致：
香港特別行政區
立法會
民政事務委員會秘書
方慧浣女士

方女士：

**有關青衣墟原居鄉村的事宜**

「青衣墟」為新界原居村落，並被編錄在新界鄉議局於 1991 年制訂的「新界原有鄉村名冊」內。

民政事務局於 1999 年，在未有徵詢青衣墟村民情況下，單方面將青衣墟自鄉村選舉名冊中刪除。

本人代表青衣墟村民，不斷要求民政事務局局長，將青衣墟重新編錄在鄉村選舉名冊內，但不得要領。個案訴諸法院、上訴庭及終審庭。

最後終審庭法官指出，立法會才有權力將青衣墟加入「原居鄉村名冊」內（隨函附上終審法院判詞 FACV No. 5 of 2007 供參考）。

現懇請 貴會法案委員會通過修訂有關法案，將「青衣墟」重新劃為獨立原居鄉村選區，並於《2009 年村代表選舉法例(雜項修訂)條例草案》附表 1 加入「青衣墟」，得以於 2011 年舉行村代表選舉。

（黎德成）
青衣墟村民召集人　上

2009 年 6 月 2 日

附件

FACV No. 5 of 2007

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 5 OF 2007 (CIVIL)

(ON APPEAL FROM CACV NO. 201 OF 2005)

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Between

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|---|---|
| LAI TAK SHING | Applicant (Appellant) |
| and | |
| THE SECRETARY FOR HOME AFFAIRS | Respondent (1st Respondent) |
| | Intervener (2nd Respondent) |
| TSING YI RURAL COMMITTEE | |

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Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Woolf NPJ

Date of Hearing: 8 October 2007

Date of Judgment: 5 November 2007

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J U D G M E N T

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**Chief Justice Li:**

1. I agree with the judgment of Mr Justice Chan PJ and that of Mr Justice Ribeiro PJ.

**Mr Justice Bokhary PJ:**

2. I entirely agree with the judgment of Mr Justice Chan PJ. The following is contributed purely by way of respectful emphasis. Settling the list of indigenous villages cannot have been an easy task. It is plainly a major feature of the legislature's achievement in passing the Village Representative Election Ordinance, Cap.576. Adding any indigenous village to the list could – and probably would – have a very considerable impact on the position so achieved. The courts will not lightly ascribe to the legislature an intention to leave a major feature of primary legislation exposed to what could prove to be a very considerable impact by way of delegated legislation. It is also to be observed that there would still be substantial content in the Secretary for Home Affairs' power under s.67 to amend Schedule 2 even if the power did not extend to such addition. These are fundamental considerations. They constitute my primary reasons for holding that the Secretary is not empowered to add indigenous villages. On that interpretation, the appellant's judicial review challenge to the Secretary's refusal to add such a village necessarily fails.

**Mr Justice Chan PJ:**

3. At the centre of this appeal is the construction of s.67 of the Village Representative Election Ordinance, Cap 576 ("the Ordinance") – what is the scope of the power conferred by this section upon the Secretary for Home Affairs ("the Secretary") to amend the three schedules of the Ordinance? In the circumstances of this case, the specific question to be decided by the Court is whether the Secretary has the power to add to the list of indigenous villages in Schedule 2 of the Ordinance. If the Secretary does not have such power, his decision not to do so as requested by the appellant ("Mr Lai") was right and should be upheld. If, on the other hand, he has such power, it would then be necessary to consider whether he had properly exercised that power and if he had not done so, whether Mr Lai is entitled to any relief, having regard to the findings of fact made by the judge at first instance at the request of the parties.

*Background*

4. Mr Lai claims to be an indigenous inhabitant of Tsing Yi Hui (青衣墟). The basis of his claim is that Tsing Yi Hui is an indigenous village which existed in Tsing Yi in 1898 and that his grandfather was a resident of that village at that time. The status of Tsing Yi Hui as an indigenous village and Mr Lai's status as an indigenous

inhabitant are not recognized by the Tsing Yi Rural Committee (“TYRC”).

