power of decision

25. It is common ground that the Council's decision to add fluoride to the water supplies for Patea and Waverly is an exercise of a statutory power of decision that falls within the ambit of the Judicature Amendment Act 1972.

Nature of judicial review

26. The Council adopts the general approach to judicial review as outlined in the Court of Appeal's decision in *Pring v Wanganui District Council*:[12]

> It is well established that in judicial review [proceedings] the Court does not substitute its own factual conclusions for that of the consent authority. It merely determines, as a matter of law, whether the proper procedures were followed, whether all relevant, and no irrelevant considerations were taken into account, and whether the decision was one which, upon the basis of the material available to it, a reasonable decision-maker could have made.

12 *Pring v Wanganui District Council* [1999] NZRMA 519 (CA) at 523.

27. It is apparent from the *Pring* case that judicial review is process orientated and not concerned with the merits of the case except to the extent that the decision is reasonable or not. See also *Northcote Mainstreet Inc v North Shore City Council*.[13]

28. Similar observations to those in the *Pring* case were made by Panckhurst J in *Just One Life Ltd v Queenstown Lakes District Council*. His Honour stated:[14]

> I am uncomfortable about the nature and extent of the affidavit evidence in this case. In the first place it is conflicting, yet there has not been cross-examination upon it (which would not have been appropriate in any event). **A more fundamental issue is that it is not my function to re-examine the merits of the various decisions reached. Rather I must determine whether such decisions involve reviewable error.** That is whether the decision-making process itself involved an erroneous approach in law, was deficient on account of matters not considered or improperly considered, or produced an outcome which was plainly unreasonable. Errors of this ilk aside, the weighting to be given to competing considerations and the merit-based decisions reached are not justiciable in this forum. (emphasis added)

29. He went on to say:[15]

> Although that assessment is not accepted by Mr May, nor by some of the experts who have sworn affidavits in this proceeding, to my mind it represents a view which was properly open to those involved in the decision process. It follows, I think, that the intervention of the Court is sought in relation to the merits, not for the correction of reviewable error. It would be wrong to intervene in such circumstances.

30. These aspects of His Honour's decision were not challenged on appeal.

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13 *Northcote Mainstreet Inc v North Shore City Council* (2004) 10 ELRNZ 146 (HC) at [67].
14 *Just One Life Ltd v Queenstown Lakes District Council* [2003] 2 NZLR 411 (HC) at [79].
15 *Just One Life Ltd v Queenstown Lakes District Council* [2003] 2 NZLR 411 (HC) at [85].

Standard of review

31. Courts are generally slow to intervene in decisions made by elected representatives that involve questions of public policy. The learned authors of *De Smith's Judicial Review* state as follows:[16]

> The principle of the separation of powers confers matters of social and economic policy upon the legislature and the executive, rather than the judiciary. Courts should, therefore, avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy. It is not for judges to weigh utilitarian calculations of social, economic or political preference.

32. In *Wellington City Council v Woolworths New Zealand Ltd (No 2)* the Court of Appeal stated as follows:[17]

> Finally, there are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene.

33. It is submitted that the Court should equally be slow to intervene in the Council's decision to add fluoride to the water supply. There is a significant degree of policy content in a decision to fluoridate, as it involves the weighing of competing and wide ranging arguments both for and against fluoridation and making a decision one way or the other. Parliament has left the decision to fluoridate to the Council as a democratically elected local body. It is this body that is best placed to weigh the competing considerations. Therefore, it is respectfully submitted that the Court should give appropriate deference to the Council's decision.

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16 *De Smith's Judicial Review* (7th ed, Sweet and Maxwell, London, 2013) at 19-20.
17 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546.

34. It is also particularly important in the present case to distinguish between permissive and mandatory relevant considerations when considering the second cause of action.

Permissive and mandatory considerations

35. In their discussion of judicial review based on an allegation of failure to take into account relevant considerations, the learned authors of *Administrative Law* (Sir William Wade and Christopher Forsyth) state:[18]

> Under many statutes the discretion conferred is extensive, and it is no concern of the court to restrict it artificially by limiting the considerations that are relevant. A minister may be entitled to take account of every factor that may affect the public interest, but it does not follow that he is obliged to do so. In another New Zealand case Cooke J pointed out 'the difference between obligatory considerations (i.e. those which the Act expressly or impliedly requires the Minister to take into account) and permissible considerations (i.e. those which can properly be taken into account but do not have to be).

36. Cooke J (as he then was) noted in *CREEDNZ Inc v Governor General*:[19]

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground invoked. **It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision**.

37. The point for this case is that the relevant provisions in the Local Government Act 2002 (**LGA 02**), which are discussed in detail below, contain the only express or implied mandatory considerations. They do not refer expressly or by necessary implication to the matters alleged to be mandatory relevant considerations in the amended statement of

18 Sir William Wade and Christopher Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 321-322.
19 *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA) at 183.

claim. As Cooke J puts it above, it is not enough that these considerations *could* have been taken into account.

38. The learned author of *Constitutional and Administrative Law in New Zealand*, Philip Joseph, states:[20]

> ...the weight to be given to **mandatory** considerations is a matter for the decision-maker. Arguments of wrong weight address "value judgments rather than questions of law" and are prone to intrude on the specialist agency's domain. (emphasis added)

39. It is clear that when the weight given to a particular matter forms the basis of a challenge to a decision on the grounds of *unreasonableness*, the threshold for review has only been reached when the weight given was beyond the bounds of reason. Thus, in *Waitakere City Council v Lovelock*,[21] Thomas J noted Cooke P's conclusion in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* and stated:[22]

> The relative weight given to each consideration was therefore for the Minister to decide subject only to the qualification that the decision be "within the limits of reason".

40. Similarly, in *Constitutional and Administrative Law in New Zealand* Philip Joseph notes that:[23]

> The ground of "wrong weight" may masquerade under several guises. If the weighting of relevant factors is not "within the bounds of reason", the decision may be struck down as unreasonable under the Wednesbury principle.

41. We return to these principles in our discussion of the second cause of action below.

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20 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 897.
21 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 401.
22 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.
23 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 898.

FIRST CAUSE OF ACTION

Introduction

42. These submissions will address this cause of action by first examining the Council's power to fluoridate, and will then address whether that power to fluoridate water supplies is affected by the NZBORA.

Council's power to add fluoride to drinking water

Legislative context - introduction

43. The Council's position is that the power to fluoridate the Patea and Hawera water supplies is derived from both the LGA 02 and the Health Act 1956 (**Health Act**). The power to fluoridate water supplies is within the Council's general power of competence under the LGA 02. It is also consistent with its obligation to promote public health under section 23 of the Health Act, and is implicitly recognised by the provisions of Part 2A of the latter Act.

44. The LGA 02 involved a major reform of local government legislation, principally in establishing a purpose of local government (being essentially to enable local democracy and to promote sustainable community wellbeing), coupled with a conferral of a power of general competence. The conferral of this wide ranging power was however balanced with new accountability requirements and in particular new planning and decision making provisions in Part 6, Subpart 1 of the LGA 02.

45. The previous local government legislation (the Local Government Act 1974 (**LGA 74**) and the Municipal Corporations Act 1954) were highly prescriptive and contained detailed powers and obligations for many of local authorities' functions, including water supply.[24] The changes made by the LGA 02 are described in the Explanatory Note to the Local Government Bill 2001 as a:[25]

> shift from a detailed and prescriptive style of statute (that focuses councils on compliance with detailed legislative rules) to a more

24 Local Government Act 1974, Part 23.
25 Local Government Bill 2001 (191-1) (Explanatory Note).

broadly empowering legislative framework that focuses councils on meeting the needs of their communities.

46. This statement is consistent with the purpose of the Act which is set out in section 3 and is as follows:

> **3 Purpose**
>
> The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—
>
> (a) states the purpose of local government; and
>
> (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and
>
> (c) promotes the accountability of local authorities to their communities; and
>
> (d) provides for local authorities to play a broad role in meeting the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions.

47. To enable local government to perform its role (as set out in section 11), a general power of competence is conferred by section 12(2).

48. The exercise of the general power of competence is necessarily constrained by the purpose of local government set out in section 10, its role in section 11, and the rights and powers conferred on a local authority by any other enactment.[26] The provisions which are of immediate relevance to the power of the general competence are sections 10, 11, 11A, 12(1), 12(2), and 12(3), and these are as follows:

> **10 Purpose of local government**
>
> (1) The purpose of local government is—
>
> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
>
> (b) to meet the current and future needs of communities for good-quality local infrastructure,

26 *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC) at [19].

local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

(2) In this Act, **good-quality**, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are—

(a) efficient; and

(b) effective; and

(c) appropriate to present and anticipated future circumstances.

11 Role of local authority

The role of a local authority is to—

(a) give effect, in relation to its district or region, to the purpose of local government stated in section 10; and

(b) perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment.

11A Core services to be considered in performing role

In performing its role, a local authority must have particular regard to the contribution that the following core services make to its communities:

(a) network infrastructure:

(b) public transport services:

(c) solid waste collection and disposal:

(d) the avoidance or mitigation of natural hazards:

(e) libraries, museums, reserves, recreational facilities, and other community infrastructure.

12 Status and powers

(1) A local authority is a body corporate with perpetual succession.

(2) For the purposes of performing its role, a local authority has—

(a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and

(b) for the purposes of paragraph (a), full rights, powers, and privileges.

(3) Subsection (2) is subject to this Act, any other enactment, and the general law.

(4) A territorial authority must exercise its powers under this section wholly or principally for the benefit of its district.

(5) A regional council must exercise its powers under this section wholly or principally for the benefit of all or a significant part of its region, and not for the benefit of a single district.

(6) Subsections (4) and (5) do not—

(a) prevent 2 or more local authorities engaging in a joint undertaking, a joint activity, or a co-operative activity; or

(b) prevent a transfer of responsibility from one local authority to another in accordance with this Act; or

(c) restrict the activities of a council-controlled organisation; or

(d) prevent a local authority from making a donation (whether of money, resources, or otherwise) to another local authority or to a person or organisation outside its district or region or outside New Zealand—

(i) if the local authority considers, on reasonable grounds, that the donation will benefit its district or region, or the communities within its district or region; or

(ii) if the local authority considers, on reasonable grounds, that a benefit will be conferred on the local government sector as a whole; or

(iii) for emergency relief; or

(e) prevent a local authority from making a donation (whether of money, resources, or otherwise) to a local government body outside New Zealand to

enable it to share its experience and expertise with that body.

49. Local authorities must also act in accordance with a set of principles in section 14. Of particular relevance in this current situation are sections 14(1)(b), (c), (d) and (h). These are set out below:

> **14 Principles relating to local authorities**
>
> (1) In performing its role, a local authority must act in accordance with the following principles:
>
> ...
>
> (b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and
>
> (c) when making a decision, a local authority should take account of—
>
> (i) the diversity of the community, and the community's interests, within its district or region; and
>
> (ii) the interests of future as well as current communities; and
>
> (iii) the likely impact of any decision on the interests referred to in subparagraphs (i) and (ii):
>
> (d) a local authority should provide opportunities for Maori to contribute to its decision-making processes:
>
> ...
>
> (e) in taking a sustainable development approach, a local authority should take into account—
>
> (i) the social, economic, and cultural interests of people and communities; and
>
> (ii) the need to maintain and enhance the quality of the environment; and

(iii) the reasonably foreseeable needs of future generations.

50. Many of the specific powers in the LGA 74 were not carried over to the LGA 02 because they were subsumed in the general power of competence. For example, the power contained in section 389 of the LGA 74 to construct or purchase waterworks was not carried over to the LGA 02, but is now part of the general power of competence.

51. Also of note is that Part 7, Subpart 2 of the LGA 02 contains a number of specific obligations and restrictions to the assessment and delivery of water services, but those provisions do not refer to or prescribe what might be added to a water supply as defined in section 124 of the LGA 02. These provisions are considered in more detail below.

52. The Council's general submission advanced below is that the general power of competence in relation to supply of fluoridated water as conferred by the LGA 02 is consistent with and reinforced by the powers and obligations set out in the Health Act.

53. Section 23 places a duty on local authorities to improve, promote, and protect public health within its district.

54. Reference also needs to be made to Part 2A of the Health Act, which was inserted by the Health (Drinking Water) Amendment Act 2007 and which is subject to detailed submissions by the Plaintiff. This Act made significant changes to the law for drinking water suppliers. Part 2A imposed a range of duties on drinking-water suppliers, including requirements to:

(a) create and implement a public health risk management plan (section 69Z); and

(b) to take all practicable steps to comply with the drinking-water standards, which, at the time, were only being complied with on a voluntary basis (section 69V).

55. It will be submitted that Part 2A implicitly recognises the Council's power to fluoridate for the reasons discussed below.

Council's power to fluoridate

56. The amended statement of claim alleges that a territorial local authority does not have an express or implied power to fluoridate water.

57. The amended statement of claim notes that the Privy Council in *Ex Relatione Lewis v Lower Hutt City* (***Lewis* case**) held that section 240 of the Municipal Corporation Act 1954 contained an implied power to add fluoride to water.[27] Section 240(1) of the Municipal Corporation Act 1954 states (emphasis added):

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

58. The interpretation of section 240 was informed in the *Lewis* case by section 288 of the Municipal Corporations Act 1954 and section 23 of the Health Act 1956, which respectively stated at the relevant time:[28]

> **288 Powers of Council with respect to preservation of public health**
>
> The Council may do all things necessary from time to time for the preservation of the public health and convenience, and for carrying into effect the provisions of the Health Act 1956 so far as they apply to the district...

> **23 General powers and duties of local authorities in respect of public health**
>
> Subject to the provisions of this Act, it shall be the duty of every local authority to promote and conserve the public health within its district...

59. The question before the Privy Council in the *Lewis* case was "*whether the power to construct waterworks for the supply of "pure water" entitles*

27 *Ex Relatione Lewis v Lower Hutt City* [1965] NZLR 116 (PC).
28 Section 23 of the Health Act 1956 was amended, as from 22 January 1996, by section 3(3) Health and Disability Services Amendment Act 1995 by substituting "improve, promote, and protect" for "promote and conserve the".

the corporation to [add fluoride to drinking water]".[29] The Privy Council's concise answer is set out below:[30]

> 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 found in water in most parts of the world. The addition of fluoride adds no impurity and the water remains not only water but pure water and it becomes greatly improved and still natural water containing no foreign elements. **Their Lordships can feel no doubt that power to do this is necessarily implicit in the terms of s. 240 and that the respondent corporation is thereby empowered to make this addition** and they agree with the observations of North P. and McCarthy J. already quoted. **They think too that it is material to note that, while their Lordships do not rely on s. 288 nevertheless that section makes it clear that the respondent corporation is the health authority for the area and s. 240 must be construed in the light of that fact; that is an additional reason for giving a liberal construction to the section.**

60. It will be submitted that in the same way as section 288 of the Municipal Corporations Act 1954 was relevant to the interpretation of section 240, section 23 of the Health Act is relevant to the interpretation of the Council's powers relating to fluoridation of water supplies.

61. Section 240 of Municipal Corporation Act 1954 was superseded by section 379 of the LGA 74. Paragraph 22 of the amended statement of claim incorrectly pleads that the two provisions are identically worded. This is not the case but the two provisions were sufficiently similar to infer that the power to fluoridate must have been carried over into the LGA 1974. This is because both sections refer to the "*supply of **pure water***". It appears that the plaintiff accepts this position.

62. The provisions of the LGA 02 are necessarily more permissive than those in the LGA 74 and Municipal Corporation Act 1954.

