

Report of a Public Inquiry, Convened Pursuant to
s 17, Merchant Shipping (Local Vessels) Ordinance Cap 548.

Background:

1. On the evening of 1 October 2012, a collision occurred between a local ferry, “Sea Smooth”, and a local vessel, “Lamma IV”, in the waters west of Shek Kok Tsui light beacon, on the north-west coast of Lamma Island.

2. At the time of the collision, Mr Lai Sai Ming was the coxswain of the Sea Smooth, and Mr Chow Chi Wai was the coxswain of the Lamma IV.

3. As a result of the collision, 39 passengers aboard the Lamma IV, including 8 children, lost their lives, and numerous others were injured. Both Mr Lai and Mr Chow are holders of Local Certificates of Competency (“LCC’s”).

4. A Commission of Inquiry, (“the Commission”), was conducted into the collision. The Commission reported on 19 April 2013, making certain findings against Mr Lai and Mr Chow. It appeared to the Director of Marine, (“the Director”), that, in consequence of those

findings, both Mr Lai and Mr Chow were either unfit to discharge their duties, whether by reason of incompetence or misconduct or for any other reason, (s 17(1)(a) Merchant Shipping (Local Vessels) Ordinance, Cap 548, “MS(LV)O”), or had been seriously negligent in the discharge of their duties, (s 17(1)(b) MS(LV)O). The Director, pursuant to s 17 (1) MS(LV)O, accordingly caused this Inquiry to be held.

5. On 2 June 2016, pursuant to s 17(2)(a) MS(LV)O, the Chief Justice of the Court of Final Appeal appointed Mr John Lonsdale Saunders, a retired Judge of the Court of First Instance of the High Court of Hong Kong to conduct the Inquiry. On 5 July 2016, pursuant to the provisions of r 5(1) Merchant Shipping (Local Vessels) (Conduct of Inquiries) Rules, (“the Rules”), the Director appointed Captain Law Kwun Pan and Captain Tsang Cheuk Yin as Assessors to assist in the Inquiry.

6. Captain Law is the Chairman of the Hong Kong Pilots Association Ltd, and holds a Foreign Going Master, Class 1, Certificate of Competency, and a Hong Kong Harbour Pilot’s Licence Class 1. Captain Tsang was formerly a Principal Marine Officer with the Marine Department in Hong Kong, and is a Master Mariner, holding a Certificate of Competency (Deck Officer) Class 1.

7. Pursuant to s 17(4)(a) MS(LV)O, the Tribunal conducting the Inquiry may, if satisfied of any of the matters specified in s 17(1)(a) or (b) MS(LV)O, (see §4 above), cancel or suspend the subject’s LCC, or censure the subject, and, pursuant to s 17(4)(b), may make such order with regards to the costs of the Inquiry as the Tribunal thinks just.

8. The Inquiry was held on Friday, 29 July 2016. The Director was represented by Ms Frances Lok, of Counsel, instructed by the Department of Justice. Mr Lai was represented by Mr Christopher Chan, solicitor, of Messrs Holman Fenwick Willan, solicitors. Mr Chow was represented by Mr Robert Chan, of Counsel, instructed by Messrs Reed Smith Richards Butler, solicitors.

9. On 17 June 2016, pursuant to r 4 of the Rules, formal Notices of Inquiry were sent to both Mr Lai and Mr Chow. In accordance with r 4(3)(a) and (b), the Notices set out the relevant facts giving rise to the Inquiry, the allegations made, and the grounds therefor. In accordance with r 4(3)(c) and (d), the Notices informed both of their rights, and the time date and location of the Inquiry.

The format of the hearing:

10. Prior to the hearing, by correspondence, the solicitors for both Mr Lai and Mr Chow indicated that their clients did not intend to dispute the factual circumstances giving rise to the Inquiry, and sought a means by which the relevant evidence could be put before the Tribunal. Both had sought to surrender their LCC's prior to the Inquiry.

11. It was proposed between the parties that the evidence, reduced to relevant documents, could be admitted by both Mr Lai and Mr Chow, without the need to be formally presented to the Tribunal, and that the submissions to be made to the Tribunal would be essentially confined to matters relevant to costs.