5. The dispute in the present case is not concerned with the lawful traditional rights and interests of indigenous inhabitants which are preserved under art. 40 of the Basic Law. It is concerned with the entitlement of indigenous inhabitants to participate in public affairs through village representative elections. A village representative is automatically a member of the rural committee in the district in which the village is situated. See s.61 of the Ordinance. The chairmen and vice chairmen of rural committees are ex officio members of the Full Council of the Heung Yee Kuk (“HYK”). See s. 3(2)(a)(i) of the Heung Yee Kuk Ordinance, Cap 1097. Members of the Full Council form a functional constituency from which a candidate can be returned as a member of the Legislative Council. See s.20A of the Legislative Council Ordinance, Cap 542. In addition, the chairmen of rural committees are ex officio members of the relevant District Councils. See s.9(1) of the District Councils Ordinance, Cap 547.

6. There is no definition of “indigenous inhabitants” in the Basic Law. Nor was it defined in any statute until the enactment of the Ordinance (although similar terms such as “New Territories residents” and “indigenous villagers” are defined in the Government Rent (Assessment and Collection) Ordinance, Cap 515 (s.5), and the Rating Ordinance Cap 116 (s.36) by reference to “established villages”). The term “indigenous inhabitants” has been commonly understood to refer to persons who in 1898 were residents of villages which existed in the New Territories at that time and to persons who are their male descendants. Not all villages in the New Territories are indigenous villages. For decades, the practice has been that to qualify as an indigenous village, a village in the New Territories must not only have been in existence in 1898 but must also have been recognized as such by the Secretary (or the relevant official). The Secretary normally consults the HYK and the relevant rural committees because the members or chairmen of these organizations are usually village elders and long time residents of the relevant parts of the New Territories who are in a position to confirm the existence or otherwise of the relevant facts.

7. The village representation system in the New Territories which existed prior to 2003 only came into existence during the Japanese occupation. In the early years, a village representative to deal with the Government was elected or chosen by the heads of households in a village from among themselves. This was not surprising in view of the fact that members of the village were usually of the same surname, shared a common ancestor and jointly owned family property in the same village. The arrangements for such election changed over time due to changes in the circumstances

including the emigration overseas of the indigenous inhabitants and the settlement of non-indigenous residents in many indigenous villages.

8. In August 1994, a set of Model Rules for the Conduct of Village Representative Elections was introduced by the HYK and adopted by a large number of indigenous villages in the village representative election held in 1999. It is to be noted that under the previous provisions of the Heung Yee Kuk Ordinance (s.3(3)), an elected person required the approval of the Secretary before he could become a village representative.

9. In December 2000, this Court in *The Secretary for Justice & Others v Chan Wah & Others* (2000) 3 HKCFAR 459 held, among other things, that certain arrangements adopted for the 1999 village representative election were unconstitutional. First, the exclusion of non-indigenous villagers from voting and standing as a candidate in the election was inconsistent with art. 21 of the Hong Kong Bill of Rights (the right to participate in public life). Secondly, the exclusion of non-indigenous men married to indigenous women from voting in such election while allowing non-indigenous women married to indigenous men to do so contravened s.35 of the Sex Discrimination Ordinance, Cap 480.

10. Following this decision, it was considered by the Government that the village representation system existing then should be put under a proper statutory framework and that village representative elections must be conducted in an open, fair and honest manner and must be consistent with art. 21 of the Hong Kong Bill of Rights and s.35 of the Sex Discrimination Ordinance. A working group was set up to review the procedure and arrangements for rural elections. Extensive consultation with the HYK and all 27 rural committees in the New Territories was conducted with a view to introducing legislation for regulating village representative elections in 2003 ("the 2003 VR Election") as well as in subsequent years. The underlying principle for the proposed legislation, according to Mr Fisher, the then Deputy Secretary for Home Affairs, was that the 2003 VR Election should be held for indigenous villages and existing village settlements which were included in the village representation system in the New Territories and in the VR election in 1999.