63. The plaintiff submits however that there is now no power to fluoridate water supplies. It is submitted to the contrary that if Parliament had

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29 *Ex Relatione Lewis v Lower Hutt City* [1965] NZLR 116 (PC) at 122.
30 *Ex Relatione Lewis v Lower Hutt City* [1965] NZLR 116 (PC) at 124.

wanted to remove the Council's power to fluoridate in enacting the LGA 02, it would have expressly said so in that Act, given:

- the existence of settled binding authority from the Privy Council that an implied power to add fluoride exists within the power to supply "pure water"; and

- the importance of the issue for local communities and their inhabitants.

Local Government Act 2002

64. As already already mentioned, Subpart 2 of Part 7 of the LGA 02 contains obligations and restrictions in relation to the provision of water services. Under section 130 the Council "*must continue to provide water services and maintain its capacity to meet its obligations under this subpart*".

65. "Water services" are defined in section 124 as "*water supply and wastewater services*".

66. "Water supply" is defined in the same section as "*the provision of **drinking water** to communities by network reticulation to the point of supply of each dwellinghouse and commercial premise to which drinking water is supplied*".

67. "Point of supply" is defined in section 69G of the Health Act as:

> (a) in the case of drinking water supplied through a networked reticulated system to any property, whichever of the following is applicable:
>
> (i) the point of supply as defined in any bylaw, supply agreement, or local Act that applies in respect of that system:
>
> (ii) if subparagraph (i) does not apply, the point immediately on the property owner's side of the toby:

(iii) if neither subparagraph (i) nor (ii) applies and there is no toby, the point at which that system joins the pipework that forms part of—

(A) the water supply utility system from any building on that property; or

(B) any other pipework on that property (whether or not used for the supply of drinking water):

(iv) if neither subparagraph (i) nor (ii) applies, and there is no point referred to in subparagraph (iii), the last point at which the supply of water can be interrupted or stopped before it reaches any tap on the property:

(b) in the case of drinking water supplied by a water carrier, the end of the hose or fitting used by that carrier to supply drinking water from that carrier's means of transportation:

(c) in the case of drinking water placed into a container, the point at which the water is placed into that container

68. The difference between the LGA 02 and LGA 74 is that the LGA 02 refers to "drinking water" as opposed to "pure water". "Drinking water" is not defined in the LGA 02.

69. However, the use of the term "drinking water" as opposed to "pure water" cannot impact on the conclusion in the *Lewis* case that territorial local authorities have an implied power to fluoridate. If there is a difference, the term "drinking water" is a more "permissive" standard than "pure water" on a literal reading.

70. The change, it is submitted, is largely semantic but the term "drinking water" is a more accurate term than "pure water" because the water which is supplied for consumption would never in a literal sense be "pure".[31] This change does not indicate an intention of Parliament to remove the Council's power to fluoridate water supplies.

71. It is also notable that the LGA 74 and Municipal Corporations Act 1956 did not include an express reference to fluoridation when those two acts

31 The Privy Council recognised that "pure water" would not and could not represent chemically pure water in *Ex Relatione Lewis v Lower Hutt City* [1965] NZLR 116 (PC) at 117.

were highly prescriptive, yet the Privy Council held that there was an implied power to fluoridate. There is no reason to reach a different conclusion under the LGA 02 in the absence of any express direction from the legislature.

Health Act 1956

72. As already mentioned, section 23 places a duty on local authorities. It states as follows:

> **23 General powers and duties of local authorities in respect of public health**
>
> Subject to the provisions of this Act, it shall be the duty of every local authority to improve, promote, and protect public health within its district, and for that purpose every local authority is hereby empowered and directed—
>
> (a) To appoint all such Environmental Health Officers and other officers and servants as in its opinion are necessary for the proper discharge of its duties under this Act:
>
> (b) To cause inspection of its district to be regularly made for the purpose of ascertaining if any nuisances, or any conditions likely to be injurious to health or offensive, exist in the district:
>
> (c) If satisfied that any nuisance, or any condition likely to be injurious to health or offensive, exists in the district, to cause all proper steps to be taken to secure the abatement of the nuisance or the removal of the condition:
>
> (d) Subject to the direction... of the Director-General, to enforce within its district the provisions of all regulations under this Act for the time being in force in that district:
>
> (e) To make bylaws under and for the purposes of this Act or any other Act authorising the making of bylaws for the protection of public health:
>
> (f) To furnish from time to time to the Medical Officer of Health such reports as to diseases, drinking water, and sanitary conditions within its district as the Director-General or the Medical Officer of Health may require.

73. It is submitted, contrary to the plaintiff's submissions at paragraph 104, that these words do impose a general duty to improve, promote, and protect public health. The words which follow in that section ("and for that purpose") are empowering and directory but cannot be applied to read down the opening words of the section.

74. With regard to adjusting the mineral composition of water or adding other substances like chlorine, this is consistent with the section 23 duty. Reference may be made to the affidavits of Dr Whyman, Dr Haisman-Welsh, Dr Simmons, Dr Jessamine, and Ms Pryor.[32]

75. Further, it is submitted that Part 2A of the Health Act, which was introduced in 2007, implicitly recognises the power to fluoridate water.

76. "Drinking water" is defined in section 69G as:

> **drinking water—**
>
> (a) means—
>
> (i) water that is **potable**; or
>
> (ii) in the case of water available for supply, water that is—
>
> (A) held out by its supplier as being suitable for drinking and other forms of domestic and food preparation use, whether in New Zealand or overseas; or
>
> (B) supplied to people known by its supplier to have no reasonably available and affordable source of water suitable for drinking and other forms of domestic and food preparation use other than the supplier and to be likely to use some of it for drinking and other forms of domestic and food preparation use; but
>
> (b) while standards applying to bottled water are in force under the Food Act 1981, does not include—

32 Dr Whyman, paragraphs 17-27, 36, 43-90; Dr Haisman-Welsh paragraphs 4-9, 22-24; Dr Simmons, paragraphs 6-25; Ms Pryor, paragraphs 14-24, 57-64.

(i) any bottled water that is covered by those standards; or

(ii) any bottled water that is exported; and

(c) to avoid doubt, does not include any water used by animals or for irrigation purposes that does not enter a dwellinghouse or other building in which water is drunk by people or in which other domestic and food preparation use occurs.

77. "Potable" is also defined by section 69G:

> **potable**, in relation to drinking water, means water that does not contain or exhibit any determinands to any extent that exceeds the maximum acceptable values (other than aesthetic guideline values) specified in the drinking-water standards

78. The definition of determinand in section 69G is:

> **determinand** means –
>
> (a) a substance or organism in water in circumstances where the extent to which any water contains that substance or organism may be determined or estimated reasonably accurately; or
>
> (b) a characteristic or possible characteristic of water in circumstances where the extent to which any water exhibits that characteristic may be determined or estimated reasonably accurately.

79. Fluoride is a determinand (being a measurable substance in water) which has a maximum acceptable value (**MAV**) of 1.5ppm in the drinking-water standards.[33] This value is significantly higher than the naturally occurring fluoride level in New Zealand water supplies, which Dr Whyman states is usually between 0.1 and 0.3ppm.[34] It is submitted

33 Drinking-water Standards for New Zealand 2005 (revised 2008), at table 2.2; Drinking-water Standards for New Zealand 2000, table 14.2. (Under section 14(3) of the Health (Drinking Water) Amendment Act 2007, drinking-water suppliers can elect to comply with the 2000 standards until 31 December 2014.)

34 Affidavit of Dr Whyman, paragraph 18.

that the reason for setting the MAV at 1.5ppm can only be explained by enabling local authorities to increase the fluoride levels in drinking water.

80. Additionally, the Drinking-water Standard for New Zealand 2005 includes the following comment in relation to fluoride:

> For oral health reasons, the Ministry of Health recommends that the fluoride content for drinking-water in New Zealand be in the range of 0.7–1.0 mg/L; this is *not* a MAV.

81. Therefore, water that has added fluoride where the total fluoride level is less than the MAV must fall within the definitions of "potable" and "drinking water".

82. The drinking water standards set out limits (including MAVs) and criteria relating to sampling and testing that drinking water suppliers (as defined by the Act) have a duty to take all practicable steps to meet under section 69V. The drinking water standards and Health Act do not prescribe how drinking water suppliers are free to meet the standards. Instead, they have a discretion as to how they meet the drinking water standards.

83. The steps taken in the water treatment process can include adding various substances to the water, including chemical coagulants to aid removal or turbidity and organic compounds and chlorine as a disinfectant.[35] Drinking water suppliers are free to adjust the mineral composition of drinking water, including the fluoride level, so long as the water supplied meets the limits in the drinking water standards.

84. The power to add fluoride to water is however reinforced by section 69O(3)(c), which implicitly recognises that power. Section 69O is an empowering provision that permits the Minister of Health to issue or adopt drinking-water standards and sets out what the Minister may include in the drinking-water standards. Section 69O(3)(c) states:

> (3) Standards issued or adopted under this section-
>
> ...

35 Affidavit of Howard Wilkinson, paragraph 9.

(c) must not include any requirement that fluoride be added to drinking water.

85. It is submitted that section 69O(3)(c) would be redundant if the Council did not have a power to fluoridate its drinking-water in the first instance. The intention of section 69O(3)(c) is recorded in the Health Committee's commentary to the Health (Drinking Water) Amendment Bill:[36]

> **Issue, adoption, amendment and revocation of drinking-water standards—new clause 69O**
>
> New clause 69O sets out the process by which the Minister may issue, adopt, amend, or revoke drinking-water standards. Although new clause 69O or the standards were never intended to enable the mandatory fluoridation of water, in theory it is possible that they might be applied this way. To prevent such a possibility we recommend inserting a new subclause (3)(c).

86. The effect of section 69O(3)(c) is that discretionary decisions about fluoridation of drinking water are left with local authorities.

Summary - the Council's power to fluoridate

87. It is submitted that Parliament's intended meaning in relation to the Council's power to fluoridate is clear. Parliament has provided relevant local authorities with a discretion to add fluoride to drinking-water, provided the total level of fluoride is below the MAV in the drinking-water standards.

Response to plaintiff's submissions – paragraphs 38 to 61

88. The following section responds to paragraphs 38 to 61 of the plaintiff's submissions. The plaintiff submits that water fluoridation is ultra vires the Council because:[37]

(a) adding a compound to the water supply for therapeutic purposes is akin to a regulatory function and properly requires express authorisation; and

36 Health (Drinking Water) Amendment Bill 2006 (52-2) (Select Committee Report), at 5.
37 Plaintiff's submissions, paragraph 38.

(b) the power of "full capacity" or general competence is limited to what an individual or corporate can lawfully do and an individual or corporate cannot lawfully add a compound to the water supply for a therapeutic purpose.

89. In addition, the plaintiff argues that water is a 'food' for the purposes of section 94 of the Medicines Act 1981.[38]

90. Each of these points is dealt with in turn below.

Fluoridation is not a regulatory function

91. The plaintiff submits that "*water fluoridation is analogous to an exercise of regulatory power which cannot be exercised by an individual*".[39] It is submitted to the contrary that the supply of water and water fluoridation is not an exercise of a regulatory power.

92. The *Concise Oxford English Dictionary* defines 'regulate' as "control or supervise by means of rules and regulations" and 'regulatory' is listed as a derivative of 'regulate'.[40]

93. It is also of note that the Legislative and Regulatory Reform Act 2006 (UK) defines 'regulatory function' as follows:

> (2) In this Act "regulatory function" means—
>
> (a) a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or
>
> (b) a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or

38 Plaintiff's submissions, paragraph 53.
39 Plaintiff submissions, paragraph 47.
40 *Concise Oxford English Dictionary* (11th ed (revised), Oxford University Press, Oxford, 2008) at 1212.

guidance which under or by virtue of any enactment relate to any activity.

94. In *Strachan v Marriott*, the Court of Appeal considered section 17(2)(g) of the Law Practitioners Act 1982, which empowered the Law Society to make rules "*regulating the formation... of solicitors' nominee companies...*". Blanchard J stated that "[t]o regulate is defined in *The Oxford English Dictionary as "to control, govern or direct by rule or regulation*"".[41]

95. It is submitted that based on these factors, the supply of water (including the addition of fluoride to water) is not a regulatory function, as neither of these activities involves controlling, supervising or restricting by way of rules or regulations.

96. This conclusion is reinforced by references to 'regulatory' in the LGA 02. Section 143 of the LGA 02 is entitled "Outline of Part" and relates to Part 8, which relates to "*regulatory, enforcement and coercive powers of local authorities*". Section 143 states (as far as is relevant, emphasis added):

> This Part provides the powers necessary for local authorities—
>
> ...
>
> (a) in relation to enforcement,—
>
> (i) **to enforce all regulatory measures** made under this Act, including bylaws and infringement offences; and
>
> (ii) to undertake, or contract out the administration of, those enforcement powers:

97. The use of the words "*enforce all regulatory measures*" indicates that regulatory measures are something that can be enforced, such as rules or regulations.

98. Section 179 of the LGA 02 relates to the contracting out of enforcement powers. Section 179(1) states (as far as is relevant):

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41 *Strachan v Marriott* [1995] 3 NZLR 272 (CA) at 291.

> **179 Contracting out administration of enforcement**
>
> (1) A local authority may contract out to any other local authority or other person the administration of its regulatory functions, including, without limitation, the operational aspects of enforcement, inspection, licensing, and other administrative matters.

99. The use of the words "enforcement", "inspection" and "licencing" shed light on the nature of regulatory functions. It is again submitted that providing water or adding fluoride to water does not relate to enforcement, inspection or licencing, and so is not a regulatory function.

100. Rather, the supply of water (and the addition of fluoride to that water supply) is the provision of a service rather than a regulatory function. The provision of local public services are one of the three distinct functions of local government as set out in section 10(1)(b), which are "*to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions ...*".

101. This is also consistent with section 11A, according to which water supply (as network infrastructure) is a core service of local authorities. Section 11A states:

> **11A Core services to be considered in performing role**
>
> In performing its role, a local authority must have particular regard to the contribution that the following core services make to its communities:
>
> (a) network infrastructure:
>
> (b) public transport services:
>
> (c) solid waste collection and disposal:
>
> (d) the avoidance or mitigation of natural hazards:
>
> (e) libraries, museums, reserves, recreational facilities, and other community infrastructure.

102. Section 197(2) of the LGA 02 defines "network infrastructure" as "*the provision of roads and other transport, water, wastewater, and stormwater collection and management*".

103. The plaintiff asserts that a regulatory power cannot be exercised by an individual.[42] However, the supply of drinking water (and the addition of substances to the water) is something that can be undertaken by private persons, and there is no basis for regarding it as a regulatory function.

104. The supply of drinking water by a private person is recognised in Part 2A of the Health Act 1956. "Drinking water supplier" and "drinking water supply" are defined in that Part as follows:

> **drinking-water supplier** means a person who supplies drinking water to people in New Zealand or overseas from a drinking-water supply, and—
>
> (a) includes that person's employees, agents, lessees, and subcontractors while carrying out duties in respect of that drinking-water supply; and
>
> (b) includes (without limitation)—
>
> (i) a networked supplier; and
>
> (ii) a water carrier; and
>
> (iii) every person who operates a designated port or airport; and
>
> (iv) a bulk supplier; and
>
> (v) any person or class of person declared by regulations made under section 69ZZY to be a drinking-water supplier for the purposes of this Part (a prescribed supplier); but
>
> (c) does not include—
>
> (i) a temporary drinking-water supplier; or
>
> (ii) a self-supplier; or
>
> (iii) any person or class of person declared by regulations made under section 69ZZY not to be a drinking-water supplier for the purposes of this Part

42 Plaintiff submissions, paragraph 47.

drinking-water supply—

(a) means a publicly or privately owned system for supplying drinking water to a person or group of persons, on a temporary or permanent basis, up to but not including the point of supply; and

(b) includes, without limitation, a networked reticulation system, a well, a reservoir, or a tanker.