12. Pursuant to s 18(1)(a) MS(LV)O, the persons holding the Inquiry may make such examination and investigation as is considered necessary for the purpose of the Inquiry. Rule 7 (6) of the Rules provides:

“Without prejudice to the admission of documents as secondary evidence allowed by any enactment or otherwise, affidavits, depositions, statutory declarations and other written evidence shall, unless the person appointed considers it unjust, be accepted as evidence at the inquiry.

In the light of these provisions, and the willingness of the subjects of the Inquiry to admit the factual allegations against them, I accordingly agreed to the suggested procedure. The evidence presented and considered by the Tribunal is set out in the schedule to this Report.

13. We accept Ms Lok’s submission that the burden of proof in demonstrating the matters required to be established to entitle the Tribunal to act pursuant to s 17(4)(a) or (b) falls upon the Director. The applicable standard of proof is the balance of probabilities, taking into account the seriousness of the allegations: see *Re H (Miners)*[1996] AC 563 at 586A-587E, applied in *Nina Kung v Wang Din Shin* (2005) 8 HKCFAR 387 at §182, and *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117.

The collision:

14. The following facts, established by the documentary evidence, set out the collision and its consequences.

15. The circumstances of the collision, and the vessels, are best described by the following passages from the report of the Commission of

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Inquiry:

“1. At 20:20:17 on 1 October 2012 the bow of the port hull of the Sea Smooth collided with the port after quarter of the Lamma IV in the waters west of Shek Kok Tsui light beacon off the north-west coast of Lamma Island. The visibility was good, the Hong Kong Observatory reporting visibility of 10 km in the general vicinity. There was an incoming tide, with a set to the north. At 20:00 the wind was 9 km/h from the east and at 21:00 was 14 km/h from the north-east.

The Sea Smooth

2. The Sea Smooth is a twin screw, twin-hull catamaran with two passenger decks, constructed in glass reinforced plastic (‘GRP’), with a length overall of 28.02 m and a tonnage of gross 274 tonnes. She was owned by Islands Ferry Co Ltd, a wholly owned subsidiary of Hong Kong and Kowloon Ferry Holdings Ltd, and was licensed as a Class I, Category “A” Ferry Vessel to carry 389 persons, having been licensed first by the Marine Department in 2002. As required by the Marine Department, she was equipped with radar and a Very High Frequency (“VHF”) radio. Also she had Automatic Identification System (“AIS”) equipment.

The Lamma IV

3. The Lamma IV is a twin screw passenger launch with two passenger decks constructed in aluminium and GRP, with a length overall of 27.21 m and a tonnage of gross 184 tonnes. She is owned by The Hongkong Electric Co Ltd and was licensed as a Class I, Category “A” Launch to carry 232 persons, having been licensed first by the Marine Department in 1996. Although not required by her license, she was equipped with radar, but not a VHF radio. Both vessels were built in Hong Kong by Cheoy Lee Shipyards Ltd.

4. The Sea Smooth was on a scheduled voyage from Central Pier, which it departed at about 20:00 hours, to Yung Shue Wan on Lamma Island. She had a crew of four and was carrying 95 passengers. The Lamma IV had a crew of three and was carrying 124 passengers, of whom 32 were children, on a voyage from the Lamma Power Station Pier to Victoria Harbour to view the firework display celebrating National Day. The passengers were made up of Hongkong Electric Company employees, their families and friends.”

16. Following the collision, the Lamma IV sank, and became partially submerged in the water. As a result of the collision, 39 passengers

on board the Lamma 1V, including 8 children, lost their lives and numerous others were injured.

17. We are satisfied that Ms Lok has fairly summarised the findings of the Commission against Mr Lai and Mr Chow in the following way:

(a) Mr Lai:

(i) Given that the Sea Smooth was travelling at high speeds of about 23 to 24 knots once outside Victoria Harbour, Mr Lai should have changed the radar setting from time to time to afford himself the opportunity of identifying the course and speed of oncoming vessels on the radar screen at a greater distance, so that he would be alert to their impending arrival. Had he done that, he would have been able to detect the movement of Lamma IV as she left the Hongkong Electric Company Typhoon Shelter. Mr Lai failed to do so. Mr Lai only set the radar on the Sea Smooth at 0.75 nautical miles setting without ever changing it. Even on that setting the Lamma IV would have been detectable as a radar echo by 20:19:08, but Mr Lai still failed to detect it until it was only 2-3 boat lengths away. Mr Lai made no use or proper use at all of the radar available on the Sea Smooth on the voyage in breach of Rule 7(B) of the International Regulations for Preventing Collisions at Sea, 1972, (“ColRegs”)

