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Lange v Atkinson [2000] NZCA 95; [2000] 3 NZLR 385; (2000) 5 HRNZ 684 (21 June 2000)

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Lange v Atkinson [2000] NZCA 95 (21 June 2000); [2000] 3 NZLR 385; (2000) 5 HRNZ 684

Last Updated: 9 December 2011

IN THE COURT OF APPEAL OF NEW ZEALAND CA52/97

BETWEEN	D R LANGE Appellant
AND	J B ATKINSON First Respondent
AND	AUSTRALIAN CONSOLIDATED PRESS Second Respondent

Hearing:	10 February 2000
Coram:	Richardson P Henry J Keith J Blanchard J Tipping J
Appearances:	P A McKnight for the Appellant R Harrison QC and S J Mills for Respondents W M Wilson QC and J M Mallon for Commonwealth Press Union and New Zealand Press Council intervening by leave
Judgment:	21 June 2000

JUDGMENT OF THE COURT

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Introduction

[1] In its judgment delivered on 28 October 1999 ([2000] 1 NZLR 257), the Privy Council set aside the decision of this Court reported at [1998] 3 NZLR 424 and remitted the appeal from the judgment of Elias J [1997] 2 NZLR 22 for rehearing. In so doing their Lordships observed that they considered this Court would wish to take into account the decision of the House of Lords in Reynolds v Times Newspapers Ltd [1999] 3 WLR 1010 delivered on the same day and by the same Judges as those who sat in the Privy Council in the present case. Their Lordships amplified this remission by saying:

Their Lordships emphasise that they do not suggest that at the further hearing the New Zealand courts are bound to adopt either the English or the Australian solutions. Nor do they seek to influence the New Zealand courts towards either of these solutions. If satisfied that the privilege favoured in the judgment now under appeal is right for New Zealand, although wider than has been held acceptable in either England or Australia, the New Zealand Court of Appeal is entitled to maintain that position. Nevertheless, in the light of the comparative case law which has now emerged, including the clarification of the English common law in Reynolds, their Lordships think it appropriate to give the New Zealand Court of Appeal the opportunity to reconsider the issue. After all, the three countries are all parliamentary democracies with a common origin. Whether the differences in details of their constitutional structure and relevant statute law have any truly significant bearing on the scope of qualified privilege for political discussion is among the aspects calling for consideration.

[2] Earlier in the judgment, following a review of recent judgments, their Lordships had said this:

Against this somewhat kaleidoscopic background, one feature of all the judgments, New Zealand, Australian and English, stands out with conspicuous clarity: the recognition that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions. These conditions include matters such as the responsibility and vulnerability of the press. In their Lordship's view, subject to one point mentioned later, this feature is determinative of the present appeal. For some years their Lordships' Board has recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy. The

present case is a prime instance of such a case. As noted by Elias J and the Court of Appeal, different countries have reached different conclusions on the issue arising on this appeal. The Courts of New Zealand are much better placed to assess the requirements of the public interest in New Zealand than their Lordship's Board. Accordingly, on this issue the Board does not substitute its own views, if different, for those of the New Zealand Court of Appeal. ([2000] 1 NZLR 257, 261-262, emphasis added)

> [3] The judgment also mentioned another matter better undertaken by the Courts of New Zealand rather than by the Board : the assessment of whether a matter is appropriate for legislative development or judicial resolution ([2000] 1 NZLR 257, 262-263). Having mentioned the two matters of local public policy and the legislative/judicial balance, their Lordships accepted that there was a high content of judicial policy in the solution of the issue; that different solutions may be reached in different jurisdictions without any faulty reasoning or misconception; and that the necessary value judgment may be best made by local courts.
> [4] The "one point" referred to in the passage quoted in para [2] above which the Privy Council identified as standing in the way of deference to this Court's assessment of local public policy arose from the later decisions of the English Court of Appeal and the House of Lords in the Reynolds case. The New Zealand courts which had undertaken an analysis of the English law had not had the advantage of those decisions. While English case law is by no means determinative, an appraisal of that law is

an important part of the background against which the Courts in New Zealand are assessing the best way forward on this important and difficult point of the common law. This is not surprising. Even on issues of local public policy, every jurisdiction can benefit from examinations of an issue undertaken by others. Interaction between the jurisdictions can help to clarify and refine the issues and the available options, without prejudicing national autonomy. ([2000] 1 NZLR 257, 263)

Separation of occasion of privilege and its misuse

> [5] We have carefully considered the position now reached in the United Kingdom in the light of Reynolds. Having reconsidered the issues and reflected upon the various ways they have been dealt with in other jurisdictions, and especially in Reynolds, we think it desirable to stress one point immediately. While there is potential for factual overlap, it is of first importance to keep conceptually separate the questions whether the occasion is privileged and, if so, whether the occasion has been misused: see for example the speech of Lord Buckmaster in London Association for Protection of Trade v Greenlands Ltd [1916] 2 AC 15, 23. The dichotomy between occasion and misuse is mirrored by the roles of Judge and jury in this field. Subject to the resolution of any dispute about primary facts, which is for the jury, the Judge decides whether the occasion is privileged. The jury decides whether a privileged occasion has been misused.
> [6] In our earlier judgments we were concerned primarily with the first issue - whether the occasion was privileged. The references made to proper use of the occasion in terms of s19 of the Defamation Act 1992 were included because, although the two questions are conceptually and analytically separate, they must be seen together when determining whether in combination the law is striking a proper balance between the competing interests.

The decision in Reynolds

> [7] In Reynolds, the House of Lords rejected a proposition to the effect that there should be what was described as a generic privilege extending to publication of political information to the public at large. The arguments, and the speeches in the House, centred on publication by a newspaper. The term generic appears to have been used in the sense of a privilege which attaches solely because the subject matter of the publication comes within a defined category. While recognising that publication to the world at large of political information may now properly attract protection, Reynolds decided that it was still necessary, on a case by case basis, to examine the circumstances of publication before determining whether the public interest was served by treating the occasion as one of qualified privilege. In his speech, expressly approved by Lord Cooke of Thorndon and Lord Hobhouse of Woodborough, Lord Nicholls of Birkenhead identified some ten (but non-exhaustive) enquiries (or constraints), which could

come within the circumstances enquiry. Lord Steyn saw it as necessary to have regard to the particular circumstances, including in the case of a newspaper its entitlement to rely on the information, in determining whether an occasion was privileged. Lord Hope of Craighead required an examination of the nature of the material, the persons by whom and to whom it was published, and in what circumstances. By way of contrast, the High Court of Australia in Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520 incorporated a test of reasonableness as an appropriate constraint in this area of political discussion.