105. A "drinking-water supplier" is not therefore limited to a local authority, and can clearly include private persons. A "drinking-water supply" is expressly either a publicly or privately owned system for supplying drinking water to a person or group of persons.

The power of general competence is not limited to what an individual or corporate can do

106. The plaintiff's submissions develop the argument that the power of general competence ("full capacity") only confers upon councils the rights and obligations of individuals and corporations. It is then said in reliance on this proposition that a Council cannot supply fluoridated water because individuals or corporations cannot lawfully supply such water to members of the community.

107. It must be noted that there are no words in section 12 that limit the power of general competence to what a person or individual can do. If Parliament had wanted to limit the power of general competence in such a way, it is submitted that it would have done so.

108. Such a limit was included in an amendment to the former Companies Act 1955. The Companies Amendment Act (No 2) 1983 gave companies incorporated after 1 January 1984 "*the rights, powers, and privileges of a natural person*". According to Dr Kenneth Palmer in *Local Authorities Law in New Zealand* this amendment was put in place "*to eliminate restrictions arising under the ultra vires principle*".[43]

43 *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012) at 51.

109. The power of general competence was implemented for much the same purpose – "*to ameliorate the harshness of the ultra vires doctrine*".[44] It is submitted that when enacting the LGA 02, Parliament had a clear precedent for responding to the same or similar problem, but deliberately chose not to use the same legislative measure of providing local authorities with the powers of natural persons.

110. As already noted the scope of the power of general competence is defined by reference to the role of local authorities and the purpose of local government. Section 12(2) confers upon a local authority *for the purpose of performing its role* full capacity to carry on or undertake any activity or business. The limits on the general power of competence must be found in the LGA 02 itself, or any other enactments, or the general law in terms of section 12(3).

111. As has been already mentioned, under section 11(a), the role of local government is to give effect to the purpose of local government under section 10. Section 10(1)(b) in turn refers to meeting current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions.

112. Not all of these services and functions can be performed by individuals but are nevertheless activities for the purpose of the general power of competence. For instance, by definition, "local public services" as referred to in section 10(1)(b) are not things that private individuals can provide. This is reinforced by section 11A of the LGA 02 which is set out above.

113. While some core services could be provided by individuals and corporations separately, those entities do not have a statutory role in providing them generally to communities, and at least some of the specific services cannot again by definition be provided by individuals and corporations.

114. For instance, private individuals and corporations do not have a role in providing to communities with services to the avoidance and mitigation of natural hazards under section 11A(d). The same is the position for

44 *The Laws of New Zealand* (looseleaf ed, LexisNexis), Local Government, paragraph 33.

"community infrastructure" which is referred to in section 11A(e). "Community infrastructure" is defined in section 197(2) as (emphasis added):

> (a) land or development assets on land, owned or controlled by the territorial authority to provide **public** amenities; and
>
> (b) include land that the territorial authorities will acquire for that purpose.

115. In further developing the argument, the plaintiff's submissions refer at paragraphs 41 to 43 to the Select Committee's report on the Bill and two texts. Importantly for present principles, the Select Committee's report refers to the fact that local authorities should "*as the **starting point***", have the same rights and obligations as individuals and corporations.[45] This passage recognises that the powers of local authorities are not necessarily restricted to what individuals and corporations may do.

116. Other passages in the Select Committee report do not refer to limitations upon the power of general competence to what individuals or corporations may do. In particular, the heading on page 6 explicitly links the powers of local government to the purpose of local government when it states "*Purpose of local government demarcates powers of local authorities*".[46] Text under that heading further recognises this connection, when it states that "*Any provision that involves the powers of local authorities also relates to the purpose of local government*".[47]

117. The next heading is "*Local authorities have broad powers to perform their role*".[48] This section deals specifically with the powers of local authorities. The text under that heading does not limit the powers of local authorities to those of individuals or corporations in any way. On the contrary, it emphasises the broad nature of the powers of a local authority:[49]

> Clause 9 sets out the status and powers of local authorities. In accordance with the intent of this legislation, the powers of local

45 Local Government Bill 2001 (191-2) (select committee report) at 3.
46 Local Government Bill 2001 (191-2) (select committee report) at 6.
47 Local Government Bill 2001 (191-2) (select committee report) at 6.
48 Local Government Bill 2001 (191-2) (select committee report) at 7.
49 Local Government Bill 2001 (191-2) (select committee report) at 7.

> authorities are broadly-based powers of general competence. In the words of the bill, a local authority is given 'full capacity' to give effect to the purpose of local government in its district or region.

118. The plaintiff refers to paragraph 12.01 of *Local Government Key Legislation* (looseleaf ed, Brookers) and paragraph 33 of the Local Government chapter of *The Laws of New Zealand* (looseleaf ed, LexisNexis). However, neither commentary provides any authority for the proposition that "*local authorities are authorised to do anything that any person or body corporate may do*". It is submitted that this is a convenient starting point for describing the power but the power cannot be limited by that position. Indeed, as noted above, section 12 is not expressly limited by such words.

119. In *Local Authorities Law in New Zealand*, Dr Palmer does not define the scope of the power of general competence by reference to the powers of persons or organisations.[50]

120. There are however two constraints on local authorities having "full capacity", ie capacity beyond what a natural or corporate person may enjoy:

(a) first, full capacity is expressly limited by reference to the role of local authorities in section 11; and

(b) secondly, section 12(3) states that subsection (2) is subject to the LGA 02, any other enactment and the general law.

121. As an example, section 130(2) places limits on local authorities in relation to water services. One such limit is that local government organisations are prevented from using water services assets as security for any purpose. This is a constraint on what local authorities would otherwise be competent to do under section 12.

122. However, there are no constraints in section 130 or any other part of the LGA 02 or indeed any other enactment on the addition of fluoride to water. The plaintiff's submissions at paragraph 69, with respect,

50 Dr Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012) section 2.1.1, at 51-53.

misunderstand the nature of section 130 and other provisions in Part 7 Subpart 2 of the LGA 02. Properly understood, they are constraints on local authorities' powers in relation to water services rather than provisions in which the power to fluoridate is to be found.

123. In summary, it is submitted that the power of general competence goes beyond simply what individuals and corporations can do in a private capacity. Further, in relation to the fluoridation of water supplies, the analogy with individuals and corporations does not bear detailed scrutiny because of the provisions of the Health Act which contemplate the fluoridation of water supplies by the Council (and by private drinking water suppliers).

The supply of water is not the provision of a food under the Medicines Act 1981

124. The plaintiff submits that if a private person were able to supply water to the public, that would involve the provision of a food under section 94 of the Medicines Act 1981.[51] This submission cannot be determinative of the Council's powers to fluoridate water supplies for the reasons already outlined above.

125. It is submitted however, that water is not a 'food' for the purposes of section 94 of the Medicines Act 1981. That section states:

> **94 Interpretation**
>
> (1) In this Part of this Act, unless the context otherwise requires, the term **related product** means any cosmetic or dentifrice or food in respect of which a claim is made that the substance or article is effective for a therapeutic purpose; but does not include—
>
> (a) Any medicine:
>
> (b) Any substance or article of a kind or belonging to a class that is declared by regulations made under this Act to be a kind or class of substance or article that is not a related product for the purposes of this Act.
>
> ...

51 Plaintiff's submissions, paragraph 53.

126. The word 'food' is not defined in the Medicines Act 1981.

127. However, the High Court considered the meaning of 'food' in section 94 in *Diet Tea Co Ltd v Attorney-General*. In that case, the Court was required to answer the following question:[52]

> Whether a drink substantially devoid of nutritional value such as tea in respect of which a claim is made that it is effective for a therapeutic purpose is a 'related product' in terms of s 94(1) of the Medicines Act 1981.

128. Answering that question required the Court to consider whether tea was 'food', as it was clearly not a 'cosmetic or dentifrice'. The Court held that tea was not 'food', and accordingly answered the above question in the negative.

129. If tea is not 'food', it is difficult to see how water (or water with added fluoride) could be considered 'food', given that it is even more devoid of nutritional value than tea.

130. In any event, there is no evidence before the Court on whether fluoridated water could be sold by a third party prior to the Medicines Act 1981.[53]

FIRST CAUSE OF ACTION PART 2: NEW ZEALAND BILL OF RIGHTS ACT 1990

131. It is now proposed to consider the application of NZBORA to fluoridation of drinking water.

132. Tipping J set out a useful step-by-step approach to considering an alleged breach of a right or freedom in NZBORA against sections 4, 5 and 6 in the Supreme Court's decision in *R v Hansen*, which is:[54]

> Step 1. Ascertain Parliament's intended meaning.

52 *Diet Tea Co Ltd v Attorney-General* [1986] 2 NZLR 693 (HC), at 694.
53 Plaintiff's submissions, paragraph 61.
54 *R v Hansen* [2007] 3 NZLR 1 (SC) at [92].

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.

Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

133. The Supreme Court recognised that other approaches may be appropriate depending on the context of the case.[55] However, it is submitted that Tipping J's summary approach is appropriate for this case and the submissions below follow Tipping J's six steps.

Is fluoridation inconsistent with section 11?

134. The Council has read and adopts the Attorney-General's submissions regarding whether or not fluoridation is a breach of the right to refuse medical treatment in section 11 of theNZBORA. On this basis there would be no need to further examine the provisions of the NZBORA.

55 *R v Hansen* [2007] 3 NZLR 1 (SC) at [57] and [61] per Blanchard J. See also McGrath J at [192].

135. However if the Court did consider it necessary to consider sections 4 and 5 of the NZBORA, the further submissions in the section below are made.

136. We first briefly comment on the plaintiff's submissions in relation to section 11.

Reply to plaintiff's submissions on section 11

137. The Council agrees with the plaintiff's submission at paragraph 132 which states to the effect that if something has a medical purpose but utilises a non-medical method then it would be unlikely to be medical treatment. It is submitted that *how* something which has a medical purpose is delivered, and *who* delivers it is essential to whether or not it can properly be considered "medical treatment".

138. It is submitted that there are three necessary elements for "medical treatment". Medical treatment must be provided:[56]

(a) to a patient;
(b) by a health professional (doctors, nurses, dentists, physiotherapists, etc);
(c) as a part of professional treatment.

139. This approach is consistent with the definition of medical treatment in the *Oxford English Dictionary* included in the plaintiff's submissions at paragraph 129, which describes "medical treatment" as "*the administration or application of remedies* ***to a patient*** *for a disease ...*".

140. The plaintiff refers to hand washing as an example of something which has a medical purpose but could not be defined as a medical treatment. It is submitted that hand washing could be part of medical treatment, if it was performed by a physician or other health professional and the washing was part of the treatment for an infected cut or other ailment.

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56 In his reply affidavit at paragraphs 5 to 7 Associate Professor Menkes', with respect, appears to misunderstand Professor McMillan's affidavit. Professor McMillan uses physicians as an example of a health care professional, but does not limit his discussion to physicians. Associate Professor Menkes also does not accurately reflect the content of Professor McMillan's affidavit in several places of his reply affidavit notably paragraphs 26, 30, and 31. It does not appear that Associate Professor Menkes has qualified himself in bioethics yet much of his two affidavits are dedicated to bioethical issues.

141. The same distinction applies to food supplements. Putting aside the argument that there is a distinction between supplements and medicines,[57] manufacturers of salt with added iodine are not providing medical treatment when they add iodine to their salt, even though the addition of iodine might have a medical purpose. But, a doctor prescribing a course of iodine supplements to a patient would be providing medical treatment. The same applies to local authorities adjusting the fluoride level in drinking water.

142. Professor McMillan records in his affidavit that the House of Lords decision in *Airedale Hospital Trustees v Bland* highlights the same distinction in relation to the provision of food to a patient in a persistent vegetative state;[58] the provision of food and water artificially was considered to be medical treatment when performed by a physician.[59]

143. This distinction was important in the *Bland* case, because the patient was in a persistent vegetative state with no prospect of recovery. The family and physicians wished to end the treatment, but there were doubts as to whether they would be subject to criminal liability in doing so.

144. The Airedale Hospital Trustees sought a declaration from the High Court. On appeal, the House of Lords found it lawful for the physicians to cease the medical treatment (the provision of artificial food and water) where the treatment no longer benefited the patient. Lord Keith noted that if a lay person who has a responsibility to care for another person who cannot look after themselves, like a baby, failed to feed it causing death, they would be guilty of manslaughter at least.[60]

145. The plaintiff's submissions under its heading "Is water fluoridation medical treatment" focus on whether fluoridation has a medical purpose or is a medicine.[61]

146. The plaintiff in its submissions and Associate Professor Menkes in his reply affidavit appear to accept that dietary supplements are not

57 The Council's position is that fluoride at the levels provided through water fluoridation is a supplement.
58 *Airedale Hospital Trustees v Bland* [1993] AC 789 (HL).
59 Affidavit of Professor McMillan, paragraph 15.
60 *Airedale Hospital Trustees v Bland* [1993] AC 789 (HL) at 858.
61 Plaintiff's submissions, paragraphs 133-151.

medicines, nor medical treatment.[62] The plaintiff says at paragraph 138 of its submissions that "*A dietary supplement is taken to remedy a deficiency in a person's diet*". Dr Whyman states in his affidavit that fluoridation recreates naturally occurring fluoride levels in other parts of the world, which assists the population in meeting the nutrient reference values in the *Nutrient Reference Values for Australia and New Zealand*.[63]

147. Contrary to the plaintiff's submissions at paragraph 134, fluoridation does not treat dental decay, instead it reduces the incidence and severity of decay.[64]

148. The plaintiff suggests at paragraph 148 that medical treatment is not restricted to individual patients and is sometimes administered to groups. The plaintiff lists immunisation or antibiotics as examples. It is submitted that these measures could be medical treatment if administered by a health professional to the population *individually*, but not otherwise.

149. If fluoridation has a medical purpose (which is not accepted by the Council), this does not mean that the Council is providing "medical treatment". The Council is not a health professional and fluoridated drinking water is not "administered" to patients.

150. At paragraph 149 of its submissions, the plaintiff states the Ministry of Health has the "imprimatur of health professionals" and appears to equate the Ministry's support of fluoridation as the equivalent of a doctor administering treatment to a patient. This analogy is not correct. First, the Ministry does not provide fluoridated water, rather it is the territorial local authorities that do so. Secondly, the promotion of something with a medical purpose cannot amount to providing medical treatment. A doctor does not provide medical treatment if he or she promotes a type of treatment generally.

151. At paragraph 150, the plaintiff lists three cases where a Court has commented that fluoride has a medical purpose. It is submitted that

62 Plaintiff's submissions, paragraph 138; Reply affidavit of Associate Professor Menkes, paragraphs 8-9.
63 Affidavit of Dr Whyman, paragraphs 38-40.
64 Affidavit of Dr Whyman, paragraphs 19, 28-36.

something with a medical purpose does not mean it is a medicine, nor that every way it can be provided is medical treatment. Many dietary supplements could be described as having a medical purpose, but they are not medicines nor are they medical treatment unless they are prescribed by a health professional.