*Events leading to judicial review*

11. Between April and July 2002, the Home Affairs Bureau ("HAB"), the HYK and the rural committees in the New Territories reached an agreement after extensive consultation to maintain the then current number of indigenous villages and village representatives in the forthcoming election in 2003.

12. In July and August 2002, in preparation for the 2003 VR Election, the proposed boundaries of Existing Villages under the TYRC were published for public inspection and comments. Tsing Yi Hui was not included as an Existing Village since it was not recognized as an Indigenous Village by the TYRC.

13. On 2 August 2002, Mr Lai wrote to the Secretary requesting the recognition of Tsing Yi Hui as an Indigenous Village and the delineation of a boundary for Tsing Yi Hui as an Existing Village in the 2003 VR Election. This matter was discussed at length at a meeting of the TYRC held on 16 August 2002 in which representatives of the HYK and the Secretary were present. On 23 August 2002, the Secretary turned down Mr Lai's request but indicated that the TYRC would reflect its opinion to the HYK and that the matter would be further considered after a "consensus had been reached" between the HYK and the TYRC.

14. On 23 September 2002, Mr Lai made a second and similar request to the Secretary. On 4 November 2002, the Director of Lands ("the Director") informed the TYRC that Mr Lai's ancestors were considered by the Director as originating from Ma Wan and not Tsing Yi. At a meeting held on 10 December 2002, the TYRC took the view that Mr Lai was not an indigenous inhabitant of Tsing Yi. On 27 December 2002, the Director of Home Affairs on behalf of the Secretary replied to Mr Lai explaining further why Tsing Yi Hui was not accepted as an indigenous village.

15. In February 2003, the Ordinance was passed into law. Tsing Yi Hui was not included in the Schedules.

16. On 19 and 20 March 2003, Mr Lai filed two applications for registration as an elector of the 2003 VR Election in the Tsing Yi Hui Existing Village and Indigenous Village constituencies under the TYRC. On 7 April 2003, the Electoral Registration Officer of Kwai Tsing rejected his applications on the ground that Tsing Yi Hui was not listed as an Indigenous Village in Schedule 2 of the Ordinance. In May 2003, Mr Lai challenged this refusal under ss.24 and 25 of the Electoral Affairs Commission (Registration of Electors) (Village Representative Election) Regulation, Cap 541K. This was dismissed by the Revising Officer on 12 May 2003.

17. By a letter dated 3 July 2003, Mr Lai's solicitors wrote to the Secretary re-iterating that Tsing Yi Hui should have been included as an Indigenous Village and inviting the Secretary to exercise his power under s.67 of the Ordinance to make amendments to the Schedules to that effect. In a reply dated 18 July 2003, the Director of Home Affairs explained that the Schedules were compiled after extensive

consultation with the rural committees and the HYK; that the basic principles were that villages eligible for inclusion in the 2003 VR Election should be those under the current village representative system in the New Territories and recognized by the respective rural committees; and that Tsing Yi Hui was not included in the Schedules because it was not recognized by the TYRC and no village representative election had been held there since the establishment of the TYRC in the 1950s. The reply ended by undertaking to relay Mr Lai's proposal to the TYRC for consideration.

18. On 18 August 2003, Mr Lai commenced the present proceedings against the Secretary's decision as contained in this reply.

*The relevant provisions of the Ordinance*

19. Before going into the details of the proceedings, it is appropriate to set out the relevant provisions of the Ordinance. As mentioned above, it was prompted by the judgment of this Court in *Chan Wah* It maps out a comprehensive scheme for village representative elections: establishing three types of village representative, setting out the qualifications for voting and standing as candidates in such elections and making provisions for the conduct of such elections.

20. In s.2, the Ordinance first identifies three types of village: (1) Existing Villages, (2) Indigenous Villages, and (3) Composite Indigenous Villages. We are not concerned with the last type of village. Existing Villages are defined by reference to a list of villages in Schedule 1 of the Ordinance and the designated areas on a specific map. Indigenous Villages are defined by reference to a list of villages in Schedule 2 and the particulars shown or contained in a specific Index. Both the map and the Index are kept in the office of the Director of Home Affairs and are available for public inspection. Corrections can be made to the Index but there is no express provision for the correction of any details on the map. (See ss.2, 3 and 4.)