[8] Three matters arise at the outset. First, as earlier noted in its 1998 decision this Court was primarily concerned with the issue of whether it was appropriate to recognise that an extension should be made to the common law defence of qualified privilege to cover political discussion to a wide, possibly nationwide, audience. It decided that it was appropriate, a course which had already been accepted in Australia, and has now also been accepted in England. In the last few years the High Court of Australia was the first to address the issue of political discussion in Lange v Australian Broadcasting Corporation. Next came this Court in the present case, and then the House of Lords in Reynolds. Each country has recognised a new occasion or the potential for a new occasion of qualified privilege for communications made in the course of political discussion. In each case it is envisaged that the occasion may be one in which the communication is made to the public at large, thereby removing any capacity for the defence to be defeated by excess of publication. The compass of the subject matter seen as giving rise or capable of giving rise to the privilege is not the same in the three countries. In the United Kingdom the subject matter is widely defined, but the focus is directed particularly to the position of a national newspaper. In Australia the subject matter relates essentially to the conduct of politicians, both in that country and elsewhere. In New Zealand the subject matter is tightly defined, but its application is to all manner of publications. It is primarily the definition of the controls governing the extension which has given rise to differences of approach.

[9] In our 1998 decision we reviewed decisions about publications on political matters given by courts in Canada, the United States and Europe, as well as those of Australia and the United Kingdom. To this can be added decisions from South Africa (such as National Media Ltd v Bogoshi 1998 (4) SA 1196), India (such as Raja Gopal v State of Tamil Nadu AIR 1995 SC 264) and Pakistan (such as Majid Nazami v Muhammad Rashid PLD 1996 Lahore 410). Those cases demonstrate two things among others. The first is the critical importance accorded to freedom of speech in respect of political matters in many countries and the second the different balances which are struck in different countries according to different assessments of the competing principles, rights and interests.

[10] Secondly, it is necessary to re-state what this Court did decide in 1998. Following a lengthy survey of the development and characteristics of qualified privilege, the comparative experience (including the relevant international human rights law), freedom of expression in its wider context, the choice between court decision and legislation, the New Zealand constitutional context and the freedom of expression provision of the New Zealand Bill of Rights, the Court came to this conclusion:

(a) Political statements may be protected by qualified privilege

Our consideration of the development of the law leads us to the following conclusions about the defence of qualified privilege as it applies to political statements which are published generally:

(1) The defence of qualified privilege may be available in respect of a statement which is published generally.

(2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.

(3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

(4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.

(5) The width of the identified public concern justifies the extent of the publication.

(As appears from para (3) above this judgment is limited to those elected or seeking election to Parliament: [1998] 3 NZLR 424, 467-468; all five Judges joined in this conclusion; see Tipping J at 477-478.)

> [11] The Court then went on to consider other matters, especially the protection of private reputation, including the role of s19 of the Defamation Act 1992 which negates qualified privilege in the event of ill will or improper advantage being taken of the privileged occasion.
> [12] The five conclusions stated in the 1998 judgment are to be read as a whole. They proceed from the first conclusion that the general publication of a statement does not of itself defeat the defence (as a survey of judgments and legislation at 442-450 had already shown). The second, based on the discussion of the New Zealand constitutional system, along with the discussion of freedom of expression in its wider context (462-465 and 460-462), is more focussed : the wider public may have a proper interest, supporting the defence, in respect of generally published statements which directly concern the functioning of representative and responsible government. The final phrase of that conclusion – "the performance or possible future performance of specific individuals in elected public office" – leads directly into the third conclusion which is to be read in the context of the previous two. The proper interest does exist and the defence is accordingly capable of applying to the statements identified in that conclusion so long as those statements directly concern the functioning of representative and responsible government. The fourth conclusion is a further essential element. It is only those matters which are properly of public concern that are protected. The assessment of the occasion to see whether it establishes the privilege must address that issue, along with the contextual elements indicated in the second conclusion.
>
> [13] Thirdly, it should be made clear that the five point conclusion earlier quoted was not intended to remove from the assessment whether the occasion is privileged an enquiry into the circumstances or context of the publication. Conclusion no. 3 confirmed that statements within those parameters are those in which the wider public has a legitimate interest. Ordinarily it can be expected such a statement will warrant protection, but it is still necessary to take into account the circumstances of publication. Those circumstances will include such matters as the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information. As an example of circumstances where the subject matter may not be determinative, it is questionable whether a one line reference to alleged misconduct of a grave nature on the part of a parliamentary candidate reflecting on his or her suitability, appearing in an article in a motoring magazine about that person's activities in motor sport, should receive protection. By contrast, the inclusion of such material in the course of a lengthy serious article on a coming election may justifiably attract the protection.

Submissions

> [14] Mr McKnight, representing the appellant Mr Lange, argued that it was appropriate for this Court to revise its earlier judgment and adopt the approach taken by the House of Lords in Reynolds. He contended, first, that there were no truly significant political or legislative differences between New Zealand and the United Kingdom requiring or justifying a divergence of approach; second, that whether the defendant is a member of the media or an individual should not be seen as determinative but rather just one consideration in whether qualified privilege should apply to political discussion; third, that as the defence will benefit mostly the media, the newspaper rule (discussed below) will frustrate the legitimate inquiries of plaintiffs before trial; fourth, that the difficulties for plaintiffs in pleading and proving "malice" are real; and fifth, that our previous decision and the decision of the High Court of Australia in Lange v Australian Broadcasting Corporation were materially different and thus the harmony with Australia suggested as desirable by the respondents did not really exist.
> [15] Mr Harrison QC, for the respondents, urged us to maintain our previous approach. He based his argument first on what were suggested to be significant social, political and legislative differences between New Zealand and the United Kingdom. He drew attention to the particular

facts in Reynolds, and to the circumstance that the argument rejected by the House of Lords was for a specific media defence, whereas this Court had seen the matter on a somewhat wider basis having significant constitutional implications. He contended that the Reynolds decision had blurred the difference between defining an occasion of privilege, and the question whether the privilege had been misused. This he said tended to cause confusion and uncertainty. He suggested the newspaper rule need not be a major impediment and the difficulties of proving abuse of privilege had been exaggerated. He claimed general support from Braddock v Bevins [1948] 1 KB 580 in spite of its legislative negation in the United Kingdom, and urged us to achieve as much harmony between New Zealand and Australia as possible, because of the close ties in many areas between our two countries.