Commission of Inquiry into Fluoridation of Public Water Supplies and New Zealand Human Rights Commission Report on Fluoridation

152. The question of fluoridation of water supplies was considered by a Commission of Inquiry in 1957. The Commission heard 122 witnesses and its detailed report in to fluoridation spans 240 pages. Although scientific knowledge has progressed since 1957, the issues material to whether fluoridation is compulsory "mass medication" have not changed.

153. The Commission noted two reasons why fluoridation was not a medication. First, it concluded that fluoride is best described as a food rather than a drug. Secondly, the Commission considered the character of drinking water remains materially unchanged with added fluoride.[65] The Commission concluded:[66]

(1) That the avoidance of fluoridated water might cause inconvenience but in no case would its use be compulsory;

(2) That the process does not involve medication of community supplies;

(3) That humans have an inherent right to water as one of the essentials of life but not such wide interests in regard to community water supplies which are merely one of the means of providing it; and

(4) That no question of personal liberty arises in regard to fluoridation.

65 Commission of Inquiry 1957 *Fluoridation of Public Water Supplies* (Government Printer, Wellington, 1962), page 140.

66 Commission of Inquiry 1957 *Fluoridation of Public Water Supplies* (Government Printer, Wellington, 1962) at 142-143.

154. The New Zealand Human Rights Commission considered water fluoridation in 1980, and that fluoridation does not constitute a denial of human rights. The Human Rights Commission stated:[67]

> The argument about mass medication or forced mediation appears to be based on false analogy of the forced feeding that occurs in respect to people who have gone on hunger strikes. There are, however, no real similarities between the two situations as no attempt is made to force people in any direct physical way to drink water that has been fluoridated. There may be difficulties and even a considerable degree of inconvenience in obtaining fluoridated water by those to whom this is a matter of importance, but there is no sense in which it can be alleged that they are forced to drink fluoridated water except as a matter of their own convenience.

De minimis

155. The Council agrees with the Attorney-General's submission that section 11 anticipates a *de minimis* threshold. If the Court were to consider fluoridation is medical treatment which cannot be refused, it is submitted that fluoridation of water is nevertheless a trivial breach of that right.

156. Fluoridation is a small adjustment in the natural mineral content in water to replicate levels that occur naturally in many places in the world, but at all times remain very low. Dr Whyman's view is that fluoridation is also safe.[68]

157. There are reasonable ways of avoiding fluoridated water either completely or substantially. Additionally, the decision to fluoridate drinking water rests with local authorities rather than Parliament and so individual communities have a more direct means of participating in the democratic decision making as to whether to fluoridate water supplies or not.

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67 New Zealand Human Rights Commission *Report on Fluoridation* (1980).
68 Affidavit of Dr Whyman, paragraphs 55-82.

Section 5 – justified limitation

158. Section 5 states that rights in NZBORA may be subject "*only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*". The plaintiff challenges the power to fluoridate under both elements of section 5, namely whether it is "*prescribed by law*" and whether it is "*demonstrably justified in a free and democratic society*".

159. "Prescribed by law" was described by McGrath J in *R v Hansen* as follows:[69]

> To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

160. The authors of *The New Zealand Bill of Rights Act: A Commentary* consider "law" in this context:[70]

> ... presumably extends to orders in council, bylaws and tertiary legislation such as instructions, operational standards and rules issued either under the authority of an Act or secondary legislation.

161. The High Court in *Attorney-General v IDEA Services Ltd* found that even decisions made under a broad statutory discretion that limit a right are "prescribed by law" if the decision is within the scope of the discretion conferred under the empowering legislation.[71] That case concerned the exercise of a broad (and imprecise) statutory power being the Minister of Health's power to enter into Crown funding agreements under section 10 of Public Health and Disability Act 2000. By contrast, and leaving aside the power of general competence, the drinking water standards and section 69O(3)(c) of the Health Act 1956 provide far greater clarity than existed in the IDEA Services case that the general power can be exercised in the manner challenged by the plaintiff.

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69 *R v Hansen* [2007] 3 NZLR 1 (SC) at [180].
70 Butler & Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at 150.
71 *Attorney-General v IDEA Services* [2013] 2 NZLR 512 (HC) at [186].

162. It submitted that the power to fluoridate is clearly "prescribed by law", being necessarily derived by necessary implication from statute and the drinking water standards.

Response to plaintiff's submissions on "prescribed by law"

163. The plaintiff submits water fluoridation must be authorised by an express or implied provision in statute at paragraph 179. Although it is submitted that this analysis is incorrect, and that the authorities on "prescribed by law" envisage a broad range of sources of law, in the present case it is the Council's position that there is an express and implied statutory power to fluoridate water supplies.

164. It is further submitted that the comment referred to by the plaintiff at paragraph 177 from *Gravatt v Coroners Court at Auckland* is not a relevant authority on this matter.[72] The comment that the plaintiff refers to was not made in relation to the question of what is "prescribed by law" for the purposes of section 5.

165. The plaintiff's summary of the Supreme Court's decision in *Cropp v Judicial Committee* at paragraph 178 of its submissions appears to be overstated.[73] No paragraph reference is given. The Supreme Court did not agree, as the plaintiff puts it, "*that a fundamental right such as bodily integrity may not be interfered with except under a statutory provision where the right is excluded or abridged expressly or by necessary implication.*"

166. In that case, the appellant made a submission to that effect,[74] but the Supreme Court did not agree with it. The Court only agreed with the position that "*the courts will presume that general words in legislation were intended to be subject to the basic rights of the individual.*[75]

167. The source of law in *Cropp* which met the "prescribed by law" test was the Constitution and New Zealand Rules of Racing, which were

72 *Gravatt v Coroners Court at Auckland* [2013] NZHC 390 at [39].
73 *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC).
74 *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [26].
75 *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [27].

described as "*rules of a domestic body made under authority delegated by Parliament*". They were not regulations.[76]

Whether the section 5 inquiry should focus on the empowering legislation or the exercise of the power

168. It is submitted that the focus of the section 5 inquiry should be on the empowering legislation, as opposed to the exercise of that power by the Council. The plaintiff's submissions appear to take this approach, but the amended statement of claim refers to the Council's decision.

169. The High Court in the *IDEA Services* case above provides some guidance. In reaching its conclusion, the High Court applied two different situations that Lamer J identified in the Canadian Supreme Court case of *Slaight Communications Inc v Davidson*:[77]

(a) One situation was where the legislation under which the decision was made confers, either expressly or by implication, the power to infringe a right protected by the Canadian Charter. In that situation, it was the legislation that was subject to the test of whether it was a reasonable limit that could be justified in a free and democratic society;

(b) The second situation was where the legislation pursuant to which the decision was made confers an imprecise discretion, and does not confer, either expressly or by implication, the power to limit the rights guaranteed by the Canadian Charter. In that situation it is the decision, and not the legislation, which is subject to the test of whether it is a reasonable limit that can be demonstrably justified in a free and democratic society.

170. The *IDEA Services* case concerned situation (b) above. It is submitted that the present situation falls within the ambit of situation (a) because the legislation includes a power to fluoridate for reasons which have already been canvassed. The consequence of this is that, on the

76 *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [1].
77 *Attorney-General v IDEA Services* [2013] 2 NZLR 512 (HC) at [183] citing *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038.

approach in situation (a), it is the empowering legislation which is subject to the second element of the section 5 test.

171. Accordingly, for the second element of section 5, the focus should be on the legislative power as opposed to the Council's exercise of the power. However, we deal separately with the Council's exercise of the power in the event that the Court decides the case falls under situation (b) above.

"Demonstrably justified in a free and democratic society"

172. The Supreme Court and Court of Appeal have adopted the approach formulated in the leading Canadian case of *R v Oakes*[78] for the second element of the section 5 test.[79] Tipping J set out a convenient summary of the approach in *Oakes* in *R v Hansen*:[80]

> This approach can be said to raise the following issues:
>
> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b)
>
> (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

173. Tipping J summarised that inquiry as "*whether the limit on a right or freedom is justified under section 5 is essentially an inquiry into whether*

78 *R v Oakes* [1986] 1 SCR 103.
79 For example see *R v Hansen* [2007] 3 NZLR 1 (SC) at [64] per Blanchard J, [103] per Tipping J, and [203]-[205] per McGrath J; and *Ministry of Health v Atkinson* [2012] 3 NZLR 487 (CA) at [143].
80 *R v Hansen* [2007] 3 NZLR 1 (SC) at [104] per Tipping J.

a justified end is achieved by proportionate means".[81] We note in passing that although the *Oakes* approach is useful it is not a substitute for the actual test in section 5.

174. Before discussing the issues in the *R v Oakes* case, reference needs to be made to the extent of latitude that should be given to the "decision maker" (the legislature or other functionary), which in turn involves considering the respective roles of the court and decision maker.

175. The case authorities on this matter were recently canvassed by the Court of Appeal in *Child Poverty Action Group Incorporated (CPAG) v Attorney-General*.[82] The key considerations are summarised below.

176. The Court's function is one of review, rather than substituting its own view.[83] If the Court finds that the limit to a right is not justified, it must then ask whether the decision maker (in this case Parliament) was entitled to come to the conclusion under challenge.[84]

177. How much choice or latitude is given to the decision maker depends on the subject of the decision. Tipping J in *Hansen* described it as:[85]

> ... a spectrum which extends from major, political, social or economic decisions at one end to matters which have a substantial legal content at the other. The closer to the legal end of the spectrum, the greater the intensity of the court's review is likely to be.

178. Tipping J also observed:[86]

> Ultimately, judicial assessment of whether a limit on a right or freedom is justified under s 5 of the Bill of Rights involves a difficult balance. Judges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise, as they may do even with matters primarily involving legal issues. ... [Depending on the circumstances] the Court should allow the decision

81 *R v Hansen* [2007] 3 NZLR 1 (SC) at [124] per Tipping J.
82 *Child Poverty Action Group Incorporated (CPAG) v Attorney-General* [2013] NZCA 402 at [78]-[92].
83 *R v Hansen* [2007] 3 NZLR 1 (SC) at [116] and [123].
84 *R v Hansen* [2007] 3 NZLR 1 (SC) at [123] per Tipping J.
85 *R v Hansen* [2007] 3 NZLR 1 (SC) at [116].
86 *R v Hansen* [2007] 3 NZLR 1 (SC) at [117], referred to in *Child Poverty Action Group Incorporated (CPAG) v Attorney-General* [2013] NZCA 402 at [81].

> maker ... some degree of discretion or judgment. If the decision maker is Parliament, and it has manifested its decision in primary legislation, the case for allowing a degree of latitude may well be the stronger.

179. Tipping J figuratively described the concept as a shooting target, with a bull's eye and an area beyond the bull's eye. The size of the area beyond the bull's eye is determined by the subject matter, but Parliament cannot miss the target altogether.[87]

180. In relation to these principles, it is submitted that the power to fluoridate (and other public health policy decisions) sits at the end of Tipping J's spectrum that concerns matters of policy, political and social consequences, and the degree of latitude to be given to Parliament should be broad.

181. Parliament's decision to give local authorities a discretion whether to fluoridate water involves a weighing of private interests against the public good, as well as a review of scientific and medical opinion. It also involves a consideration of who is best placed to make decisions on fluoridation in a democratic society. These considerations are highly political and are best determined by Parliament.

182. We note that local decision making on fluoridation has support from the Nuffield Council on Bioethics which is a leading independent body that examines bioethical issues for medicine and biology. The Nuffield Council's view is that the most appropriate way of making decisions on water fluoridation is democratic decision making procedures made at the local level.[88] The 1957 Commission of Inquiry also recommended that decisions on water fluoridation should be made by local authorities.[89]

183. It is submitted that most if not all public health measures will pass the test in the second element of section 5, provided there is a reasonable basis for the measure. Public health measures are an important part of Parliament's function as the steward of the population's health and

87 *R v Hansen* [2007] 3 NZLR 1 (SC) at [119].
88 Affidavit of Professor McMillan, paragraph 45.
89 Commission of Inquiry 1957 *Fluoridation of Public Water Supplies* (Government Printer, Wellington, 1962), pages 144-147.

wellbeing in a "free and democratic society". Through public health measures, Parliament helps people live healthier lives, reduces social inequalities and assists those who cannot speak for themselves, like children.

184. By necessity, many public health measures limit personal freedoms. Common examples include compulsory seatbelts and bike helmets, and prohibitions on smoking in public places. Where limits on personal freedoms are required, it is submitted that most will almost certainly be justified because public health measures concern a collective increase in community health, rather than individual preferences. Part of participating in an free and democratic society is accepting some limits on individual rights for the common good.

185. It is submitted that individuals should not have an ability to veto public health initiatives, which is distinct from the right to refuse medical treatment.

186. In *Jacobson v Massachusetts,* the Supreme Court of the United States of America made the following observations in relation to proceedings which concerned compulsory immunisation and the right to liberty:[90]

> ... the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all time and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.
>
> ...
>
> This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state..."

90 *Jacobson v Commonwealth of Massachusetts* 197 US 11 (1905) at 361.

Standard of proof/evidential matters

187. The standard of proof and the Court's scope to determine any evidential questions is important. The plaintiff's submissions in relation to section 5 approach the merits of fluoridation in a manner which would be more appropriate for an inquiry or trial, which it is submitted is incorrect.

188. The plaintiff's submission state at paragraph 188 that the burden of establishing a limit on a right is demonstrably justified shifts to the defendant and standard of proof is the balance of probabilities. The plaintiff's submissions then turn to an argument about the merits of fluoridation under the heading "Efficacy, benefits and harms".

189. It is submitted that the plaintiff's analysis of the nature of the requisite evidential inquiry should not be adopted, and that it is not the Court's role in this case to make adjudicative determinations on the merits of fluoridation.

190. The evidential inquiry for the purposes of section 5 of NZBORA should instead contemplate whether Parliament's position on fluoridation is open to it on a reasonable basis.

191. The Court of Appeal in *Ministry of Health v Atkinson* recently considered this issue by reference to Canadian authorities and an article by Professor Choudhry.[91] The Court of Appeal recognised difficulty in certain situations for the decision maker to produce empirical evidence to demonstrate the proportionality between an objective and the legislation or policy in question. The Court of Appeal referred to the following passage by the Professor Choudhry with approval:

> Public policy is often based on approximation and extrapolations from the available evidence, inferences from comparative data, and, on occasion, even educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Justice La Forest offered an observation in [*McKinney v University of Guelph,* [1990] 3 SCR 229 at 304] which rings true: "[d]ecisions on

91 *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) at [163] to [166].

such matters must inevitably be a product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society".

192. In terms of the burden to justify a limit on the right, the Court of Appeal in the *Atkinson* case summarised the standard of proof as follows:[92]

> It is clear the context will affect the type of evidence required to meet the standard of proof. The point was aptly made by McLachlin J in *RJR-MacDonald* when she said that the context of the particular law, or policy, will be obviously relevant because the s 1 inquiry is a fact-specific one. McLachlin J continued:
>
> > [133] ... Context is essential in determining legislation objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge.
> >
> > ...
> >
> > [137] Context and deference are related to a third concept in the s 1 analysis: standard of proof. I agree with La Forest J that proof to the standard required by science is not required. Nor is proof beyond a reasonable doubt on the criminal standard required ... Discharge of the civil standard of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view.

193. The Supreme Court of Canada has considered the evidential issues that involve an evaluation into the equivalent of the section 5 inquiry in several cases. *Irwin Toy Limited v Quebec* concerned a prohibition of commercial advertising directed at persons under 13 years of age.[93]

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92 *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) at [166]. The section 1 inquiry referred to is the Canadian equivalent of section 5 of NZBORA.
93 *Irwin Toy Limited v Quebec* [1989] 1 SCR 927.