21. The Ordinance further establishes the offices of Resident Representatives for Existing Villages ("Resident Representatives") and Indigenous Inhabitant Representatives for Indigenous Villages (and Composite Indigenous Villages) ("Indigenous Inhabitant Representatives"). A Resident Representative is elected from among residents of an Existing Village; he is to reflect views on the affairs of that Village on behalf of the residents in that Village, but shall not deal with any affair relating to the lawful traditional rights and interests of indigenous inhabitants. (See s.5.) An Indigenous Inhabitant Representative is elected from among indigenous inhabitants of an Indigenous Village; he is to reflect views on the affairs of that Village on behalf of the indigenous inhabitants of that Village and to deal with all

affairs relating to the lawful traditional rights and interests, and the traditional way of life, of the indigenous inhabitants in that Indigenous Village. (See s.6.)

22. It is possible for a village to be both an Existing Village and an Indigenous Village and hence possible to have both a Resident Representative and an Indigenous Inhabitant Representative in the same village. An elected village representative no longer requires the approval of the Secretary before he can take office. He is however still an ex officio member of the relevant rural committee as specified in the Schedules. (See s.61.)

23. The Ordinance also makes provisions for the eligibility for registration as an elector in a village election and for nomination as a candidate. Hong Kong permanent residents who have resided in an Existing Village for three years or more are eligible for registration as an elector in that Existing Village. (See s.15(4).) Indigenous inhabitants or the spouses or surviving spouses of indigenous inhabitants holding an identity document are eligible for registration as an elector in that Indigenous Village. (See s.15(5).) Residence is not required for an elector in an Indigenous Village. A person is eligible for nomination as a candidate in an Existing Village election if that person is over 21 years of age, has been a resident of that Village for 6 years immediately before nomination, is a registered elector and is not disqualified. (See s.22.)

24. The lists of villages set out in the three Schedules are central to the whole village representative election scheme. Only villages listed in the Schedules can hold elections. Section 67 confers upon the Secretary a power to amend the Schedules. It provides:

> "(1) The Secretary may, by order published in the Gazette, amend Schedule 1, 2 or 3.
>
> (2) An order under this section may contain such incidental, consequential, supplemental, transitional or saving provisions as may be necessary or expedient in consequence of the order."

25. The scope of this power is the bone of contention in this case. What sorts of amendments can be made by the Secretary to the Schedules under this section? Can he add to the list of indigenous villages to Schedule 2? Unfortunately, due to the manner in which the case was conducted before the judge as discussed below, this issue was not dealt with by him.

*Proceedings before the Court of First Instance*

26. Mr Lai's case before the judge was that Tsing Yi Hui was an indigenous

village within the definition of s.2 of the Ordinance but was omitted from the Schedules. The Secretary had the power and discretion to rectify this omission pursuant to s.67, but did not do so on the ground that Tsing Yi Hui was not recognized by the TYRC and no village representative election was held there in the 1999 village representative election and no election had ever been held for Tsing Yi Hui. It was contended that this was an improper exercise the Secretary's power and discretion in that the Secretary had deferred his decision to the views of the TYRC.

27. Mr Lai initially sought three heads of relief: (1) an order of certiorari to quash the Secretary's decision as set out in his letter dated 18 July 2003; (2) an order remitting to the Secretary the question whether the Schedule 2 of the Ordinance should be amended by adding the name of Tsing Yi Hui to it; and (3) a declaration that Mr Lai is an indigenous inhabitant of Tsing Yi Hui within the meaning of s.2 of the Ordinance.

28. In view of the third relief sought by Mr Lai, the TYRC applied to be joined as the 2nd respondent to these proceedings. The basis for doing so was that according to s.61 of the Ordinance, a village representative for an Existing Village or Indigenous Village is an ex officio member of the relevant rural committee. Should Tsing Yi Hui be declared an Existing Village or Indigenous Village, its village representative would be a member of the TYRC. Hence the TYRC was clearly interested to be heard on this issue. The application for joinder was not opposed.