[16] Mr Wilson QC, representing the Commonwealth Press Union and the New Zealand Press Council who had been granted leave to intervene, adopted Mr Harrison's submissions with one qualification, which related to the newspaper rule. He suggested that a newspaper would wish to protect its sources in all but the most extraordinary of circumstances. Mr Wilson did, however, ally himself with Mr Harrison when submitting that the availability of protection for a newspaper's sources should not determine the availability of qualified privilege of the kind in issue. He pointed out that the defence of qualified privilege outlined in our previous judgment was available, not only for the media, but also for politicians themselves, and for the general public.

[17] Mr Wilson also suggested as regards Reynolds that the approach of their Lordships was in the nature of a hindsight test which created real difficulties for editors and their advisers in deciding whether or not to publish. In contrast he contended that the approach adopted by this Court in its earlier decision could be readily applied by editors in advance of publication.

The concept of an occasion of privilege

[18] All occasions of qualified privilege are derived either from statute or from the common law. The original concept was born of a recognition that it was not always right to presume malice from the publication of false and defamatory words. In some circumstances malice could not reasonably be presumed; these circumstances became known as occasions of qualified privilege. The occasion was privileged unless actual malice could be shown. As the common law developed, a unifying principle emerged by which the most commonly occurring circumstances capable of amounting to such occasions could be recognised. That principle was the familiar duty/interest test which was expressed by Lord Atkinson in Adam v Ward [1917] AC 309, 334 in this way:

Such a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

[19] In Stuart v Bell [1891] 2 QB at 350 Lindley LJ had said:

The question of moral or social duty being for the Judge, each Judge must decide as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal.

His Lordship added that the privilege would arise "if all or, at all events, the mass of right-minded men in the position of the defendant would have considered it their duty in the circumstances" to communicate the information concerned.

[20] A privileged occasion thus had to be an occasion in which the duty/interest test was satisfied. If in the circumstances that test was satisfied, the occasion was capable of being regarded as one of qualified privilege. But despite a communication being made between persons who might in other circumstances have a shared interest in the subject matter it could happen that the maker and recipients of the statement did not in the particular circumstance of the publication have the necessary interest or duty to satisfy what we are calling the shared interest test.

[21] That is where there is a need for amplification of our earlier conclusions. A statement the subject matter of which qualifies for protection is not by dint of that fact alone always made on an occasion of privilege. Ordinarily that will be so because the shared interest test is likely to be

satisfied. But there may be times when a communication within that subject matter will not be made on an occasion of qualified privilege, because there is in the particular circumstances no shared interest in the particular communication between its maker and recipients. To revert to the example given in para [13], a statement in the form of a gratuitous slur upon a politician in a publication concerned with a quite different topic could not sensibly be regarded as having been made on an occasion of privilege. This requirement for the occasion to qualify, as well as the subject matter, may sometimes lead to difficulties at the margins, but in reality there is likely to be comparatively little uncertainty in this area. Any bona fide communication in the course of political discussion and within the defined subject matter is very likely to be made on an occasion of qualified privilege. The possibility of the occasion not attracting privilege is unlikely to cause difficulty for news media organisations, or indeed others who are engaged in genuine political discussion. Such possibility, and the small level of uncertainty it may cause, is a necessary price to pay to guard reputations against false imputations made on occasions which are outside the purpose of the privilege; albeit within its literal subject matter.

[22] This amplification of our earlier formulation is necessary because, taken in isolation, paragraph 3 of our five point conclusion (see para [10]) could be read, and may indeed have been read, as suggesting that a communication within the qualifying subject matter will always attract qualified privilege. The surrounding points do not themselves indicate the complete picture, which involves not only qualifying subject matter but also a qualifying occasion. The fact that ordinarily a communication within the qualifying subject matter will be made on a qualifying occasion may also have masked the need for the occasion to qualify. It is to be noted however that the heading to this part of the judgment at 467 reads - “political statements may be protected by qualified privilege” (emphasis added). The point is, as that mode of expression implies, that whereas in terms of point 3 a shared interest “does” exist, it does not inevitably do so on all occasions.

[23] Certain observations made by Lord Hope in his speech in Reynolds - see [1999] 3 WLR at 1057 - can usefully be related to the circumstances of the present case. Speaking of the English Court of Appeal’s circumstantial test which that Court had viewed as being additional to matters of duty and interest, His Lordship suggested that the difficulty was perhaps more one of detail than of principle. That is debatable because a shared interest cannot be divorced from the circumstances in which the communication is made. Lord Hope then observed that the occasion had to be identified because it is the occasion which attracts the qualified privilege. That point is important. He said that to make this identification it is necessary to examine “the nature of the material, the persons by whom and to whom it was published, and in what circumstances”. This in present circumstances represents an inquiry into whether the subject matter qualifies in terms of conclusion 3 of our earlier formulation; and whether the maker and recipients of the communication have the necessary shared interest on the occasion of publication - they usually will in relation to the defined subject matter but not always. And, as His Lordship added, questions of occasion and misuse are separate inquiries.