194. The Supreme Court was required to decide whether the prohibition represented a minimal impairment of the right to freedom of expression. In doing so, the Supreme Court stated that the question for the Court was whether the government had a *reasonable basis* for concluding, on the evidence before it, that the limiting measure impaired the relevant right as little as possible.

195. The Supreme Court made the following relevant statements:[94]

> Thus, **in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck**. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.
>
> ...
>
> **When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.**
>
> ...
>
> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the

94 *Irwin Toy Limited v Quebec* [1989] 1 SCR 927at 993-994.

> courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions: see *Sunday Times v. United Kingdom* (1979), 2 E.H.R.R. 245, at p. 276. The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources.
>
> In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. **The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.**

196. The Supreme Court of Canada applied these principles in *RJR-MacDonald Inc v Canada*,[95] which is a case often referred to in New Zealand case law.[96] *RJR-MacDonald* concerned legislation which banned advertising and promotion of tobacco products, and sale of tobacco products unless the packaging included health warnings.

197. It is submitted that the *RJR-MacDonald* case is a useful example of how an appellate court applied the section 5 tests in circumstances where the Canadian legislature had prepared policy and legislation that dealt with similar broad considerations to those relevant for fluoridation. The broad considerations include the protection of public health, competing scientific debate, and balancing individual rights against a public benefit.

198. In *RJR-MacDonald*, the Supreme Court recognised that Parliament should be given a greater degree of deference in that case because of the subject matter of the case. After quoting the passages of *Irwin Toy* above, the Court stated:[97]

> In drawing a distinction between legislation aimed at "mediating between different groups", where a lower standard of s. 1 justification

95 *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199.
96 See for example *Ministry of Health v Atkinson* [2012] 3 NZLR 456 at [153] and [166].
97 *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [68] per La Forest, L'Heureux-Dubé and Gonthier JJ.

> may be appropriate, and legislation where the state acts as the "singular antagonist of the individual", where a higher standard of justification is necessary, the Court in *Irwin Toy* was drawing upon the more fundamental institutional distinction between the legislative and judicial functions that lies at the very heart of our political and constitutional system. Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. **However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups.** In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary.

199. The Supreme Court described the legislation in the following way:[98]

> Seen in this way, it is clear that the Act is the very type of legislation to which this Court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate.

200. The Supreme Court concluded that:[99]

> an attenuated level of s. 1 justification is appropriate in these cases. Taking into account both the nature of the right and the nature of the

98 *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [70] per La Forest, L'Heureux-Dubé and Gonthier JJ.

99 *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [77] per La Forest, L'Heureux-Dubé and Gonthier JJ.

> legislation in issue, I am satisfied that LeBel J.A. was correct in deciding that the Attorney General need **only demonstrate that Parliament had a rational basis for introducing the measures contained in this Act**. With these observations firmly in mind, I now proceed to an application of the proportionality test.

201. The Supreme Court went on to consider the *R v Oakes* tests on the basis that it was unnecessary for the government to demonstrate each step to the civil standard of proof, instead the government had to establish that it had a reasonable basis for its position.[100]

202. Tipping J recognised this principle in *Hansen* when he stated:[101]

> The court's function is not immutably to substitute its own view for that of the legislature. If the court agrees with the legislature that the limit is justified, no further issue arises. **If the court does not agree, it must nevertheless ask itself whether the legislature was entitled, to use Lord Hoffman's word, to come to the conclusion under challenge.** It is only if Parliament was not so entitled that the court should find the limit to be unjustified.

203. In accordance with the authorities above, it is submitted that the evidential inquiry under section 5 is limited to whether Parliament's position regarding the power to fluoridate water is reasonably open to it. There must be a reasonable basis for its position, but no more. In making this decision, Parliament must be given latitude to balance competing social values and make a judgment on the information before it.

204. We now address the tests in *R v Oakes* set out in paragraph 172 above with these principles in mind.

Importance of objective and rational connection

205. The objective of drinking water fluoridation is to make available an adequate supply of fluoride, which would otherwise be missing in New

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100 *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at [82] and [96] per La Forest, L'Heureux-Dubé and Gonthier JJ. See also [137] per McLachlin J.
101 *R v Hansen* [2007] 3 NZLR 1 (SC) at [123].

Zealanders' diets due to the naturally low level of fluoride in our water supplies, in order to take advantage of the known effect that adequate consumption of fluoride has on reducing the incidence and severity of dental decay. It is submitted that this objective is a sufficiently important objective to justify curtailment of the section 11 right and that fluoridation of drinking water is rationally connected to that purpose.

206. It is submitted in particular that measures which help reduce widespread health conditions are sufficiently important objectives that can justify limits on the section 11 right. Dental decay is a widespread disease. Dr Whyman in his affidavit records the findings of the prevalence of dental decay through the New Zealand Oral Health Survey as follows:[102]

(a) Among children aged 2–11 years, 41% have experienced dental decay in their primary teeth and 17% have untreated decay or caries.

(b) Among children aged 5-17 years, 39% have already experienced dental decay in their permanent teeth and 8% have untreated decay or caries.

(c) Among adults, over 35% have untreated decay, while over 75% have had dental decay at some point.

207. These levels of dental decay exist despite long standing promotion of twice daily brushing with fluoride toothpaste and free dental care for children.[103]

208. The situation is worse in Patea and Waverly. Dr Pryor and Dr Simmons' observations in their affidavits in relation to oral health in those towns are summarised below:

Ms Pryor

(a) The average decayed, missing and filled teeth (DMFT) scores for 17 olds enrolled in her practise in the years of 2007 and 2010 were 8.6 and 10.4 (bearing in mind that 17 years old have

102 Affidavit of Dr Whyman, paragraph 43.
103 Affidavit of Dr Simmons, paragraphs 15-16; Affidavit of Dr Whyman, paragraphs 87-89.

28 teeth on average). The average DMFT score for 12 to 17 year olds nationwide is 1.9.[104]

(b) The majority of Patea people do not have the ability or inclination to access oral health care like other more prosperous and better educated communities. The 2006 census recorded that 64% of households in Patea earn less than $20,000, and 47% of over 15 year olds have no formal qualifications. The demographics are similar in Waverley.[105]

(c) A large portion of the Patea community only visit Ms Pryor (the only local dentist) when they have a toothache and extractions are often the only option.[106] Of the 398 people Ms Pryor treated in 2010, 89 of them were Community Service Card holders who presented with pain or infection that generally required extraction.[107] Ms Pryor also refers approximately 10 to 15 adults a year to the Hospital for full dental clearances.[108]

(d) Many adolescents do not attend their appointments (21 out of 95 enrolled with her) and she occasionally sees an adolescent at the age of 15, 16, or 17 for their first dental assessment.[109]

Dr Simmons

(e) Maori and lower socio-economic groups suffer worse dental decay than non-Maori and higher socio-economic groups. Patea and Waverley are among the 10% of the most deprived communities in New Zealand and have a high proportion of Maori (51% in Patea, 31% in Waverley).[110]

(f) Tooth decay is significantly worse in South Taranaki than the rest of Taranaki.[111]

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104 Affidavit of Ms Pryor, paragraph 38.
105 Affidavit of Ms Pryor, paragraph 16.
106 Affidavit of Ms Pryor, paragraph 60.
107 Affidavit of Ms Pryor, paragraph 17.
108 Affidavit of Ms Pryor, paragraph 19.
109 Affidavit of Ms Pryor, paragraph 20.
110 Affidavit of Dr Simmons, paragraphs 6–17.
111 Affidavit of Dr Simmons, paragraph 18.

209. It is also submitted that there is a clear rational connection between fluoridation and its objective. Fluoridation increases the amount of fluoride available for consumption which in turn decreases the incidence and severity of dental decay across the population who receive fluoridated water.[112] It is correct that not all people who receive fluoridated water will enjoy its benefit, because some people do not have teeth. However, the majority of people have teeth and will benefit from fluoridation. Therefore, fluoridation of water supplies cannot be considered arbitrary as a public health measure.

Is the impairment greater than is reasonably necessary?

210. Under this heading, the primary question is whether or not fluoridation falls within the range of reasonable alternatives available.

211. Blanchard, Tipping and McGrath JJ all made observations in relation to this point in *R v Hansen.*

212. Blanchard J said "*a choice could be made from a range of means which impaired the right as little as was reasonably necessary*".[113]

213. Tipping J stated:[114]

> The court must be satisfied that the limit imposed ... is no greater than is reasonably necessary to achieve Parliament's objective. I prefer that formulation to one which says that the limit must impair the right as little as possible. The former approach builds in appropriate latitude to Parliament; the latter would unreasonably circumscribe Parliament's discretion. In practical terms this inquiry involves the court considering whether Parliament might have sufficiently achieved its objective by another method involving less cost to the presumption of innocence.

214. McGrath J framed it slightly differently:[115]

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112 Affidavit of Dr Whyman, paragraphs 28-36.
113 *R v Hansen* [2007] 3 NZLR 1 (SC) at [79].
114 *R v Hansen* [2007] 3 NZLR 1 (SC) at [126].
115 *R v Hansen* [2007] 3 NZLR 1 (SC) at [217].

> The second question concerning proportionality is whether the measure intrudes ... as little as possible, in other words whether there is minimal impairment. The inquiry here is into whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness.

215. These passages recognise that the effectiveness of the measure is relevant to determining whether there are other reasonable alternatives. They also recognise the degree of latitude to be afforded to Parliament, as discussed above.

216. Although some of the plaintiff's affidavits suggest otherwise, there was and is a persuasive body of evidence that a consumption of water with a sufficient concentration of fluoride is effective in reducing the incidence of dental decay.[116] The Ministry of Health currently promotes that position.[117]

217. It is submitted that, even if an alternative view was sensibly available on the evidence, it is beyond the function of the Court in judicial review proceedings to evaluate the core merits of the competing views explained in the evidence. It is also important to recognise the difference between evidence which goes to legislative facts as opposed to adjudicative fact. Disputes about adjudicative fact must be resolved by trial, whereas evidence that concerns legislative fact can be considered by the Court where it goes to the content of law and determination of policy.[118]

218. It is recognised there are a range of complimentary steps which could also reduce dental decay, such as encouraging oral hygiene, limiting the availability and affordability of sugary foods and drinks. Indeed, the Crown carries out a number of programmes to reduce dental decay, including providing free dental care for children under 18 and promoting twice daily brushing with fluoride toothpaste.

219. It is submitted that whilst these matters all relate to the common goal of reduced dental decay, they are not part of the specific objective in

116 Affidavit of Dr Whyman, paragraphs 47-54.
117 Affidavit of Dr Haisman-Welsh, paragraph 5.
118 This distinction is discussed by McGrath J in *R v Hansen* [2007] 3 NZLR 1 (SC) at [229] – [232].

fluoridating drinking water, which is to provide an adequate supply of fluoride for consumption to make up for the low level of naturally occurring fluoride in New Zealand water supplies. Therefore, the inquiry into alternatives should only need to evaluate alternative methods of providing additional fluoride.

220. Other possible mechanisms for delivering fluoride include milk and salt fluoridation, or providing or subsidising fluoride supplements in tablet form. It is suggested by the plaintiff and by Mr Litras in his affidavit that fluoride could be made available for consumption by fluoridating the salt in fast food and soft drinks.[119]

221. In relation to milk and salt fluoridation, it is hypothetically possible that Parliament could require milk or salt fluoridation. Parliament could either require all milk or salt to be fluoridated or give manufacturers a discretion to provide such fluoridation.

222. If milk fluoridation were compulsory, in places where raw milk is less available (like most urban centres), consumers of milk would have little option but to drink fluoridated milk, or to drink milk alternatives. It is submitted this situation would be no less of a limit, and potentially a greater limit, to the section 11 right than water fluoridation. It could be more so if a person had to decline to drink milk altogether to avoid additional fluoride. Fluoride can be readily filtered out of drinking water,[120] but there is no evidence that a similar process is available for milk.

223. Compulsory salt fluoridation would also be a greater limit on the section 11 right.

224. Optional fluoridation of milk or salt would have the benefit of giving consumers choice as to whether they consume a fluoridated product or not.[121] However, giving manufacturers a discretion to fluoridation would be a less attractive alternative to water fluoridation for two reasons.

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119 Plaintiff's submissions, paragraph 245; Affidavit of Mr Litras, paragraph 79. Mr Litras' recommendation of salt fluoridation as a "more targeted preventative" policy appears to imply he recognises the benefits of fluoridation.

120 Affidavit of Mr Wilkinson, paragraph 26.

121 It is submitted that consumers have the same choice with water fluoridation.

225. First, optional milk or salt fluoridation would be unlikely to be as effective as water fluoridation. There would be no certainty as to whether fluoridated products would be available in all communities in a meaningful manner if a discretion to fluoridate was given to manufacturers.

226. In any event, it is Dr Whyman's evidence that there is less good quality scientific evidence that milk and salt fluoridation are effective regardless of how they are distributed.

227. Dr Whyman's evidence records the Australian National Health and Medical Research Council's (**NHMRC**) finding in their 2007 review of fluoridation that milk fluoridation is beneficial in reducing and preventing dental decay but that there is less good quality evidence than that of water fluoridation. However, Dr Whyman notes that milk fluoridation is generally associated with school-based programmes so the benefits are only available to children who attend school during school terms.[122]

228. In the same review, the NHMRC found that there are no studies on salt fluoridation which met its scientific criteria for its review.

229. Therefore, at the present time, salt and milk fluoridation, however it is administered, cannot be seen as an equally effective alternative, as being the test described by McGrath J above at paragraph 214.[123]

230. Secondly, manufacturers are not well placed, and certainly not better placed, to make decisions that affect the availability of fluoride in communities than locally elected representatives. The suggestion of requiring fluoridated salt in fast foods and soft drinks[124] appears counter-intuitive as a measure to improve health.

231. A key feature in the current legislation is that Parliament has conferred on individual communities a discretion as to whether to fluoridate water. This discretion is exercised by locally elected representatives after considering community views and preferences. Local authorities'

122 Affidavit of Dr Whyman, paragraph 53.
123 *R v Hansen* [2007] 3 NZLR 1 (SC) at [217].
124 Plaintiff's legal submissions, paragraph 245.

decisions can also respond to local conditions, such as the extremely poor state of oral health in Patea and Waverley.[125]

232. In this way, the local decision making process provides a vehicle to address the inequalities in oral health that Maori and Pacific Island people and low-socio economic communities suffer.[126] This is particularly important for communities like Patea and Waverley, which are low socio economic communities with a high percentage of Maori and could enjoy significant benefits from fluoridation.[127] It is notable that a number of Maori health organisations and representatives submitted in support of fluoridation to the Council including the New Zealand Maori Dental Association, the Chief Advisor Maori Health at the Taranaki District Health Board, Te Whare Punanga Kororo Trust Inc, Tui Ora Limited, National Hauora Coalition and Te Kaahui o Rauru.[128]

233. As already mentioned, both the Nuffield Council and the 1957 Commission of Inquiry recognised and supported local decision making on fluoridation.[129]

234. Parliament or food manufacturers could not replicate the local decision making element in the present framework through "top down" mandatory milk or salt fluoridation, or voluntary milk or salt fluoridation.

235. Therefore, it is submitted that, while salt or milk fluoridation could hypothetically be administered, they can be properly regarded as less attractive alternatives to water fluoridation.