29. The Secretary's case was that he had consulted the HYK and the TYRC and had taken their views among other matters into consideration before deciding not to include Tsing Yi Hui in the Schedules. He had not fettered his discretion by relying exclusively on the views of the HYK and the TYRC. In any event, on the evidence adduced before the court, Mr Lai had failed to prove that Tsing Yi Hui was an indigenous village and the decision was correct. The TYRC supported the Secretary's case. It maintained its position that Tsing Yi Hui was not recognized as an indigenous village and that Mr Lai was not an indigenous inhabitant.

30. On the first day of the trial, counsel for Mr Lai indicated that he was not pursuing the third relief. With the permission of the judge, the TYRC continued to take part in the proceedings. No issue was taken as to whether Mr Lai has sufficient standing to institute these judicial review proceedings (although the judge later questioned this in his findings).

31. However, although Mr Lai was no longer seeking a declaration that he was an indigenous inhabitant, his counsel submitted that this was one of the issues before the

court. Extensive submissions were made on the evidence adduced on this issue. It was contended that the Secretary had ignored the evidence showing that Tsing Yi Hui existed in 1898 and that Mr Lai's ancestor was living there then, and had instead acted on irrelevant considerations. It is only fair to say that the other parties to the case also addressed the court on the facts in dispute. Those being the submissions made by the parties, the judge was in effect invited to rule on these factual issues.

32. Having considered the evidence and the parties' submissions, the judge made the following findings:

(1) that Mr Lai had failed to establish that Tsing Yi Hui was an indigenous village and that "more probable than not" it was not;

(2) that it was not necessary to decide whether Mr Lai was an indigenous inhabitant because irrespective of whether the Secretary's consideration was made in accordance with the provisions of the Ordinance, "his conclusion is correct";

(3) that Mr Lai did not have sufficient interest to bring this application; and

(4) that since Tsing Yi Hui was not an indigenous village, the provisions of the Ordinance relating to the election of village representatives do not apply to Tsing Yi Hui.

33. These findings related to the merits of the Secretary's decision and in making them, the judge was said to have referred to evidence which was not before the Secretary. These findings led, justifiably in my view, to the criticism that he had usurped the function of the Secretary, albeit what he did was merely acceding to the request of the parties. These findings also gave rise to the dispute (which was raised on appeal before the Court of Appeal and this Court) as to whether they are binding on the parties and whether any useful purpose can be served by remitting the case to the Secretary for re-consideration. In any event, having come to these conclusions, the judge did not think it was necessary to deal with the construction of s.67 of the Ordinance, although quite clearly this is an essential issue in the resolution of this case.

34. Mr Lai's application for judicial review was dismissed with costs to the Secretary and the TYRC. He appealed to the Court of Appeal against both the dismissal of his application and the costs order made against him in favour of the TYRC.

*Decision of the Court of Appeal*

35. On appeal, the Court of Appeal (Cheung JA, Yam and Sakhrani JJ) grasped the nettle and ruled on the construction of s.67 of the Ordinance. They took the view that while it was accepted that the policy behind the Ordinance was to have village representative elections only for those villages which were already included in the then current village representation system and which had held an election in 1999, the legislative intent was not to confine the village representation system only to these villages. The court accepted the suggestion that there could be circumstances in which additional villages should be included in the Schedules. In their opinion, the power to amend under s.67 was a wide power which allowed for the amendment of the Schedules by addition and deletion. The court concluded that the Secretary had failed to exercise this power in that he had made no independent evaluation of Mr Lai's case.

36. The court then dealt with the question whether any relief should be granted to Mr Lai. On that issue, it held that it was premature to consider whether on the evidence, a decision refusing amendment was inevitable when the Secretary had not even exercised his statutory discretion. However, as Mr Lai did not challenge the findings of fact made by the judge, the court was not concerned with the appropriateness of those findings but with their effect; and even if the matter was to be remitted to the Secretary, he would be bound by those findings and it would be futile to remit the matter to him for re-consideration. Mr Lai's appeal was therefore dismissed with no order as to costs between Mr Lai and the Secretary but costs to the TYRC.