Chilling effect and role of jury

[24] Before considering the three matters which the Privy Council proposed this Court consider, it is helpful to refer to two important aspects of defamation law which are affected by Reynolds. The first is its chilling effect, which has been carefully researched in the United Kingdom in Libel and the Media (1997) by Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson, referred to by Lord Steyn in Reynolds ([1999] 3 WLR 1010, 1032). Their account of social and socio-legal practice was based on responses to questionnaires, repeated interviews, and information about the media libel writs filed, set down and heard. The publishers and others questioned in that research included those involved with periodicals; the monthly publication involved in this case, North & South, being such a periodical. The survey led the authors to the conclusion that “the chilling effect genuinely does exist and significantly restricts what the public is able to read and hear.” (191) The authors also stated this general conclusion applicable to all media sectors : “uncertainty in both the principles of defamation law and their practical application induce great caution on the part of the media. Virtually every interviewee, in all branches of the media, emphasised the lottery aspect attached to this area of the law.” (186) The blurring, perhaps even the removal, of the line between the occasion and its abuse in Lord Nicholls' non exhaustive list must add significantly to that uncertainty. In the absence of compelling justification that consequence appears undesirable.

[25] Secondly, this development seems undesirable for another reason : it reduces the role of the jury in freedom of speech cases. Lord Nicholls does not discuss the distinct role of the jury to determine that malice or misuse defeats the privilege although he does mention its fact finding role (at [1999] 3 WLR 1027); nor does Lord Cooke (cf [1999] 3 WLR 1010, 1041 and 1047-1048). By contrast Lord Steyn and Lord Hope do, drawing on the orthodox restatement by the American Law Institute that it is for the Judge to determine whether the occasion of the publication gives rise to a privilege (although the jury is to decide any disputed facts relevant to that issue) and for the jury to decide whether the defendant had abused the privilege (Restatement of the Law, Torts (2d 1977) s619 and commentary, [1999] 3 WLR 1010, 1037-1038, 1058). In its 1998 decision this Court quoted Lord Esher MR, Lord Finlay LC and the latest edition of Gatley on Libel and Slander to exactly the same effect and raised the question whether the jury's role might extend to some broader matters of public concern ([1998] 3 NZLR 424, 470-471). The constitutional role in defamation cases which the jury has played since the enactment of Fox's Libel Act in 1792 was also mentioned; see too s52(1) of the Defamation Act. As in 1998, these matters should be left open at this stage of the litigation; but their relevance remains.

New Zealand's constitutional structure and relevant statute law

[26] In 1998 this Court mentioned three major features of New Zealand's constitutional and political system ([1998] 3 NZLR 424, 462-465). The Privy Council asks this Court to address the differences between our system and the United Kingdom and Australian systems (para [1]). The three countries share the main relevant features of a parliamentary democracy, based on universal suffrage, with a government which is responsible to Parliament and, through it, to the electorate, and which is subject to the law. There are however major differences in the electoral systems. In particular only the New Zealand system enables each voter to vote on an equal nationwide basis for the party which the voter wishes to see in the House of Representatives and in the Government. As the Court said in 1998, the electoral system now recognises more directly than it had, the competition organised by and through political parties for the power of the state exercised through Parliament and the executive government ([1999] 3 NZLR 424, 463). By contrast, the general elections for the United Kingdom Parliament are still on a plurality, constituency by constituency basis. The limited movement towards partial proportionality as seen in the arrangements for Scotland and Wales and for European elections would not appear to be relevant to statements about candidates for and members of the United Kingdom Parliament, the equivalent situation to the present one. While the Australian electoral systems are more proportional than those of the United Kingdom, they too do not provide for voting on a national basis. In both countries of course the voting system tells only part of the story since in all three national elections are fought by parties on a country wide basis.

[27] Freedom of information legislation was the second matter mentioned in the 1998 judgment. Here too there is a major distinction. While in New Zealand the Queen's papers have become the people's, in the United Kingdom they are still in the Queen's hands (or rather those of her Ministers and officials). United Kingdom law and practice relating to access to and release of information has yet to emphasise, in the way found here, the rights of citizens to participate in the process of policy and decision making and to call the government to account. Again, Australian state and federal legislation is closer to New Zealand's**.** The contrast is marked by the extensive and common release in New Zealand litigation of Cabinet and Ministerial documents.

[28] The third major matter in the 1998 judgment was the New Zealand Bill of Rights Act 1990 which as from October this year is to be matched by the United Kingdom Human Rights Act 1998. Australia, at the state and federal levels, has no comparable legislation. The New Zealand Act has a significantly narrower focus than the United Kingdom Act which gives effect to all the substantive provisions of the European Convention on Human Rights and certain of its protocols. As the Court said in 1998, the New Zealand Bill emphasises the protection of public processes, notably political processes, by its affirmation of the right to vote in genuine periodic elections of members of the House of Representatives by equal suffrage and to be a candidate, and the rights of freedom of expression ..., freedom of assembly and freedom of association, and the right to justice. The

central role of democracy is also emphasised in the recognition in s5 that any limit on a recognised freedom has to be demonstrably justified in a free and democratic society. ([1998] 3 NZLR 424, 464).

> [29] Another relevant difference is that the United Kingdom Act, in addition to protecting freedom of expression, unlike our Bill of Rights also expressly protects the right to privacy:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

(Article 8 of the European Convention on Human Rights, scheduled to and given the force of law by the Human Rights Act)

> [30] A further, related difference is that the United Kingdom Human Rights Act gives a particular direction to the Courts about how to approach freedom of expression matters. Among other things, the Courts are to have regard to the extent to which it is or would be in the public interest for journalistic material to be published as well as any relevant privacy code (s12(4)). As Lord Cooke says, it may not be enough under that formula simply to determine that the material related to governmental or political matters. A more specific examination appears to be contemplated ([1999] 3 WLR 1010, 1045-1046). Such a specific examination, regarding a balancing exercise in the light of the concrete facts of each case, was also required, it was suggested, by the basic approach of the European Court of Human Rights (Lord Steyn at 1032-1033 citing Professor John Fleming, "Libel and Constitutional Free Speech" in Peter Cane and Jane Stapleton eds Essays for Patrick Atiyah (1991) 333, 337 and 345; Lord Cooke at 1045; see also Lord Nicholls at 1026). While, as this Court said ([1998] 3 NZLR 424, 457-459 and 466), the European jurisprudence is of real value in New Zealand given our Bill of Rights and the close similarity of the freedom of expression provisions of the International Covenant on Civil and Political Rights (which the Bill is designed to implement in part) and the European Convention, that jurisprudence does not of course have the same direct authority as it does in the United Kingdom where Parliament has made explicit, in s2(1) of the Human Rights Act, that courts must consider it.
>
> [31] Finally, the 1998 judgment mentioned the repeal, not matched apparently in the United Kingdom, of three criminal offences restricting public debate on political matters. While, as Mr McKnight pointed out, they may not have had much practical significance their repeal is not to be ignored. More importantly, nor is the omission from the New Zealand Defamation Act 1954 of the provision enacted two years earlier in the United Kingdom Defamation Act (which otherwise the New Zealand Parliament closely followed) reversing the pro speech judgment of the English Court of Appeal in Braddock v Bevins [1948] 1 KB 580 (see [1998] 3 NZLR 424, 449-450).