236. It is further submitted that providing or subsidising fluoride tablets is unrealistic. There is no evidence as to whether people would take them, and so their effectiveness as a public health measure is uncertain. There are also dosage risks associated with providing fluoride in a tablet form.

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125 Affidavit of Ms Pryor, paragraphs 14-24, 37-40; Affidavit of Dr Simmons, paragraphs 17-24.
126 Affidavit of Dr Simmons, paragraphs 6-12.
127 Affidavit of Ms Pryor, paragraphs 11-12.
128 New Zealand Maori Dental Association, CBD volume 1 page 250; the Chief Advisor Maori Health at the Taranaki District Health Board, CBD volume 1 page 355; Te Whare Punanga Kororo Trust Inc, CBD volume 1 page 49; Tui Ora Limited, CBD volume 2 page 619; National Hauora Coalition, CBD volume 2 page 689; Te Kaahui o Rauru, CBD volume 2 page 699.
129 Nuffield Council on Bioethics *Public Health: Ethical Issues* "Case Study: Chapter 7 – Fluoridation of Water", CBD volume 7 page 3215; Commission of Inquiry 1957 *Fluoridation of Public Water Supplies* (Government Printer, Wellington, 1962) pages 144-147.

237. However, if the Court were to consider the full spectrum of hypothetical ways of improving oral health, it is submitted that there is still no equally effective alternative to water fluoridation.

238. The plaintiff's submissions and Mr Litras in his affidavit have suggested a variety of non-fluoride related hypothetical measures being banning soft drinks and sugary snacks in schools, supervised tooth brushing programmes in schools, diet and hygiene education for low socio-economic families and improved access to dental care. There is no evidence before the Court about how these measures would work and whether they would be effective.

239. The Crown has long promoted dental hygiene and access to a dentist is free for everyone up to the age of 18. However, it is apparent that these measures are not effective on their own.

240. Currently, many people do not brush their teeth twice daily despite heavy promotion of twice daily brushing.[130] The 2009 New Zealand Oral Health Survey found that only about 45% of children aged 2-17 years and 65% of adults aged 18 years and over brushed their teeth twice daily with a fluoridated toothpaste.[131]

241. On a local level the situation is likely to vary from community to community. In relation to Patea and Waverley, it is Dr Simmons' opinion that even if tooth brushes and toothpaste were free, there is no certainty they would be used.[132] Additionally, it is Ms Pryor's observation that many of her elderly patients with diseases like arthritis cannot brush properly which increases decay.[133] Ms Pryor's evidence is that many people in Patea and Waverley do not take care of their teeth, despite repeated messages to brush twice daily, and free dental care until the age of 18.[134]

130 Affidavit of Dr Whyman, paragraphs 87-88.
131 Affidavit of Dr Whyman, paragraph 89.
132 Affidavit of Dr Simmons, paragraph 16.
133 Affidavit of Ms Pryor, paragraphs 62-64.
134 Affidavit of Ms Pryor, paragraphs 16 and 21.

242. In relation to other hypothetical measures, such as banning soft drinks and sugary snacks in school, there is no evidence that these measures could be as effective as water fluoridation.

243. In summary, it is submitted that the Court can properly conclude there is a proper basis for the conclusion that no practical or equally effective method of providing an adequate supply of fluoride. It is also submitted that there is no known practical or equally effective means of reducing the incidence and severity of dental decay on a population basis other than water fluoridation.

244. It is further submitted that even if there is an effective alternative that will have less impact on the section 11 right, fluoridation is within the range of reasonable alternatives available to Parliament. This is because the section 11 right is limited in a minor way.

Is the limit in due proportion to the importance of the objective?

245. It is submitted that fluoridation can be regarded a proportionate response, because:

(a) the problem it helps address is important and wide spread: the prevalence and severity of dental decay in New Zealand is high, and in communities like Patea and Waverley it is even worse;

(b) there is evidence that New Zealand diets lack the optimal intake of fluoride and that water fluoridation is safe and effective, particularly in areas like Patea and Waverley where oral hygiene is poor; and

(c) fluoridation limits the section 11 right in a minimal way.[135]

246. As previously submitted, the objective of fluoridation is important due to the prevalence of dental decay and its effects.

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135 The Council does not accept that fluoridation is a breach of the section 11 right, see earlier submissions at paragraphs 134-158.

247. There is also evidence that fluoridation is effective in reducing the incidence of dental decay. Dr Whyman discusses the major peer reviewed scientific literature on the topic at paragraph 47 of his affidavit. It is his opinion that fluoridation is effective and that the benefits are "*real and significant*".[136] The Ministry of Health's position is that fluoridation is "*the most effective and efficient way of preventing dental caries in communities receiving a reticulated water supply*...".[137]

248. Dr Whyman discusses the safety of fluoridation and the recent and most reliable studies at paragraphs 55 to 82 of his affidavit. In summary, the only known risk associated with fluoridation is an increase in the prevalence of very mild to mild fluorosis. The increase is from 15% to 30% of children having one tooth or more affected. The affect is cosmetic only and teeth with no fluorosis and very mild or mild fluorosis are assessed as equally attractive.[138]

249. The plaintiff asserts there is evidence of a number of possible health effects from consumption of fluoride. However, as Dr Whyman states, there is no credible scientific evidence that fluoride is related to any of these conditions at the levels recommended by the Ministry of Health (0.7-1.0ppm), and below the MAV in the drinking water standards (1.5ppm). The Ministry of Health continues to monitor and commissions reports into the safety of fluoride.[139]

250. Lastly, if fluoridation is a limit on the section 11 right, it represents only a minor limit, as outlined above and by the Attorney-General.

251. Therefore, it is submitted in summary that fluoridation can properly be regarded as a proportionate response to its objective: the objective is important and the limit on the right is minor.

252. In general response to the plaintiff's submissions for this issue, the plaintiff again places heavy reliance on its position in relation to the merits of fluoridation. The Council does not accept that the plaintiff's position is correct, but that does not detract from the fact that there is a

136 Affidavit of Dr Whyman, paragraph 54.
137 Affidavit of Dr Haisman-Welsh, paragraph 5.
138 Affidavit of Dr Whyman, paragraphs 56-61.
139 Affidavit of Dr Haisman-Welsh, paragraphs 10-19.

considerable body of evidence that fluoridation is a safe and effective means of reducing a widespread disease.

253. Although it is submitted that the Court does not have to make merits findings on matters of scientific evidence, we briefly comment on aspects of the plaintiff's submissions at paragraphs 252 to 270 for completeness:

(a) *Paragraph 252* – there is a substantial body of evidence that the benefits of fluoridation are significant.[140] That body of evidence is recognised by reputable health organisations.[141]

(b) *Paragraphs 256* – there is evidence that swallowing fluoride is beneficial because the saliva includes an effective concentration of fluoride.[142]

(c) *Paragraphs 257-258* – there is only an small increase in the prevalence of very mild to mild fluorosis, and there is no evidence that fluoridation causes an increase in moderate fluorosis.[143] Teeth with no fluorosis and very mild to mild fluorosis are judged as being equally attractive.[144] A small percentage of the population suffer from moderate fluorosis regardless of water fluoridation.[145]

(d) *Paragraph 259* – the plaintiff's submission that there is clear evidence of risks at 4 ppm appears to be based on the findings of the 2006 NRC review, by reference to paragraph 220 of the plaintiff's submission. That report states:

> The committee's conclusions regarding the potential for adverse effects from fluoride at 2 to 4 mg/L in drinking water do not address the lower exposures commonly experienced by most U.S. citizens. Fluoridation is widely practised in the United States to protect against the development of dental

140 Affidavit of Dr Whyman at paragraphs 47-54.
141 See above, paragraph 12.
142 Affidavit of Dr Whyman, paragraph 36.
143 Affidavit of Dr Whyman, paragraphs 56-64.
144 Affidavit of Dr Whyman, paragraph 60.
145 Ministry of Health "Our Oral Health: Key findings of the 2009 New Zealand Oral health Survey" (2010) CBD volume 5 page 1870.

> caries; fluoride is added to public water supplies at 0.7 to 1.2 mg/L. The charge to the committee did not include an examination of the benefits and risks that might occur at these lower concentrations of fluoride in drinking water.

Accordingly, the relevance of the findings of this study are limited in the New Zealand context where the recommended level of fluoride in drinking water 0.7-1.0 mg/L and the MAV is 1.5 mg/L. Mr Whyman's evidence is that fluoride at the levels consumed through drinking water in New Zealand produce no adverse effects aside from the increase in very mild to mild fluorosis discussed above.[146]

(e) *Paragraph 260* – there is no evidence that New Zealanders are consuming too much fluoride.[147]

(f) *Paragraph 261* – the cost of a water filter at approximately $600 for installation and $150 per year running costs[148] does not make opting out unrealistic.

(g) *Paragraph 262* - The plaintiff refers to the Nuffield Council's stewardship model and suggests when applying that model there is no justification for fluoridation. The Nuffield Council itself concluded that fluoridation is consistent with its stewardship model in its case study on fluoridation of water supplies, particularly if decisions about fluoridation are made at a local level.[149]

(h) *Paragraph 264* – the risk of formula fed babies consuming too much fluoride is overstated.[150]

(i) *Paragraph 265* – Dr Whyman states the studies the plaintiff refers to suffer from methodological deficiencies, and are unreliable and inconsistent. The studies related to people who consumed water with far higher levels of fluoride than what is

146 Affidavit of Dr Whyman, paragraphs 55-82.
147 Affidavit of Dr Whyman, paragraphs 71-72. See also paragraphs 67-70.
148 Affidavit of Mr Wilkinson, paragraph 26.
149 Nuffield Council on Bioethics *Public Health: Ethical Issues* "Case Study: Chapter 7 – Fluoridation of Water", CBD page volume 7 page 3215.
150 Affidavit of Dr Whyman, paragraphs 67-70.

consumed in New Zealand and cannot be extrapolated to exposure to 0.7 to 1.0ppm.[151]

(j) *Paragraph 266* – there is evidence that fluoridation reduces health inequalities experienced by Maori and Pacific Islanders and low socio economic communities in New Zealand.[152] Both Dr Simmons and Ms Pryor agreed to comply with the Code of Conduct for expert witnesses, and the fact that they lodged submissions to the Council on a matter within their expertise does not indicate they are less than impartial.

(k) *Paragraph 267* – it is a function of Parliament and the Council to promote public health. Parliament is also entitled to compel people to do things for their own safety. Examples include compulsory seat belts and bike helmets. However, fluoridation of drinking water is not coercive as people can choose not to drink fluoridated water.

(l) *Paragraph 268* – it is for Parliament (and, in turn, local authorities) to decide what approach is best for fluoridation as it is best placed to balance the social and scientific factors. In any event, the most reliable evidence suggests a precautionary approach is not necessary for fluoridation.

(m) *Paragraph 269* – there is no reliable evidence that fluoridation materially increases the content of mercury, arsenic and lead in drinking water.[153] In any event, drinking-water supplies are obliged to monitor and maintain the levels of these metals below their respective MAVs in the drinking-water standards. Fluoride used for water fluoridation has to meet strict quality and safety standards[154]

(n) *Paragraph 270* – fluoridation is a population based health measure. However, because local authorities have a

151 Affidavit of Dr Whyman, paragraphs 75-79.
152 Affidavit of Dr Simmons, paragraphs 6- 25; Affidavit of Ms Pryor, paragraphs 28-43, 57-64.
153 Mr Atkin's affidavit covers potential contaminants in drinking water. Appropriately, Mr Atkin does not purport to be an expert witness.
154 See the submission of Dr Robyn Haisman-Welsh, Chief Dental Officer at the Ministry of Health, CBD volume 1 page 289. See also *Standard for the Supply of Fluoride for Use in Water Treatment* (2nd ed New Zealand Water & Wastes Association, Auckland, 1997).

discretion as to fluoridation, fluoridation can be administered on a community level with regard to the local conditions. As previously submitted, fluoridation is safe and effective. There are no equally effective and viable alternatives, as outlined above.

Steps 5 and 6 - are there any possible interpretations of the legislation?

254. As previously submitted, there is no possible alternative interpretation of the LGA 2002, Health Act, and drinking water standards that confer the power to fluoridate, which could be interpreted in a manner more consistent with section 11 of NZBORA.

255. In the absence of a reasonably possible alternative meaning, if the Court were to find that fluoridation limited the section 11 right and is not demonstrably justified in a free and democratic society, then section 4 of NZBORA requires that Parliament's intended meaning must be adopted. Accordingly, the Council's decision to fluoridate the water supplies for Patea and Waverley is lawful and the first cause of action cannot succeed.

Alternative submissions if Council's decision is the focus of the section 5 inquiry

256. If the Court is minded to consider whether the Council's decision is demonstrably justified, as opposed to the power to fluoridate, (ie if the matter falls within situation (b) as set out in the *Slaight Communications* case at paragraph 169 above) the relevant factors to the minimal impairment test in *R v Oakes* will be different, but our submissions on the other tests in *R v Oakes* would apply equally.

257. The Council has fewer options available to it to provide additional fluoride or to otherwise undertake measures to reduce the incidence and severity of dental decay compared with Parliament. The Council has no power to require fluoridation of salt of milk (even if there was evidence that these alternatives were effective). Nor does the Council have any power to limit the availability of sugary foods or provide other products high in fluoride like varnishes or gels or foams.

258. Fluoridation is the only effective way in which the Council can materially reduce the incidence of dental decay. The Council considered the views of its community and the high incidence of tooth decay in Patea and Waverley in reaching its decision. Its decision is an example of effective democratic decision making in a free and democratic society.

SECOND CAUSE OF ACTION

Introduction

259. The second cause of action relates to the Council's *exercise* of its power to add fluoride to drinking water, as opposed to actual vires/lawfulness of the power. The Court's conclusion in relation to the first cause of action will however necessarily influence the position to be adopted on the second cause of action.

260. The second cause of action alleges the Council failed to take into account nine separate relevant considerations. Six of these (paragraphs 32.1 to 32.6 of the amended statement of claim) relate to the various tests under section 11 and 5 of NZBORA as discussed above. The other three alleged mandatory considerations (paragraphs 32.7 to 32.9) are separate but related matters relating to the fluoridation of drinking water.

261. The amended statement of claim and the plaintiff's submissions do not specify the precise basis on which it claims the considerations were mandatory. As already indicated, mandatory relevant considerations can be express or implied.

262. These submissions on the second cause of action address the following issues:

(a) whether the section 11 and 5 NZBORA considerations or the plaintiff's other allegations in paragraph 32 are express mandatory relevant considerations.

(b) whether the section 11 and 5 NZBORA considerations or the plaintiff's other allegations in paragraph 32 are implied mandatory relevant considerations.

(c) if the answer to part or all of either (a) or (b) above is yes, whether the Council failed to take those matters into account in reaching its decision.

Express mandatory considerations

263. As previously submitted, the exercise of the general power of competence in section 12 of the LGA 02 is circumscribed by decision making requirements in the LGA 02.[155] These requirements are set out in Part 6 Subpart 1 and contain the express mandatory requirements or considerations that a Council has to consider when making a decision. The provisions of most relevance are sections 76 to 81 and are set out in Appendix A to these submissions. Subpart 1 also contains provisions to the principles of consultation, and the use of the special consultative procedure.

264. The NZBORA is not listed as a mandatory relevant consideration in Part 6 Subpart 1, nor is there any other section in the LGA 02 that could be said to make the matters in paragraphs 32.7 to 32.9 of the amended statement of claim mandatory considerations.