(ii) By 20:16:00, Mr Lai could have seen the Lamma IV very

clearly on radar and visually, and should have noticed that the two vessels were closing at 1/10 of a nautical mile every 10 seconds. However he did not keep a proper lookout, in breach of Rule 5, ColRegs, and only saw Lamma IV visually when it was about 2-3 boat lengths away from the Sea Smooth. The organisation of the bridge lookout on the Sea Smooth was appalling, and Mr Lai bears the responsibility. Given that Mr Lai was navigating the Sea Smooth at speeds up to 24.5 knots, his failure to avail himself of readily available assistance from his crew to arrange a lookout was egregious.

(iii) At 20:18:00, the two vessels were in a head-on situation, closing on each other at a combined speed of 36 knots, at which speed the distance between them narrowed at one cable every 10 seconds. Mr Lai ought to have determined that the risk of collision existed, and in accordance with Rule 14, ColRegs, turned the Sea Smooth to starboard. Not only did Mr Lai not take any positive action to avoid a collision in ample time, at 20:19:30, he altered the course of the Sea Smooth to port, in flagrant contravention of Rule 14(a), ColRegs. He only put the engines of the Sea Smooth full astern and her rudders hard to starboard immediately before the collision, which action was too late and too little. The turn to port of the Sea Smooth was the fatal manoeuvre. Mr Lai was in breach of Rules 8 & 14, ColRegs.

(iv) In the circumstances, Mr Lai failed to proceed at a safe speed so that he could take proper and effective action to avoid a

collision and be stopped within a distance appropriate to the prevailing circumstances and conditions, in breach of Rule 6, ColRegs.

(v) Mr Lai failed to sound any warning signal, light or sound, in breach of rules 34 and 36, ColRegs.

(b) Mr Chow:

(i) Mr Chow did not make any use of the radar installed on the Lamma IV during the voyage up to the collision, in breach of Rule 7(b), ColRegs.

(ii) By 20:16:00 Mr Chow could have seen the Sea Smooth very clearly on radar and visually, and could have noticed that the two vessels were closing at 1/10 of a nautical mile every 10 seconds. However, Mr Chow failed to do so because he failed to keep a proper lookout. Had he watched his radar screen (which he failed to do) he would also have noticed that the Sea Smooth changed its course at 20:19:30 to port at half nautical mile. In the circumstances, Mr Chow was in breach of Rule 5, ColRegs.

(iii) At 20:18:00, the 2 vessels were in a head-on situation, closing on each other at a combined speed of 36 knots, at which speed the distance between them narrowed at one cable every 10 seconds. However Mr Chow did not take any positive action to avoid the collision in ample time. He still did not take any

such action when he saw the Sea Smooth at about 3 cables distance from the Lamma IV. He only accelerated the engine and altered the course of the Lamma IV to starboard at about 20:20:10, seconds before the collision. Mr Chow did not alter her course sufficiently to starboard. He was in breach of Rules 8 & 14, ColRegs.

(iv) After Mr Chow saw the Sea Smooth, he failed to sound any warning signal, light or sound, in breach of Rule 34 & 36, ColRegs.

18. Ms Lok was right to draw our attention to §§187-188 of the Commission Report:

“187. Mr Lai’s failure to detect the Lamma IV at all on radar and not to detect that vessel by sight, which we have found to be displaying her proper navigation lights, until she was 2-3 boat lengths away, was a truly egregious failure of lookout. It displayed a woeful standard of seamanship.

188. Finally, whilst we accept that it is not appropriate for this Commission to condescend to any detailed attribution of the proportion of culpability between the two coxswains, we are satisfied that fairness requires that we state that we accept Captain Pryke’s opinion that Mr Lai was primarily responsible for the collision.”

19. Following the report of the Commission, criminal charges were laid against both Mr Lai and Mr Chow.

20. Following the criminal trial, Mr Lai was convicted of 39 counts of manslaughter, in respect of the 39 deceased victims, and one count of Endangering the Safety of Others at Sea, contrary to s 72 Shipping and Port Control Ordinance, Cap 313.