Local political and social conditions, including the responsibility and vulnerability of the press

> [32] Some of the constitutional and legal differences touched on in the previous part of this judgment reflect our different, newer, smaller, closer, if increasingly diverse, society. The characteristics of the society, particularly the relationship of New Zealanders to their government, were an explicit and central part of the reasoning which led to the enactment of the Official Information Act in 1982. In its general report, Towards More Open Government (1980), the Committee on Official Information stressed popular participation in the making and administration of laws and policies, the promotion of the accountability of those in office and the Government's need for public understanding and support to get its policies carried out (all matters included by Parliament in s4 of that Act when stating its purposes). The Committee wished, in addition, to draw attention to a special feature of the New Zealand setting:

New Zealand is a small country. The Government has a pervasive involvement in our everyday national life. This involvement is not only felt, but is also sought, by New Zealanders, who have tended to view successive Governments as their agents, and have expected them to act as such. The Government is a

principal agency in deploying the resources required to undertake many large scale projects, and there is considerable pressure for it to sustain its role as a major developer, particularly as an alternative to overseas ownership and control. ... Our social support systems also rely heavily on central government. History and circumstances give New Zealanders special reason for wanting to know what their Government is doing and why.

(This passage was also quoted in Fletcher Timber Ltd v Attorney-General [1984] 1 NZLR 290, 301-302.) While the role of the state has undergone substantial reassessment and alteration over the intervening 20 years, its role, if often less direct than indicated in that passage, is still extensive, as appears for instance from the fact that the state's share of national revenue has remained at similar levels over that time.

> [33] The Privy Council particularly mentioned differences between the responsibility and vulnerability of the media in New Zealand and in the United Kingdom (see para [2] above). On one view, this material is of limited significance since this case is less about the press and rather more about the constitutional right of all New Zealanders to participate in the discussion and evaluation of their own political leaders. That aspect of this case sharply distinguishes it from Reynolds and the Australian Lange case. The plaintiffs in those two cases were foreign politicians and accordingly would not fall within the conclusions this Court stated in 1998, as indeed the Privy Council recognised when referring to the ruling of the English Court of Appeal ([2000] 1 NZLR 257, 261).
> [34] Generalisations in this area are dangerous but it is possible to say that New Zealand has not encountered the worst excesses and irresponsibilities of the English national daily tabloids. According to a New Zealand journalist in a publication issued by the Newspaper Publishers Association of New Zealand, "some British tabloids have thrown away the rule book in their pursuit of sensational exclusives. Invasion of personal privacy, fabrication of interviews and the obtaining of information by dishonest means have become the norm in the downmarket tabloid press." Sir Douglas Graham, at the time the Minister of Justice, is quoted in the same publication as saying at the New Zealand Press Council's 20th anniversary that "Compared to our British counterparts, media intrusion into our daily lives is rather tame, but I do not believe the standard of journalism is by any means inferior. If anything quite the contrary." (Karl Du Fresne, Free Press Free Society (1994) 26, 34). The responsibility and vulnerability of the press are also critically dependent on the ethics and practices of the press, their ownership structures and the independence of the editorial function.
> [35] The combination of the smallness of the population with the fact that the dailies are not national papers produces low circulation figures. In 1998 the largest circulation of a New Zealand daily was about 220,000 and the other 27 dailies had circulations from about 2,400 to about 100,000 (New Zealand Official Yearbook 1998 257). Another consequence of the regional character of the dailies is that there is not the same competition that can arise, and has arisen, in the United Kingdom between national papers. The three weekly publications which contain extensive commentary on political matters have circulations of about 10,000 and 14,000 (two business weeklies) and about 90,000 (The Listener, which is also a television and radio guide). Two general monthly magazines which include serious political commentary have circulations of about 35,000 (North & South, the publication in issue in this case) and 18,000 (Metro). By contrast, five of the British dailies have circulations of about 1,000,000 or more with the highest being about 3,400,000. Another difference is that some of the British dailies have close associations with particular political parties; competing political positions are by contrast often expressed in the opinion pages of individual New Zealand dailies and weeklies.

Court or legislature?

> [36] As already indicated (para [3]), the Privy Council said that it was for the Courts in New Zealand, rather than it, to weigh the factors bearing on the choice between judicial development of the law and legislation. This Court weighed the relevant factors in its earlier judgment in deciding that it was for it to determine the extent of qualified privilege in this area ([1998] 3 NZLR 424, 462). A major factor in that judgment, seen at work also in the Reynolds and Australian cases, is that this part of the law has for centuries essentially been left to the Courts. It is for them to make the assessments of "the common convenience and welfare of society" or

"public policy" or "public good" or "public utility" or "public convenience" – to refer to some of the familiar judicial tests.