265. The LGA 02 does not contain an express requirement to consider the NZBORA, except in relation to bylaws. This is discussed below. There is however no similar requirements imposed in relation to other decision making processes under the LGA 02.

266. No other legislation, including the Health Act, requires the Council to consider the matters listed in paragraphs 32.1 – 32.9 and it is submitted those matters are not express mandatory considerations.

155 Section 12(3) states that "Subsection (2) is subject to this act, any other enactment, and the general law." See also *Whakatane District Council v Bay of Plenty Regional Council* [2010] 3 NZLR 826 (CA) at [20], and *Local Government Law in New Zealand* (looseleaf ed, Brookers) at [LG 12.01].

Implied mandatory relevant considerations

The principles relating to determining implied mandatory relevant considerations

267. The statutory structure and scheme must be used to identify an implied mandatory consideration. In *Keam v Minister of Works and Development*, Somers J stated (emphasis added):[156]

> Section 23 imposes on the Authority, to whom the matter was first referred, the duty of deciding whether a right should be given. The considerations or criteria upon which that decision is to be reached are not expressly stated. **They are to be found in the objects of the Act as ascertained from the whole of its provisions**.

268. Similarly, in *Attorney-General v New Zealand Maori Council*, Richardson J stated (emphasis added):[157]

> That is a conventional administrative law question and where, as here, the statute itself does not specify in so many words the criteria to be taken into account, **it is a matter of determining from the scheme and purpose of the legislation what was the intention of the legislature in that regard.**

269. In relation to implied mandatory considerations, the learned author of *Constitutional and Administrative Law in New Zealand* notes (emphasis added):[158]

> The listed criteria need not be exhaustive. Mandatory or permissible considerations may arise by implication in the statutory scheme. **The more comprehensive and detailed the criteria, the more likely they will be construed as exhaustive**.

156 *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA) at 327.
157 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) at 140.
158 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007 at 895.

Are the section 11 and section 5 NZBORA considerations implied mandatory considerations?

270. The Council's primary position is that fluoridation does not limit the section 11 right. On this basis, consideration of the factors in paragraphs 32.1 to 32.6 of the amended statement of claim cannot be implied mandatory considerations.

271. However, if the Court were to reach a different view concerning section 11, it is still submitted that NZBORA matters are not implied mandatory considerations for the Council's decision being challenged in these proceedings.

272. As already mentioned, the LGA 02 makes provision for a detailed and comprehensive decision making process. That process does not include a requirement to consider NZBORA matters except in relation to bylaws. The LGA 02 includes an express requirement that local authorities are to consider the implications of the NZBORA when making bylaws. Section 155(2) of the LGA 02 states:

> (2) If a local authority has determined that a bylaw is the most appropriate way of addressing the perceived problem, it must, before making the bylaw, determine whether the proposed bylaw—
>
> (a) is the most appropriate form of bylaw; and
>
> (b) **gives rise to any implications under the New Zealand Bill of Rights Act 1990**.

273. Section 155(3) also states "*No bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990, notwithstanding section 4 of that Act.*"

274. The presence of section 155(2) indicates that Parliament turned its mind to circumstances when local authorities must consider NZBORA matters. It is submitted that Parliament has decided that any implications under NZBORA must be considered when making bylaws, but not otherwise.

275. It may be inferred that the reason NZBORA must be considered under section 155 of the LGA 02 as part of decision-making on bylaws, but not for decisions on all other matters under Part 6, is that bylaws are by their nature regulatory and coercive (as the heading to Part 8 suggests). Local authorities should have to consider the implications of the NZBORA before making bylaws because bylaws inherently have the potential to impinge on rights and freedoms contained in NZBORA.

276. By contrast, other areas of local authority activity (such as water supply as network infrastructure or a public service) are not inherently coercive (contrary to the plaintiff's submissions), and so Parliament has not required decision-making in relation to such matters to take NZBORA into account. It would be futile to make NZBORA a mandatory consideration for all decisions, as it is for bylaws under section 155, because the likelihood of rights and freedoms under the NZBORA being impacted by the decision would be very low.

277. If Parliament had intended to require consideration of the NZBORA in situations other than the making of bylaws, Parliament could have said so. Accordingly, the implication of a requirement to consider the NZBORA for decisions generally under the LGA 02 would be inconsistent with the statutory scheme.

278. In addition to the general submissions above, it is submitted it would be inappropriate for the Council to have to canvas the NZBORA matters when it came to exercise the power to fluoridate drinking water.

279. It is submitted that for powers given to the Council to undertake a specific task (such as fluoridating water supplies), the NZBORA considerations are only relevant to determining whether or not the implied legislative power is consistent with the NZBORA. If that power is consistent with NZBORA, or can in any event be lawfully exercised through the effect of section 4, the Council does not have to revisit the NZBORA matters when it exercises that statutory power.

280. In this respect, it is submitted that the Council should not have to "second guess" Parliament's judgement by considering whether the

specific power it has been given limits any right and, if so, whether that limit is demonstrably justified, particularly in circumstances where the particular power is specific and sourced by statute (whether expressly or by necessary implication).

281. In this case, an implied mandatory requirement to consider the section 11 and 5 considerations when exercising the power to fluoridate water supplies would have no point because the Council could decide to fluoridate regardless of the outcome of its section 11 and section 5 inquiry. The Council's decision would be lawful regardless of that process due to the effect of section 4 of NZBORA.

282. The present situation is distinguishable from that contained in a line of case law regarding the Broadcasting Standards Authority.

283. The High Court in some cases have held NZBORA to be an implied mandatory relevant consideration for the Broadcasting Standards Authority (**BSA**) when it determines alleged breaches of the Broadcasting Standards, because of the possibility that the BSA could interpret a standard in a manner that did not represent a reasonable limit on the right to freedom of expression (section 21 of NZBORA).[159]

284. However, there is a divergence of views in the High Court. In *TV3 Network Services Limited v Holt*,[160] your Honour held that the Broadcasting Standards alone were the limits prescribed by law for the purposes of the section 5 NZBORA and so that the decisions of the Broadcasting Standards Authority were not to be subject to the section 5 analysis.[161]

285. It is not relevant for the purposes of this case which line of authority is correct in relation to the BSA's functions, because it is submitted that there is a clear distinction between the Council's decision to fluoridate and BSA's role in interpreting and applying broadcasting standards.

159 *TVNZ Ltd v West* [2011] 3 NZLR 825 (HC) at [86]; *Canwest TV Works Ltd v XY* [2008] NZAR 1 (HC) at [64]; *TVNZ Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at [52].
160 *TV3 Network Services Limited v Holt* [2002] NZAR 1013.
161 *TV3 Network Services Limited v Holt* [2002] NZAR 1013 at [38]-[39].

286. The BSA operates a quasi-judicial function which involves interpreting and applying imprecise standards in a variety of factual settings. The standards themselves refer to NZBORA and the relevance of the right to freedom of expression is also clear in the subject area. Importantly, the standards are not "enactments" and so section 4 of NZBORA does not apply to them.[162]

287. In summary, it is submitted that the matters listed in paragraphs 32.1 to 32.6 are not implied mandatory considerations.

288. However, if contrary to these submissions, section 11 and section 5 of NZBORA were to be regarded as implied mandatory relevant considerations, it is submitted that it was sufficient for the Council to broadly consider the issue under section 5, rather than address the issue in the specific manner set out in *Hansen* and the amended statement of claim. In particular, it is sufficient if the Council turned its mind to the general principles in section 5, which as Tipping J described it *"is essentially an enquiry into whether a justified end is achieved by a proportionate means".*[163]

289. This approach has support from the House of Lords and New Zealand authorities.

290. The House of Lords decision in *R (Begum) v Headteacher and Governors of Denbigh High School* concerned an alleged breach of Article 9 of the European Convention on Human Rights, which relates to freedom of thought, conscience and religion, in relation to a compulsory school uniform.[164] The House of Lords overturned the Court of Appeal's decision which included a detailed list of considerations that the Court of Appeal said the school in question had to consider before making its decision. The Court of Appeal's considerations are set out below:[165]

> The decision-making structure should therefore go along the following lines:

162 *TVNZ Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at [34]; *TVNZ Ltd v KW* HC Auckland CIV-2007-485-1609, 18 December 2008 at [14].
163 *R v Hansen* [2007] 3 NZLR 1 (SC) at [123].
164 *R (Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100 (HL).
165 *R (Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100 (HL) at [66].

1) Has the claimant established that she has a relevant Convention right which qualifies for protection under Article 9(1)?
2) Subject to any justification that is established under Article 9(2), has that Convention right been violated?
3) Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
4) Did the interference have a legitimate arm?
5) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?
6) Was the interference justified under Article 9(2)?

291. The House of Lords disagreed with this prescriptive set of considerations and reversed the Court of Appeal's decision. Lord Bingham relevantly stated:[166]

> Thirdly, and as argued by Poole in his article cited above, pages 691-695, I consider that the Court of Appeal's approach would introduce "a new formalism" and be "a recipe for judicialisation on an unprecedented scale". The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. **If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.**

292. This passage was referred to in the High Court decision in *Television New Zealand Ltd v West* where that Court observed "*the degree of formalism required of the decision-making body will vary according to the nature of that body*".[167]

166 *R (Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100 (HL) at [31].
167 *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC).

293. In the present situation, it would be unreasonable to expect that the democratically elected members of Council had to consider NZBORA in a formalistic manner.

Are the matters set out in paragraphs 32.7 to 32.9 implied mandatory relevant considerations?

294. It is further submitted that the three specific matters listed in paragraphs 32.7 to 32.9 cannot be implied mandatory relevant considerations. There is no sustainable basis in which the three specific allegations of fact (which the Council does not consider are correct on the evidence before the court) could be regarded as implied mandatory relevant considerations with regard to the statutory scheme within which the decision was made.

295. Turning to paragraph 32.7, there can be no obligation on the Council to consider how the fluoride to be put into a water supply is sourced. To the extent that it was necessary, the Council was entitled to place weight on the Ministry of Health's guidance in this matter.[168]

296. Further, the allegations in paragraphs 32.8 and 32.9 are not supported by the major scientific reviews on fluoridation and it cannot be a reviewable error to fail to have regard to such matters even if there were legitimately held competing views on the topic.[169]

Alleged mandatory considerations were considered in any event

297. Even if the NZBORA was an implied mandatory relevant consideration that the Council was required to consider when making its decision to fluoridate the water supplies, it is submitted that it can be properly be inferred that the Council did consider NZBORA matters as part of the consultation process and decision making processes that it undertook.

298. The Courts have held that a decision need not explicitly refer to a supposedly mandatory relevant consideration, in order for that consideration to have been taken into account. In *Hayes v Fighter*

168 See the submission of Dr Robyn Haisman-Welsh, Chief Dental Officer at the Ministry of Health, CBD volume 1 page 289.
169 Affidavit of Dr Whyman, paragraphs 47-82.

Trainers Limited,[170] the appellant argued that the trial judge had failed to take into account two factors that were not explicitly considered in the trial judgment on costs.

299. Nevertheless, the Court of Appeal held that because the two factors had been raised in submissions, there was no reason to believe that the factors had not been taken into account (emphasis added):[171]

> The Judge considered and referred to the first two of those factors and took them into account. The weighting of them was a matter for him. **The last two of those factors were before the trial Judge, and there is nothing to suggest they were not taken into account.**

300. The Court has also recognised that relevant considerations need not be considered in a precise manner if the relevant consideration has been addressed in a more general sense. In *Phalaket v Maxwell*,[172] the applicant applied for judicial review of the Minister's decision to refuse an application for residency on family reunification grounds. In particular, it was alleged that the Minister had failed to take into account the emotional ties between the applicant and his brother. However, the Court held that specific reference to the emotional ties was not necessary. The Court found:[173]

> A principal plank in Mr Ruthe's argument was that the issue of the emotional ties mentioned earlier in this judgment was not specifically addressed. However, the mention in the Minister's letter of the brother and the reference in broad terms to other family situations demonstrate that the point had been noted.

301. A similar situation arose in *Mohamud v Minister of Immigration*.[174] In that case, the appellants appealed a decision of the Deportation Review Tribunal which had upheld the decision of the Minister of Immigration to revoke the appellants' residency and refugee status. The appellants argued that the Tribunal failed to have regard to article 3(1) of the United Nations Convention on the Rights of the Child as a relevant

170 *Hayes v Fighter Trainers Limited* CA218/99, 20 July 2000.
171 *Hayes v Fighter Trainers Limited* CA218/99, 20 July 2000 at [15].
172 *Phalaket v Maxwell* HC Wellington CP459/91, 10 May 1995.
173 *Phalaket v Maxwell* HC Wellington CP459/91, 10 May 1995 at 3.
174 *Mohamud v Minister of Immigration* [1997] NZAR 223 (HC).

consideration. The High Court acknowledged that the Tribunal need not make specific reference to the article 3(1):[175]

> The Tribunal did not expressly refer to the Convention, to article 3(1) or, indeed, to any submissions advanced by the appellants in connection with the Convention. It does not necessarily follow, however, that article 3(1) was not properly considered by the Tribunal. There was no obligation on the Tribunal to make specific reference to the article, so long as it nevertheless had regard to the best interests of the children as a primary consideration.

302. The High Court has held, albeit in a slightly different context, that once a decision maker has had information made available to it, there is a presumption that that information has been considered by the decision maker. In *Zanzoul v Removal Review Authority*,[176] the appellant appealed against a decision of the Removal Review Authority that Mr Zanzoul be required to leave New Zealand under section 45 of the Immigration Act 1987.

303. Under section 50(5) of the Immigration Act 1987, the Authority was required to disclose any information that the Authority proposed to take into account in determining the appeal, if that information was prejudicial to the appellant (among other things). One ground of appeal was that certain information was not disclosed to Mr Zanzoul. The Authority sought to defend the decision not to disclose the information on the basis that there was no evidence that the information had been conveyed to the Authority. The Court rejected this argument in the following terms:[177]

> I accept Mr Ellis's submission that it is impossible for the appellant to prove positively that the information was conveyed to the RRA member responsible for the decision, and that once a clear inference arises that it would have been available to the RRA member, the Court should draw the inference that it was considered, until that inference is refuted.

175 *Mohamud v Minister of Immigration* [1997] NZAR 223 (HC) at 228.
176 *Zanzoul v Removal Review Authority* HC Wellington CIV-2007-485-1333, 9 June 2009.
177 *Zanzoul v Removal Review Authority* HC Wellington CIV-2007-485-1333, 9 June 2009 at [83].

304. As noted above, in the present case, all Councillors had read the written submissions in advance of the meeting at which oral presentations were made.[178] These submissions were wide ranging and covered all of the matters in section 32 of the amended statement of claim. The Councillors also convened a meeting to hear from interested parties and had the benefit of an officer's report.

305. It is submitted therefore that for reasons outlined in more detail below, the inference can be drawn that the Council did consider the relevant issues raised under NZBORA, and the other issues which allegedly it was required to consider as mandatory relevant considerations. No basis has been laid by the plaintiff to suggest that this inference has been refuted.

306. Each of these matters in paragraph 32 of the amended statement of claim is now considered under the headings below.

That fluoridation limits the right contained in s 11 of the NZBORA

307. The submission of Ms Angela Hair explicitly raised the issue of water fluoridation allegedly breaching section 11 of NZBORA.[179] Dr Keith Blayney's submission discussed the issues of "mass medication" and "personal rights".[180]

308. The Council Report summarising the submissions received noted that:[181]

> Numerous submitters said they felt the introduction of fluoride in the town supply took away their right to choose whether or not they wanted fluoride in their water and others were against mass medication without consent.