*The present appeal*

37. In the appeal before this Court, Mr Philip Dykes SC, leading Mr Kenneth K H Lee for Mr Lai, supports the construction given by the Court of Appeal to s.67 of the Ordinance but complains that the court was wrong to hold that the judge's findings of fact which went beyond the proper functions of a judge in judicial review proceedings are binding on the parties. It was also wrong to hold that Mr Lai was not entitled to any relief even though it was held that the Secretary had failed to exercise his power under that provision.

38. Mr John Bleach SC, leading Mr S H Kwok for the Secretary, submits that the underlying legislative intention of and the resulting legislative scheme under the Ordinance was that village representative elections should only be held for those

indigenous villages and existing village settlements which had been included in the village representation system in the New Territories and in the village representative election held in 1999. It is also his contention that the judge was asked by Mr Lai to make those findings which are proper and binding on the parties; alternatively, it would be irrational not to follow those findings.

*The construction of s.67*

39. Mr Dykes' arguments can be summarized as follows. "Indigenous Village", "Existing Village" and "Composite Indigenous Village" are terms which are "invented" by the Ordinance and are defined by reference to the Schedules. The inclusion of a village (which is defined in s.2 as including a community of people) in the Schedules involves a value judgment. This judgment was exercised by the Legislature when the Schedules were first compiled and may be exercised by the Secretary under the power to amend in s.67 if and when the situation arises. It is possible, counsel argues, that "communities coming into existence after 1898 by branching off from 1898 villages, or being otherwise established by indigenous inhabitants of communities in existence in 1898 or by non-indigenous persons establishing a village community" may fall within the definitions of Indigenous Village, Existing Village or Composite Indigenous Village and should be included in the Schedules. The power under s.67 is not restricted by any policy, requirements or pre-conditions and may thus be exercised "from time to time as the occasion requires" as permitted by s.39 (1) of the Interpretation and General Clauses Ordinance, Cap 1. It is a wide power since "amend" includes "repeal, add to or vary and the doing of all or any of such things simultaneously or by the same Ordinance or instrument". See s. 3 of Cap 1. Such a construction, counsel submits, is consistent with the purposes of the Ordinance.

40. With respect, I do not think this submission can be sustained. It is clearly not the intention of the Legislature to confer such a wide power on the Secretary. This is plain from the context which includes the legislative history, the mischief which the Ordinance was aimed at rectifying and the provisions of the Ordinance. On a true construction of s.67, I do not think it empowers the Secretary to add or delete any indigenous or existing village to and from the Schedules.

41. In *Chan Wah*, two aspects of the previous village representation system were found to be unconstitutional: the exclusion of non-indigenous residents and the spouses of indigenous women from village representative elections. The Ordinance was passed with a view to rectify the "mischief" identified by this Court in that

case. It was sought to achieve this by introducing the "dual representation" model and making provision for the eligibility of electors and candidates in future village representative elections. The Ordinance was not intended to make any change to the then current delineation of boundaries of each constituency. The number and names of indigenous villages where village representative elections had previously been held had already been identified and recorded in an existing Index; and the number and distribution of existing village settlements were also well known and recorded in an existing map. These were not matters which needed to be addressed by enacting new legislation.

42. Extensive consultation for several months with the HYK and the 27 rural committees in the New Territories was conducted on the basis that there was to be no change to the then current number of indigenous villages and existing village settlements or for that matter, the identity of these villages. This is clear from the records and documentation of the consultation. It was also the basis of an agreement reached between the Government and the HYK and the rural committees as to how to proceed with future elections. More importantly, it was the basis on which the Schedules were prepared and published for public inspection and comments in July 2002 and it was these Schedules which were subsequently incorporated in the Ordinance.