Concluding assessment

[37] The task of this Court is to consider whether the decision of the House of Lords in Reynolds leads us to make a different assessment of the competing considerations of the right to freedom of expression and the right to reputation from that which we made in 1998. As well, the Court has regard to the matters considered under the three preceding headings.
[38] For reasons which can be briefly restated we would not strike the balance differently from the way it was struck in 1998. First, the Reynolds decision appears to alter the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect almost inevitably present in this area of law. We are not persuaded that in the New Zealand situation matters such as the steps taken to verify the information, the seeking of comment from the person defamed, and the status or source of the information, should fall within the ambit of the enquiry into whether the occasion is privileged. Traditionally such matters are not of concern to that question in the kind of setting presently under discussion. In particular, source and status may be relevant, but only in the area of reports of meetings and suchlike. For the reasons expressed in our earlier judgment, we do not consider it necessary, nor would it be in accord with principle, to import into this enquiry, for the limited purposes of the specific subject matter now under discussion but not otherwise, a specific requirement of reasonableness.
[39] The full scope of s19 of the Defamation Act 1992 and its possible application to political discussion requires separate consideration, but as will be seen it can provide a measure of protection to or safeguard for a plaintiff which ought not to attract the restrictions sometimes applied to the common law concept of malice in this context. The idea of taking improper advantage of the occasion is important when one is considering the appropriate balance between freedom of expression and protection of reputation. Its connotations are potentially wider than the traditional concept of malice which included excess of publication and improper purpose. To that extent we are able to take a more expansive approach to defining an occasion of privilege because we have the ability in s19 to take a correspondingly more expansive approach to what constitutes misuse of the occasion. One development is therefore capable of being matched by another so that the overall balance is kept right. The idea of taking improper advantage is appropriately applied to those who are reckless and thereby do not exhibit the necessary responsibility when purporting to act under the cloak of qualified privilege.
[40] Secondly, there are significant differences between the constitutional and political context in New Zealand and in the United Kingdom in which this body of law operates. They reflect societal differences. Thirdly, the position of the press in the two countries does appear to be significantly distinct. And, fourthly, this is an area of law in which Parliament has essentially left it to the courts to develop the governing principles and apply them to the evolving political social and economic conditions.
[41] Our decision is to adhere to our previous conclusions and, in particular, to confirm the five point summary (see paragraph [10] above) which we gave in our earlier judgments. A 6th point should be added to the summary to reflect what was previously implicit, but can be made explicit:

6. To attract privilege the statement must be published on a qualifying occasion.

Misuse of occasion of privilege

[42] Section 19 of the Defamation Act 1992 prevents reliance on qualified privilege if the defendant is predominantly motivated by ill will against the plaintiff or otherwise takes improper advantage of the occasion of publication. Although s19 was designed to reflect the common law concept of malice, it has within it the same flexibility and room for development as did malice itself; particularly in its connotation of improper purpose. The purpose of the newly recognised privilege is to facilitate responsible public discussion of the matters which it covers. If the privilege is not responsibly used, its purpose is abused and improper advantage is taken of the occasion. The section is concerned with situations in which qualified privilege is lost. Occasions of privilege are both fact dependent and not limited by closed categories. Where the common law affords privilege to a particular occasion, s19 must be applied to that occasion

in an appropriate way, without any reading down of its terms.

[43] If a false and defamatory statement which qualifies for protection is made, and is disseminated to a wide audience, the motives of the publisher and whether the publisher had a genuine belief in the truth of the statement, will warrant close scrutiny. If the publisher is unable or unwilling to disclose any responsible basis for asserting a genuine belief in truth, the jury may well be entitled to draw the inference that no such belief existed. In Reynolds Lord Steyn adverted to this risk at [1999] 3 WLR 1010, 1036. Furthermore, a publisher who is reckless or indifferent to the truth of what is published, cannot assert a genuine belief that it was true.

[44] At common law malice was presumed when the words published were false and defamatory. The presumption was however rebutted if the occasion was one of qualified privilege. The privilege could nevertheless be defeated if actual malice was proved by the plaintiff. What constituted malice was restated in Horrocks v Lowe [1975] AC 135, 149-150 by Lord Diplock, in what have since been regarded as authoritative terms. His reference in that restatement to carelessness, impulsiveness or irrationality not being equated to indifference, must be read in context. The proposition does not qualify the preceding statements which cover lack of genuine belief and recklessness. Thus while carelessness will not of itself be sufficient to negate the defence, its existence may well support an assertion by the plaintiff of a lack of belief or recklessness. In this way the concept of reasonable or responsible conduct on the part of a defendant in the particular circumstances becomes a legitimate consideration. It can also be said that in the context of political discussion an irrational belief in truth is seldom likely to feature. It is for example difficult to envisage reliance on such an argument when a newspaper is defending its publication of false and defamatory material.

[45] Recklessness as to truth has traditionally been treated as equivalent to knowledge of falsity, see for example Fleming on Torts (9th edition: 1998) at 639. Both deprive the defendant of qualified privilege. We note as a relevant analogy the recent approach of the House of Lords to recklessness when their Lordships were considering the tort of misfeasance in public office: see Three Rivers District Council v Governor and Company of the Bank of England (speeches 18 May 2000). In particular Lord Steyn, when citing from the judgment of Clarke J at first instance, approved the view that recklessness involves a lack of honesty in the exercise of the power in question. He added:

> This is an organic development, which fits into the structure of our law governing intentional torts. The policy underlying it is sound: reckless indifference to consequences is as blameworthy as deliberately seeking such consequences.

[46] By the same token, it may be said that reckless indifference to truth is almost as blameworthy as deliberately stating falsehoods. Lord Diplock gave a helpful description of recklessness in the present field when he spoke of someone who publishes defamatory material "without considering or caring" whether it was true or false. Indifference to truth is, of course, not the same thing conceptually as failing to take reasonable care with the truth but in practical terms they tend to shade into each other. It is useful, when considering whether an occasion of qualified privilege has been misused, to ask whether the defendant has exercised the degree of responsibility which the occasion required.

[47] What constitutes recklessness is something which must take its colour from the nature of the occasion, and the nature of the publication. If it is reckless not "to consider or care" whether a statement be true or false, as Lord Diplock indicated, it must be open to the view that a perfunctory level of consideration (against the substance, gravity and width of the publication) can also be reckless. It is within the concept of misusing the occasion to say that the defendant may be regarded as reckless if there has been a failure to give such responsible consideration to the truth or falsity of the statement as the jury considers should have been given in all the circumstances. In essence the privilege may well be lost if the defendant takes what in all the circumstances can fairly be described as a cavalier approach to the truth of the statement.