21. Mr Chow was also charged with manslaughter but was acquitted of the manslaughter charges. He was convicted on one charge of Endangering the Safety of Others at Sea.

22. Mr Lai was sentenced to concurrent terms of 8 years imprisonment on each of the manslaughter counts, and a concurrent term of 18 months imprisonment on the count of Endangering the Safety of Others at Sea. Mr Lai initially sought leave to appeal against both the convictions and the sentence. He subsequently abandoned the appeal against conviction. The application for leave to appeal against the sentence was refused. Subsequent applications to the Court of Appeal and the Court of Final Appeal for leave to appeal against the sentence were finally dismissed on 21 June 2016. Mr Lai is presently serving his sentence of imprisonment.

23. Mr Chow did not appeal against either the conviction or the sentence, and has completed his term of imprisonment. Mr Chow made an unsuccessful application to the criminal trial judge for costs in respect of his acquittal on the 39 counts of manslaughter. That application was refused. Mr Chow sought a certificate from the trial judge that points of law of great and general public importance were involved in the cost application. The trial Judge refused that certificate. The Court of Final Appeal refused leave to appeal.

Findings:

24. This was a collision, resulting in the deaths of the 39 persons, arising out of the combined serious negligence of both coxswains,

compounded by the incompetence, of one of the coxswains. I am satisfied that both Mr Robert Chan and Mr Christopher Chan were quite correct in not seeking to argue that either coxswain should continue to hold his LCC.

25. I am satisfied to the appropriate standard of proof, by virtue of the circumstances described above, that Mr Lai has both demonstrated that he is unfit to discharge his duties by reason of incompetence, [s 17(1)(a)], and that he has been seriously negligent in the discharge of his duties [s 17(1)(b)].

26. I am further satisfied that Mr Chow has been seriously negligent in the discharge of his duties [s 17(1)(b)].

27. This is so clearly a case of incompetence and negligence that it is simply not open to the Tribunal to consider either suspension of the LCC's or censure. The only proper course open is to order that the LCC's of both Mr Lai and Mr Chow must be cancelled.

An Inquiry as a matter of principle:

28. Mr Robert Chan made an unnecessarily vigorous submission that in the whole of the circumstances of this case, with both Mr Lai and Mr Chow having, at an early date, indicated their willingness to surrender their LCC's, the Director ought not to have caused the inquiry to be conducted. Had the Director followed that course, it was argued that there would be no liability for costs.

29. I reject this submission, and am completely satisfied that the

Director has acted perfectly properly and appropriately in causing the Inquiry to be held.

30. First, there is no provision in the Ordinance which allows for a LCC to be “surrendered”. In the absence of a formal provision for surrender, and a legal definition of the consequences of a surrender of a LCC, it is open to argument that a surrender of a LCC may be equivalent to a suspension of the LCC, and, it being a voluntary action on the part of the holder of the LCC, that holder may subsequently request the Administration for the return or revival of the LCC.

31. Cancellation of a LCC is an entirely different matter. The cancellation of the LCC pursuant to s 17(4)(a) involves the fundamental termination of the entitlement of the holder to the license. Should the former holder of a LCC which has been cancelled wish to revive his entitlement it would plainly be necessary for him to start again at the beginning of the qualification process, and to requalify in all respects for the LCC.

32. Second, while it is right that the circumstances of the collision have been examined in great detail, both in an extensive Commission of Inquiry and in a criminal trial, neither procedure had the power to deal with the LCC’s. The procedure under s 17 of the Ordinance is specifically designed and directed to the fitness or conduct of the holder of an LCC.

33. Mr Christopher Chan suggested that such inquiries were unusual and went so far as to say that this was the first time that such an inquiry had been held under s 17 of the Ordinance. That is not right, but,

fortunately such inquiries are rare. I have myself conducted three such inquiries, two under the Merchant Shipping (Seafarers) Ordinance, Cap 478, (“MS(S)O”) and the present one under MS(LV)O. The one in 1999 was an inquiry of an identical nature under s 112(1) “MS(S)O”, which deals with certificates of competency in respect of officers under that Ordinance.

34. Whenever there is a collision at sea, whether within or outside local waters, involving Hong Kong seamen holding certificates of competency, it is likely that an inquiry will be held.