178 Minutes of Special Council meeting, 26 November 2012, CBD volume 8 page 3241.
179 Submission of Ms Angela Hair, CBD volume 1 pages 57-58.
180 Submission of Dr Keith Blayney, CBD volume 1 pages 72-73.
181 Report – Analysis of Submissions on the Option of Fluoridating the Patea and Waverley Water Supplies, CBD volume 8 page 3262.

Whether the objective of dental health promotion and protection is sufficiently important to limit that right

309. Dr Simmons noted that tooth decay is the most common chronic disease suffered by humans, and outlines a range of negative effects of tooth decay.[182]

310. Similarly, Dr Haisman-Welsh noted that dental caries represent the main threat to the condition of natural teeth, and that oral health is critical to the health and wellbeing of children and adults.[183]

311. Ms Jenkins' submission discussed the serious issue of dental disease and that fluoridation is the most effective and socially equitable means of achieving the dental decay preventative effects of fluoride.[184] She also noted that the benefits of water fluoridation, including reducing inequalities, substantially reducing ill health, and improving the outcomes of vulnerable groups justified restricting personal freedoms for the greater good.[185]

Whether fluoridation is reasonably necessary to achieve the objective

312. Ms Jenkins, in her submission, noted that water fluoridation is practical, feasible and cost effective at a community level but not at an individual level. Public health organisations encourage communities to adopt community water fluoridation because the benefits to everyone who have their own teeth are so worthwhile that the whole community should have access to those benefits.[186]

313. In Dr Primhak's submission, he noted that water fluoridation would benefit the most disadvantaged parts of the community who have less access to other methods for addressing tooth decay, such as fluoridated toothpastes.[187]

314. Councillor Wards stated that he was in agreement with the experts involved in international research and that by not fluoridating the water it

182 Submission of Dr Greg Simmons, CBD volume 1 page 187.
183 Submission of Dr Robyn Haisman-Welsh, CBD volume 1 page 275.
184 Submission of Ms Becky Jenkins CBD, volume 2 pages 671-672.
185 Submission of Ms Becky Jenkins CBD, volume 2 pages 677-678.
186 Submission of Ms Becky Jenkins, CBD volume 2 pages 677-678.
187 Submission of Dr Robert Primhak, CBD volume 2 page 442.

would be denying the children and young people in the communities the benefit of better community health and wellbeing and that would be a serious error of judgement on the Council's behalf.[188]

Whether fluoridation is a proportionate response to the objective

315. In Dr Wills' submission, he noted that public health measures all involve some restriction of personal rights or freedoms for a greater good. He considered whether the benefits of fluoridation justify restricting personal freedoms for the greater good.[189]

316. Ms Jenkins also noted that the benefits of water fluoridation, including reducing inequalities, substantially reducing ill health, and improving the outcomes of vulnerable groups justified restricting personal freedoms for the greater good.[190]

Whether there are other ways of achieving the objective without limiting the right in s 11

317. The submission of Dr Tomic considered the benefits of alternative schemes in comparison to water fluoridation including fluoride tablets, in-school fluoride mouth-rinse programmes, and fluoride toothpastes.[191] The Council Report summarising the submissions received noted that:[192]

> Submitters suggested it would be cheaper if children were given new toothbrushes and toothpaste and that the money was used for education and subsidised visits to the dentist. It was also suggested that better nutrition and fewer fizzy drinks would improve oral health and that most people get enough fluoride in their day-to-day routine.

318. Additionally, Councillor Wards noted that many submitters said that topical application of fluoride was better but fluoride toothpaste had to be used several times per day and parents had to ensure that children

188 Minutes of the Special Meeting of the South Taranaki District Council held on Monday 10 December 2012, CBD volume 8 page 3267.
189 Submission of Mr Russell Wills, CBD volume 2 pages 638-639.
190 Submission of Ms Becky Jenkins, CBD volume 2 pages 677-678.
191 Submission of Dr Damian Tomic, CBD volume 2 pages 710-711.
192 Report – Analysis of Submissions on the Option of Fluoridating the Patea and Waverley Water Supplies, CBD volume 8 pages 3262-3263.

brushed their teeth daily. In comparison, the ingestion of fluoride enhanced water provided a far higher level of protection.[193]

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

319. Ms Pryor submitted that there are children who do not have ready access to a toothbrush let alone toothpaste in Patea and Waverley. She explicitly compared the costs of water fluoridation (50 cents/year/head of population) with the cost of supplying fluoride tablets ($17/100 tablets ($63/year)).[194]

320. Mr Antunovic, in his submission, noted that dental services for adults remain largely outside the system of publicly funded or subsidised health care and are accessible to the affluent but are often unobtainable by those who are less well off. He further stated that, although other fluoride-containing products are available, community water fluoridation remains the most equitable and cost-effective method of delivering fluoride to all members of most communities, regardless of age, educational attainment or income level.[195]

321. Dr Haisman-Welsh noted:[196]

> In 1999, a group of independent scientists and economists advised that the economic argument of water fluoridation is very strong, especially for communities with lower socioeconomic status. In a town of around 50,000 people, fluoridation would prevent an estimated 74,200 cases of decay over 30 years. On those figures it was conservatively estimated it would cost around $4.20 to prevent each case of decay. Without fluoridation it would cost around $117.25 to treat each case of decay. This shows that treating decay is around 30 times more expensive than preventing it with water fluoridation.

193 Minutes of the Special Meeting of the South Taranaki District Council held on Monday 10 December 2012, CBD volume 8 pages 3266-3267.
194 Submission of Ms Sandra Pryor, CBD volume 1 page 16.
195 Submission of Dr David Antunovic, CBD volume 1 page 259.
196 Submission of Dr Robyn Haisman-Welsh, CBD volume 1 page 277.

That the fluoride added to water supplies is sourced from industrial by-products and contains contaminants that are potentially harmful to health

322. In Ms Hair's submission, she noted that hydrofluorosilicic acid is a toxic substance and that the potential harmful side effects of water fluoridation include dental fluorosis, the suppression of enzymes and thyroid, lower absorption of iron in pregnant women as well as negative impacts on the brain development of children.[197]

323. Dr Simmons' submission discussed the origin and purity of hydrofluorosilicic acid and concluded that the concentration of heavy metals in the drinking water at a 0.7 ppm concentration of fluoride would have no health implication.

324. At the special meeting of South Taranaki District Council on 10 December 2012, Councillor Self noted some of the opposing scientific evidence and was concerned with the issue of kidney problems that could be caused by fluoridation.[198]

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 1.0 ppm fluoride is potentially harmful to health

325. In Mr Atkin's submission, he extensively discussed the scientific evidence that purports to show that water fluoridation at a level of 0.7 to 1.0 ppm causes adverse health effects.[199]

326. In Dr Blayney's submission, he discussed the scientific research surrounding the possible adverse effects of water fluoridation and the concentrations of fluoride required for those effects to occur.[200]

327. Ms Pryor, in her submission, noted that recent reviews concluded that there is no significant scientific support for the claim that fluoride initiates arthritis and osteoarthritis or increases the risk of bone or hip fractures, cancer, osteoporosis, kidney disease, thyroid, reduces IQ or causes any

197 Submission of Ms Angela Hair, CBD volume 1 pages 54-56.
198 Minutes of the Special Meeting of the South Taranaki District Council held on Monday 10 December 2012, CBD volume 8 page 3267.
199 Submission of Mr Mark Atkin, CBD volume 3 pages 857- 955.
200 Submission of Dr Keith Blayney, CBD volume 1 page 75.

other adverse consequences.[201] Dr Haisman-Welsh also considered the extensive studies on water fluoridation and human health and noted that the large body of evidence has not identified a cause and effect relationship between chronic and acute conditions and water fluoridated at 0.7 to 1.0 ppm.[202]

328. Additionally, Councillor Wards considered that in the absence of any convincing contrary research fluoride at the proposed 0.7 to 1.0 ppm must be classed as safe and that the negative health effects mentioned by some submitters were not supported by universally accepted scientific research.[203]

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

329. In Mr Atkin's submission, he extensively criticised the scientific evidence that shows that water fluoridation at a level of 0.7 to 1 part per million is effective in reducing tooth decay.[204]

330. By way of contrast, the submission of Dr Blayney considered many New Zealand and international studies and reviews in discussing the benefits and effectiveness of water fluoridation at or below 1 ppm.[205] Mr Antunovic's submission also noted that water fluoridation at a level of 0.7 ppm can lead to improved oral health, particularly for Maori and he considered that there was a considerable body of evidence that confirms that community water fluoridation effectively reduces the incidence of dental caries with minimal side effects.[206]

331. Dr Haisman-Welsh noted that the Ministry of Health recommends the adjustment of fluoride already present in the water supply to between 0.7 and 1.0mg/litre in drinking water, the optimum level to improve and protect oral health. She also noted that expert advice from National

201 Submission of Mr Sandie Pryor, CBD volume 1 pages 13-14.
202 Submission of Dr Robyn Haisman-Welsh, CBD volume 1 page 287.
203 Minutes of the Special Meeting of the South Taranaki District Council held on Monday 10 December 2012, CBD volume 8 page 3267.
204 Submission of Mr Mark Atkin, CBD volume 3 pages 857-955.
205 Submission of Dr Keith Blayney, CBD volume pages 101-102.
206 Submission of Dr David Antunovic, CBD volume 1 pages 259-262.

Fluoridation Information Service had given the Ministry no cause to consider changing its policy on community water fluoridation.[207]

Discretion as to relief

332. Should the Court find that the alleged considerations were mandatory and the Council failed to take any of them account, it is submitted that relief should be refused to the plaintiff in the exercise of the Court's discretion.

333. Section 4(3) of the Judicature Amendment Act 1972 provides:

> Where in any of the proceedings referred to above the Court had, before the commencement of this Part of this Act, a discretion to refuse to grant relief on any grounds, it shall have the discretion, on like grounds, to refuse to grant any relief on an application for review.

334. The Court's discretion was recognised in cases such as *A J Burr Ltd v Blenheim Borough Council*,[208] where Cooke J (as he then was) said at 4:

> The determination by the Court whether to set the decision aside or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account.

335. Reference can also be made to the decision of Panckhurst J in *Just One Life Ltd* v *Queenstown Lakes District Council*:[209]

> Hence the modern approach is to take a broad-based view of the features of the case in determining whether relief should be granted. Put another way the tendency is to look at substance rather than form. The nature of the statutory requirement, the degree of non-compliance and the effect of non-compliance are all highly relevant.

336. It is submitted that the outcome of the Council's decision on fluoridation would not be have been different if it had considered any or all of the

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207 Submission of Dr Robyn Haisman-Welsh, CBD volume 1 pages 276 and 290.
208 *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA).
209 *Just One Life Ltd v Queenstown Lakes District Council* [2003] 2 NZLR 411 (CA) at [50].

alleged mandatory considerations any further than it already did. A further complication is that the Council has changed since it made its decision on fluoridation through this year's elections.

337. The Court has on a number of occasions refused to grant relief where the outcome of the decision in question was inevitable. For example, in *Brannigan v Davison*[210] the Privy Council refused to set aside a Commission of Inquiry decision because the Commissioner misdirected himself on the scope of statutory exceptions relating to requiring witnesses to give evidence who have been summoned under the Commissions of Inquiry Act 1908. The Commissioner had stated his view on a weighing exercise similar to the proper exercise. Accordingly, the Privy Council found that had the Commissioner directed himself correctly, the outcome would have been the same.[211]

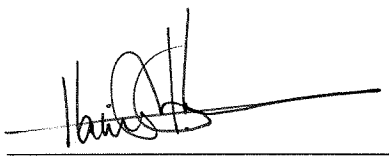
338. It is submitted that the situation in the *Brannigan* case is similar to the present circumstances, because the Council considered the underlying aspects of the alleged mandatory considerations in reaching its decision.

CONCLUSION

339. It is accordingly submitted that the proceedings should be dismissed and/or relief declined in the discretion of the Court.

340. The defendant reserves the right to make separate submissions as to costs.

Dated this 20th day of November 2013



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Counsel for South Taranaki District Council

210 *Brannigan v Davison* [1997] 1 NZLR 140.
211 *Brannigan v Davison* [1997] 1 NZLR 140 pages 148-149.

APPENDIX A
LGA 02 PROVISIONS REGARDING COUNCIL DECISION MAKING

1. Section 76(1) of the LGA 02 states that:

> Every decision made by a local authority must be made in accordance with such of the provisions of sections 77, 78, 80, 81, and 82 as are applicable.

2. Section 77 sets out the steps the Council is required to take when making a decision. Section 77 is as follows:

> **77 Requirements in relation to decisions**
>
> (1) A local authority must, in the course of the decision-making process,—
>
> (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
>
> (b) assess those options by considering—
>
> (i) the benefits and costs of each option in terms of the present and future interests of the district or region; and
>
> (ii) the extent to which community outcomes would be promoted or achieved in an integrated and efficient manner by each option; and
>
> (iii) the impact of each option on the local authority's capacity to meet present and future needs in relation to any statutory responsibility of the local authority; and
>
> (iv) any other matters that, in the opinion of the local authority, are relevant; and
>
> (c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.
>
> (2) This section is subject to section 79.

3. Section 78 states that the Council:

[M]ust, in the course of its decision-making process in relation to a matter, give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter.

4. Section 79 provides the local authority with a discretion as to how it achieves compliance with sections 78 and 79.[212] Section 79 is as follows:

> **79 Compliance with procedures in relation to decisions**
>
> (1) It is the responsibility of a local authority to make, in its discretion, judgments—
>
> (a) about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision; and
>
> (b) about, in particular,—
>
> (i) the extent to which different options are to be identified and assessed; and
>
> (ii) the degree to which benefits and costs are to be quantified; and
>
> (iii) the extent and detail of the information to be considered; and
>
> (iv) the extent and nature of any written record to be kept of the manner in which it has complied with those sections.
>
> (2) In making judgments under subsection (1), a local authority must have regard to the significance of all relevant matters and, in addition, to—
>
> (a) the principles set out in section 14; and
>
> (b) the extent of the local authority's resources; and
>
> (c) the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons.
>
> (3) The nature and circumstances of a decision referred to in subsection (2)(c) include the extent to which the requirements for such decision-making are prescribed in or under any other

212 *Whakatane District Council v Bay of Plenty Regional Council* [2010] 3 NZLR 826 (CA) at [14].

enactment (for example, the Resource Management Act 1991).

(4) Subsection (3) is for the avoidance of doubt.

5. Section 80 relates to the identification of decisions that are inconsistent with Council policies:

> **80 Identification of inconsistent decisions**
>
> (1) If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify—
>
> (a) the inconsistency; and
>
> (b) the reasons for the inconsistency; and
>
> (c) any intention of the local authority to amend the policy or plan to accommodate the decision.
>
> (2) Subsection (1) does not derogate from any other provision of this Act or of any other enactment.

6. Section 81 provides for Maori contribution into the decision making process:

> **81 Contributions to decision-making processes by Maori**
>
> (1) A local authority must—
>
> (a) establish and maintain processes to provide opportunities for Maori to contribute to the decision-making processes of the local authority; and
>
> (b) consider ways in which it may foster the development of Maori capacity to contribute to the decision-making processes of the local authority; and
>
> (c) provide relevant information to Maori for the purposes of paragraphs (a) and (b).

(2) A local authority, in exercising its responsibility to make judgments about the manner in which subsection (1) is to be complied with, must have regard to—

(a) the role of the local authority, as set out in section 11; and

(b) such other matters as the local authority considers on reasonable grounds to be relevant to those judgments.