[48] No consideration and insufficient consideration are equally capable of leading to an inference of misuse of the occasion. The rationale for loss of the privilege in such circumstances is that the privilege is granted on the basis that it will be responsibly used. There is no public interest in allowing defamatory statements to be made irresponsibly - recklessly - under the banner of freedom of expression. What amounts to a reckless statement must depend significantly on what is said and to whom and by whom. It must be accepted that to require the

defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination, may in some circumstances come close to a need for the taking of reasonable care. In others a genuine belief in truth after relatively hasty and incomplete consideration may be sufficient to satisfy the dictates of the occasion and to avoid any inference of taking improper advantage of the occasion.

[49] A case at one end of the scale might be a grossly defamatory statement about a Cabinet Minister, broadcast to the world. At the other end might be an uncomplimentary observation about a politician at a private meeting held under Chatham House rules. It is not that the law values reputation more in the one case than the other. It is that in the first case the gravity of the allegation and the width of the publication are apt to cause much more harm if the allegation is false than in the second case. A greater degree of responsibility is therefore required in the first case than in the second, if recklessness is not to be inferred. Responsible journalists in whatever medium ought not to have any concerns about such an approach. It is only those who act irresponsibly in the jury's eyes by being cavalier about the truth who will lose the privilege. Such an approach reflects the fact that qualified privilege is not a licence to be irresponsible: see McKay J in Television New Zealand Ltd v Quinn [1996] 3 NZLR 24, 45.

Misuse of occasion: Canada and Australia

(a) Canada

[50] The position in Canada is still developing. In Netupsky v Craig (1972) 28 D.L.R. (3d) 742; [1973] SCR. 55, the Supreme Court, following a passage from the speech of Lord Atkinson in Adam v Ward [1917] AC 309, 339, held that the defendant's positive belief in truth must be formed on reasonable grounds. This approach was affirmed in McLoughlin v Kutasy (1979) 97 D.L.R. (3d) 620; [1979] 2 SCR 311, and in Davies & Davies Ltd v Kott (1979) 98 D.L.R. (3d) 591; [1979] 2 SCR 686. However, in Korach v Moore (1991) 76 DLR (4th) 506 the Court of Appeal of Ontario applied Horrocks v Lowe which had been decided prior to the three Supreme Court cases, and had of course held that positive belief was enough irrespective of the reasonableness or otherwise of the grounds for that belief. The Ontario Court of Appeal took the view that in none of the three Supreme Court cases had the question of reasonable grounds been part of the ratio. At that time (ie. 1991) the leading text on defamation in Canada, Brown on The Law of Defamation in Canada, vol 1 at 743 cited the Netupsky case as authority for the proposition that the defendant must have reasonable grounds for believing the statement to be true. The author did, however, note that there was a division of opinion on the subject and expressed the view that the English approach, as evidenced in Horrocks v Lowe, appeared preferable. It should be noted, however, that in none of the Canadian cases mentioned was the Court concerned with a publication of the width now under consideration.

[51] The Supreme Court had occasion to revisit the subject after the coming into force of the Canadian Charter of Rights and Freedoms on which our Bill of Rights Act was to a significant extent modelled. Thus the position taken in Canada is of considerable importance to us. Hill v Church of Scientology of Toronto [1995] 2 SCR 1130 involved a general survey of the law of defamation against the Charter right to freedom of expression. Almost contemporaneously the Supreme Court decided Botiuk v Toronto Free Press Publications Ltd [1995] 3 SCR 3, a case dealing solely with qualified privilege. At paragraph 79 the Court said that malice (in New Zealand the taking of improper advantage of the occasion) could be established by showing that the defendant either knew he was not telling the truth or was reckless in that regard. A little later at paragraph 96 the Court drew the distinction between carelessness and recklessness and indicated that what Lord Diplock had said in Horrocks v Lowe, emphasising that distinction, did indeed "seem to be generally representative of the Canadian position". But significantly their Lordships adopted a somewhat wider approach to recklessness than what might be thought inherent in what Lord Diplock had written. In the Botiuk case the defendants were lawyers who had accused a colleague of dishonesty. They did so in a publication which was disseminated quite widely. The occasion was one of qualified privilege. After drawing attention to the conceptual distinction between carelessness and recklessness, the Court said at paragraphs 98 and 99:

...., when the defendants are lawyers who must be presumed to be reasonably familiar with both the law of libel and the legal consequences flowing from the signing of a document, their actions will be more closely scrutinized than would those of a lay person. That is to say, actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer with all the resulting legal consequences of reckless behaviour. That is the very situation presented in this case.

The appellant lawyers signed a Lawyers' Declaration which stated that they had "familiarized" themselves with the Report and that it "correctly and accurately" reflected the state of affairs during and after the Kosygin demonstration. Yet, several of them had not even read it. Most of them did not know anything about the preparation of Botiuk's account. Some neither talked to Botiuk before signing the Lawyers' Declaration nor discussed it with the others. As lawyers, they should have known how significant the impact of the Lawyers' declaration would be on Botiuk. They were duty-bound to take reasonable steps to investigate and ensure that the document was correct.

[52] A little later at paragraph 103 their Honours said:

Taking into account the appellants' status as lawyers and influential persons in the community, and the effect of their concerted action in signing the Lawyers' Declaration, [we are] satisfied that their conduct in signing the document without undertaking a reasonable investigation as to the correctness of the document, which they were duty-bound to do, was reckless.

By saying that the defendants were duty-bound to make a reasonable investigation into the correctness of the document they published, the Court was clearly stating that in the particular circumstances the degree of responsibility required of those acting under qualified privilege involved that step being taken. The Court was also of the view that recklessness in the sense adopted was within, or was at least a reasonable development of, the Horrocks v Lowe approach. It may well be thought that news media organisations are at least as influential in the community as were the group of lawyers involved in the Botiuk case. Because of its reference to the more detailed discussion in Hill, the Botiuk Court was implicitly indicating that this more flexible concept of recklessness was regarded as representing a fair balance between the competing interests; being more protective of individual reputation than simply requiring a positive belief in truth, however formed, and more favourable to freedom of expression than requiring a standard of reasonable care on all occasions of qualified privilege.