35. I note that pursuant to r 6(3) of the Rules, the inquiry is required to be held in public unless the Tribunal is satisfied that, in the interests of justice, or for other good and sufficient reason in the public interest, any part of the evidence or any argument relating thereto should be heard in private.

36. Neither Mr Robert Chan nor Mr Christopher Chan suggested any reason why the Inquiry should not be held in public, although I accepted that medical reports on the condition of both Mr Lai and Mr Chow could be submitted on a private basis.

37. The reasons why there is a requirement that an independent investigation into the fitness or conduct of a holder of a LCC should be held in public are, in my view, fourfold.

38. First, there is a clear public interest in requiring there to be a formal procedure whereby the fitness or conduct of a holder of a LCC is investigated following an incident giving rise to concern over that fitness

or conduct. In the absence of a statutorily established procedure, the public cannot be sure that those who are given the weighty responsibility of being entitled to navigate vessels are properly qualified for that responsibility.

39. By establishing a procedure for investigating issues of fitness or conduct, by requiring that investigation to be conducted by persons independent of the Director, and by requiring the investigation to be conducted in public, the legislation meets that public interest. The conduct of a public inquiry ensures that the public can see, transparently demonstrated, that when a proper question arises as to the fitness or competence of a LCC holder, that fitness and competence is appropriately and publicly examined.

40. Second, the requirement for a proper procedure to be followed, and for that procedure be both independent and in public, constitutes a protection to holders of LCC's by ensuring that a LCC can only be cancelled or suspended in appropriate circumstances. The holder of a LCC whose competence or fitness is challenged has the right to appear before the inquiry, to be represented by Counsel, and to test the allegations made against him.

41. Third, as Ms Lok pointed out, although the Tribunal is required to make a report on the case to the Director: see s 17(4)(c) MS(LV)O, the power to cancel, or suspend a LCC, or to censure the holder of a LCC, as a matter of statute, lies with the person conducting the inquiry, and not with the Director. Consequently, simply as a matter of statute law, if appropriate steps are to be taken by the Director in relation to a LCC following a collision, the only course open to the Director is to establish an

inquiry pursuant to s 17 MS(LV)O, or s 112 MS(S)O.

42. Finally, (in this case, less significantly, because of the detailed investigation by the Commission, and the subsequent criminal trial), the conduct of a public inquiry serves to complete the picture, some might say “provide closure”, to those of the public who have suffered as a result of the serious negligence or misconduct of the holder of a LCC. That is particularly important when there has been a loss of life at sea.

43. To enable the surrender of a license, thereby avoiding public examination of fitness or conduct of the holder of a LCC, would fail to meet any of these four factors.

44. To suggest, as Mr Robert Chan did, that the Director should be cautious before causing an inquiry to be brought in circumstances similar to these, and that in this case the Director had thrown “caution to the wind” was quite inappropriate. The submission substantially failed to recognise the proper role of the Director in the administration of LCC’s, the limitation on the powers of the Director, and the proper role of the Inquiry.

45. It is correct that the Director has a discretion whether or not to hold an inquiry. I note that in refusing Mr Chow’s application for costs, Deputy High Court Judge Keith described the circumstances of the collision as “one of the most traumatic events in Hong Kong’s recent history”. That is undoubtedly correct. It would be a very peculiar circumstance, where following a collision at sea which has resulted in the loss of life, it would not be appropriate for the Director to cause an inquiry

to be held, whether under the Ordinance or the Merchant Shipping (Seafarers) Ordinance.

46. I have no doubt at all that, in concluding that this was an appropriate case to hold an inquiry, the Director was acting entirely properly and in accordance with all statutory requirements.

Costs as a matter of principle:

47. Ms Lok accepted that there may well be circumstances in which an inquiry might, having regard to the personal circumstances of a subject of an inquiry, not make a costs order. However her submission was that the inquiry was necessitated by breaches of duty and misconduct on the part of the two coxswains. In those circumstances, she said that the starting point would normally be that the cost of the inquiry should be borne by the subject of the inquiry as, unless borne by them, those would have to be borne by the taxpayer.

48. Ms Lok properly accepted that both Mr Lai and Mr Chow had, through their solicitors, indicated at the earliest opportunity that they did not contest the allegations set out in the notices, and both had been cooperative in the inquiry. As a result of those admissions and cooperation, the inquiry had been substantially shortened and cost had been saved.