43. That there was to be no change to the then current number of indigenous villages and existing village settlements and only those villages in which election had been held in 1999 are to be included was also made amply clear in a Brief submitted in September 2002 by the HAB to the Legislative Council during the introduction of the Village Representative Election Bill. The Bureau explained the reasons behind the Bill, the purposes it was sought to achieve and the proposed changes. Among other things, the Legislative Council Brief stated:

> (i) that Village Representative elections should be held for indigenous villages (Indigenous Villages or Composite Indigenous Villages) and existing village settlements (Existing Villages) *now included* in the village representation system in the New Territories (paragraph 11(a)); *and*
>
> (ii) that the *current number* of Indigenous Inhabitant Representatives (ranging from 1 to 5) for an Indigenous Village or a Composite Indigenous Village *would be retained* (paragraph 11(o)) (emphasis added)

44. The number, descriptions and locations of these villages were listed in the

Schedules which formed part of the proposed legislation and were tabled before the Legislative Council. In passing the Bill in that form, it must be taken that the Legislative Council, having been informed of what was proposed and what was intended to be achieved by the Bill, made a conscious decision to adopt such an approach.

45. What Mr Lai appears to be doing in this case is that having failed to lobby the Secretary to have Tsing Yi Hui included as an indigenous village (and for that matter, also as an existing village) in the list of villages to be presented for incorporation in the proposed legislation, he now makes another attempt at it by urging the Secretary to invoke the power under s.67 in his favour after the enactment of the legislation.

46. So much for the legislative history and background to this piece of legislation. In my view, the wording of the relevant provisions of the Ordinance does not support Mr Dykes' submission either.

47. It is true that s.67(1) is in open terms and that no criterion is expressed in the Ordinance as to how and under what circumstances this power is to be exercised. But it does not follow that the power can be exercised in any way the Secretary wishes, even to the extent of defeating the intent and purpose of the Ordinance or changing the village representation scheme. I do not believe Mr Dykes goes so far as to submit that the exercise of this power is completely unrestricted. But once that is accepted, it must, in my view, follow that the power must be exercised only within the confines of the declared legislative policy and must not be exercised in such a way which is inconsistent with the legislative intent.

48. It is important to note that "Indigenous Villages" and "Existing Villages" are not defined in a descriptive way but by reference to the Schedules and to a specific Index or a specific map which were already in existence before the enactment of the Ordinance. The Schedules form part of the Ordinance. If the s.67 power were to be as wide as is submitted by counsel, this would mean that the Secretary has the power to redefine the constituencies by making changes to these definitions or even to overturn the whole village representation system by amending the Schedules. This is tantamount to giving a power to the Secretary to amend primary legislation. Although any change to the Schedules is, we are told, subject to negative vetting by the Legislative Council, I do not think the abovementioned consequence could have been intended by the Legislature.

49. In my view, s.67(1) must be construed in a way which is consonant with the declared policy and legislative intent. It is aimed at giving power to the Secretary to

correct errors and mistakes in matters of detail appearing in the Schedules which may be discovered subsequent to the enactment of the Ordinance and from time to time. Such power is necessary given the tremendous amount of details contained in these Schedules which in relation to no less than 693 Existing Villages, 586 Indigenous Villages and 15 Composite Indigenous Villages, set out the names, both in Chinese and English, of the villages and the rural committees of the districts in which the villages are situated, the number of village representative to be elected, and in the case of an Existing Village, also the reference to the map on which the area of the village is delineated.

50. I am therefore in no doubt that it was the clear intention of the Legislature to confine future village representative elections to those villages already on the list where elections had been held in 1999. I would respectfully disagree with the Court of Appeal that this was merely a policy and not the legislative intent.

51. Mr Dykes submits in his argument (which was apparently accepted by the Court of Appeal) that it is possible for new indigenous villages to be discovered and new existing villages to emerge and that the Secretary should have the power to add or remove villages to or from the Schedules. In answer to this, I would only say that if and when it is deemed necessary or appropriate to add or delete any indigenous or existing village to or from the Schedules, it is, I think, properly a matter for the Legislature and not the Secretary.

52. In view of my conclusion on the construction of s.67, the other matters do not arise for consideration. However, I must in particular note that the judge’s view that Mr Lai did not have sufficient interest to institute judicial review proceedings should not necessarily be taken as correct.