(b) Australia

[53] The position taken by the High Court of Australia in Lange v Australian Broadcasting Commission has already been mentioned. For present purposes it is sufficient to say that the "reasonableness" control there discussed derived historically from the legislation in force in New South Wales, namely s22 of the Defamation Act 1974 (NSW). The criterion of reasonableness was intended to replace the common law reciprocity of duty and interest test: see the New South Wales Law Reform Commission's Report on Defamation (LRC 11 - 1971) at paragraphs 104-105. The need for an interest or "apparent interest" in the recipient having the information was retained but the idea of the imparter of the information needing to have a duty or interest in doing so was abandoned as artificial: see paragraph 103. As was said in the New South Wales Law Reform Commission's 1995 Report on Defamation at paragraph 10.2 (page 154), the effect of s22 of the Defamation Act 1974 (NSW) was to overcome what were seen as the restrictions of the duty/interest requirement at common law and to focus attention on reasonableness in all the circumstances. The New South Wales approach was driven in part by the traditional difficulties the reciprocity of duty or interest test posed for media defendants in light of the width of their publications.

[54] In asking us to import such a reasonableness control into New Zealand law, Mr McKnight offered no basis for doing so other than what had been done by statute in New South Wales. The lack of substance in such an argument is immediately apparent, especially when one recalls our Parliament's response to the proposals of the McKay Committee in this respect. The statute law of another country or state cannot be imported into our law simply because, as counsel suggested, it seemed like a good idea. What is more, the reasonableness criterion in Lange v Australian Broadcasting Commission was by statute treated as a facet of whether the occasion was privileged, rather than as an aspect of misuse.

The newspaper rule

[55] Although so described this is the rule which protects all sectors of the media from having to reveal their sources in interlocutory proceedings. The rule is designed to promote freedom of speech by allowing people to speak to the news media in confidence. It is matched by Rule 285 which prohibits interrogatories designed to elicit sources. At the trial the same subject is governed by s35 of the Evidence Amendment Act (No.2) 1980. The rule was affirmed by this Court in Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd [1980] 1 NZLR 163 on the basis that it applies unless there are special circumstances warranting a departure from it. Whether that basis for departure is too narrow (Woodhouse P saw the rule as being almost absolute) may require reconsideration on an appropriate occasion. Similarly the absoluteness of Rule 285 may require reassessment. At trial s35 empowers the Court, against specific statutory criteria, to balance the grounds for maintaining confidentiality against the need to do justice in the individual case. Section 35 was considered in some detail by this Court, albeit in a different contexts, in M v L [1999] 1 NZLR 747 and R v H CA38/00, judgment 28 March 2000..

[56] During the course of argument in the present case the question arose whether a news media defendant could rely on a defence of qualified privilege, while at the same time maintaining its reliance on the newspaper rule. On an occasion of qualified privilege the onus is of course on the plaintiff to demonstrate misuse of the occasion in terms of s19 of the Defamation Act 1992. At issue may be the basis for an asserted belief in truth, or whether that belief was responsibly formed, but in any event the plaintiff is already at something of a disadvantage in having to establish the negative. We were pressed with the view that to allow a media defendant the benefit of both qualified privileged and the newspaper rule would be to place an unfair hurdle in the plaintiff's path. It is apparent that some of their Lordships in Reynolds were opposed to the qualified privilege sought by the newspaper in that case because of the difficulties which they considered the newspaper rule would create for plaintiffs.

[57] The whole question whether sources should be identified before trial is very much influenced by public policy as seen in the particular jurisdiction. Such policy is not immutable and both judicial and legislative reflections of it can change over time. The approach of this Court in the Broadcasting Corporation case and of the Rules Committee in Rule 285 should not therefore be regarded as set in stone. The relevant policy considerations must now recognise the ramifications of the extended range of qualified privilege as affirmed in this judgment. As has been pointed out by Michael Galooly in his Law of Defamation in Australia and New Zealand (the Federation Press - 1998) at 88-91, the Courts in Australia have recognised that inroads into the newspaper rule can be justified in the interests of achieving justice between plaintiff and defendant when qualified privilege is in issue. For example, in John Fairfax and Sons v Cojuanglo [1988] HCA 54; (1988) 165 CLR 346 the High Court held that a departure from the rule was permissible when it was "necessary in the interests of justice". Reference can also be made to the 1995 Report on Defamation published by the New South Wales Law Reform Commission at paragraph 10.21 under the heading "Revelation of Sources".

[58] It is neither necessary nor desirable to develop this point any further. It is not directly in issue; albeit raised as part of the argument about the existence and scope of the privilege in question. Nor did we have the benefit of any extended argument on the newspaper rule. It is sufficient to say we have kept the rule in mind, along with possible developments of it, in coming to our conclusions.

[59] Mr McKnight also raised further possible difficulties said to face a plaintiff who pleads ill-will or improper use of the occasion. In the absence of disclosure from, for example, a newspaper, he suggested a strike out of the plea was likely because of inability to give particulars as required by s41 of the Defamation Act 1992, the statutory equivalent of Rule 190 of the High Court Rules, which was repealed by the 1992 Act. We think this concern is overstated. The purpose of subsection (2) of s41, which requires the plaintiff to specify any particular facts or circumstances relied upon, is self evident. In some situations it may well be sufficient to plead that the statement was made recklessly, or that the defendant had no honest belief in its truth, (see for example Bullen & Leake and Jacob's Precedents of Pleadings 12th edition p.1351). The avoidance of a strike out in this sort of situation is unlikely to be a problem.

Formal orders/costs

[60] It follows that on reconsideration this appeal cannot succeed. Amendments may be necessary to the statements of defence to reflect the law as now stated. But there is no basis upon which the defence of qualified privilege as invoked by the respondents can be wholly struck out. The appeal is accordingly dismissed. The appellant is to pay the respondents' costs in the sum of $5000.00 plus all reasonable disbursements including the travel and accommodation expenses of counsel to be fixed if necessary by the Registrar. The interveners will bear their own costs.

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