49. Ms Lok was instructed to say that the Director would abide any cost order the Tribunal thought just.

Matters of mitigation of costs; Mr Lai:

50. Mr Christopher Chan properly reminded me that Mr Lai is currently serving in a sentence of imprisonment and that he has no means at all to meet an order for costs. He will be 65 years of age when he is able to be released from prison.

51. Mr Lai was born into a fishing family and like most members of his family has spent his entire life at sea. Mr Lai has no formal education and it is a tribute to him that he is able to work his way up to the position that he held. He has been at sea for 31 years and, other than the incident now before Tribunal, has an unblemished navigational record.

52. Mr Lai has lost his job and his only income. He has no other skills, and it is realistic to say that it is unlikely he will be able to find other employment to match his past employment.

53. Mr Christopher Chan properly reminded me that at the earliest opportunity Mr Lai had indicated through his solicitors his willingness to admit the allegations against him, and, in order to save costs, not to contest any matters. A sick leave certificate was produced certifying that Mr Lai suffers from a medical condition. I have taken that matter fully into account.

Mr Chow:

54. Mr Robert Chan, like Mr Christopher Chan, properly reminded me that at the earliest opportunity, Mr Chow had indicated

through his solicitors his willingness to admit the allegations against him and, in order to save costs, not to contest any matters.

55. He drew my attention to the fact that Mr Chow had been a coxswain for 20 years prior to the collision and had never been involved in any serious marine incidents. Mr Chow had never received a warning or caution in respect of any rules governing the navigation of vessels. He had not been the subject of any disciplinary action by his employer. Like Mr Lai, Mr Chow suffers from a medical condition that I have taken fully into account.

56. Most significantly, Mr Chow was commended by the Commission for conducting himself in the best tradition of seafarers by attending as best he could to the needs of passengers on his vessel, and by being the last person who left the wheelhouse until he was satisfied that there were no more persons to be rescued from the sea around the sunken vessel.

57. At his criminal trial, over 100 letters of mitigation from his employer, colleagues and passengers on-board the Lamma IV, were received and taken into account. Two of those letters were submitted to the Inquiry and I have had regard to those.

Costs:

58. I have taken all of the foregoing matters into account in considering the question of costs. Whilst accepting that in the normal course of an inquiry such as this, costs would be likely to follow the event,

in the particular personal circumstances of Mr Lai and Mr Chow, I have concluded that it is not appropriate to make a costs order.

Dated 26th August 2016

(signed)
John Saunders

We agree:

(signed)
Captain Law Kwun Pan

(signed)
Captain Tsang Cheuk Yin

Schedule

1. Notice of Inquiry in respect of Mr Chow Chi-wai
2. Notice of Inquiry in respect of Mr Lai Sai-ming
3. Letter from Messrs Reed Smith Richards Butler to the Department of Justice
4. Letter from Messrs Holman Fenwick Willan to the Department of Justice
5. Chow Chi-wai's local certificates of competency
6. Lai Sai-ming's local certificates of competency
7. Indictment of *HKSAR v Chow Chi-wai and Lai Sai-ming* (HCCC 458/2013)
8. *HKSAR v Chow Chi-wai and Lai Sai-ming* (unrep., HCCC 458/2013), Reasons for sentence
9. *HKSAR v Lai Sai-ming* (unrep., CACC 77/2015) Lai Sai-ming's application for leave to appeal against sentence
10. *HKSAR v Chow Chi-wai and Lai Sai-ming* (unrep., HCCC 458/2013), Chow

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Chi-wai's costs application

11. *HKSAR v Lai Sai-ming* (unrep., CACC77/2015) and corrigendum, Lai Sai-ming's application for certificate that points of law of great and general importance were involved in the 12.11.2015 leave application
12. *HKSAR v Chow Chi-wai and Lai Sai-ming* (unrep., HCCC 458/2013), Chow Chi-wai's application for certificate that points of law of great and general public importance were involved in the 2.2.2016 costs application
13. *HKSAR v Chow Chi-wai* (FAMC 18/2016) Chow Chi-wai's application for leave to appeal the 2.2.2016 costs application
14. Report of the Commission of Inquiry

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