*Conclusion*

53. For the reasons which I have given above, I am of the opinion that the Secretary has no power to add any new indigenous village to Schedule 2. He could not have acceded to Mr Lai’s request. I would therefore dismiss the appeal with costs to the Secretary.

*Costs orders in favour of TYRC*

54. The judge awarded costs to the TYRC against Mr Lai. That order was appealed to the Court of Appeal. It was upheld by the Court of Appeal for the reasons given in paragraphs 55 to 59 of its judgment. Basically, the court considered that the TYRC had a separate interest to be heard which was distinct from that of the Secretary

and that it had already incurred substantial costs before Mr Lai indicated to the judge that he would not seek a declaration of status. The Court of Appeal further ordered Mr Lai to pay the TYRC's costs of the appeal.

55. Before the hearing of the present appeal, Mr Lai's solicitors had indicated to the solicitors for the TYRC that Mr Lai would be seeking "to set aside the costs orders below and that the Committee (the TYRC) should bear its own costs". In view of this indication, the TYRC attended by counsel, Mr Victor Dawes, at the hearing in the present appeal, indicating at the outset that he would like to be heard on the costs orders concerning the TYRC in the courts below and the costs in this Court.

56. For the reasons given by the Court of Appeal, I would agree that this is a proper case in which Mr Lai should bear the costs of the TYRC in the courts below. The costs orders made by the judge and the Court of Appeal should stand. Further, I think it is appropriate for the TYRC to attend this hearing by solicitors and counsel. I would therefore make an order for costs in favour of the TYRC against Mr Lai in relation to the arguments before this Court on the costs orders in the courts below and in this Court.

Mr Justice Ribeiro PJ:

57. I have had the advantage of reading in draft the judgment of Mr Justice Chan PJ. I respectfully agree with his reasoning and conclusion and would like to add a few observations of my own, gratefully adopting his Lordship's statement of the facts and the abbreviations used.

58. Mr Lai's challenge is to the Secretary's refusal to exercise the powers of amendment contained in section 27 of the Ordinance to add what is said to be an indigenous village to the electoral scheme there laid down. The Secretary is alleged to have unlawfully fettered his discretion under that section and wrongly delegated its exercise to the TYRC.

59. The assumption which necessarily underlies that challenge is that section 27 does indeed confer a discretion on the Secretary to make such an amendment. The first question which therefore arises is whether that assumption is correct. If it is not, the challenge must fail. The question is one of statutory construction. It requires section 27 to be construed in the context of the Ordinance as a whole and in the light of its origins and purpose.

*The origins and scheme of the Ordinance*

In December 2000, the Court handed down its decision in *Secretary for Justice*

60. In December 2000, the Court handed down its decision in *Secretary for Justice v Chan Wah*,[1]holding that the 1999 arrangements for electing village representatives were unconstitutional. It was with a view to complying with the constitutional requirements identified that, after extensive consultations with the Heung Yee Kuk and various rural committees, the Ordinance was enacted. It lays down a scheme for elections whereby residents and indigenous inhabitants of villages elect their representatives to deal with village affairs. As the Court held in *Chan Wah*, such an electoral scheme engages the right to participate in public life protected by Article 21 of the Bill of Rights.

61. The Ordinance identifies three types of village: "Existing Villages", "Indigenous Villages" and "Composite Indigenous Villages".[2] Such villages are not identified by any specified criteria but by being individually listed in the Schedules to the Ordinance[3]and designated on related maps.[4]The last "Composite" category does not require further mention for present purposes.

62. If a village is listed as an Indigenous Village, the Ordinance provides for election of an "indigenous inhabitant representative" for the village.[5] If it is an Existing Village, the election is of a "resident representative" for the village.[6] A village may come within both categories.

63. A resident representative represents the village's residents generally and deals with village affairs except for matters relating to the lawful traditional rights and interests of indigenous inhabitants.[7] It is for an indigenous inhabitant representative to deal with those matters and to reflect the views of indigenous inhabitants.[8]

64. To be eligible to vote in a village election, one must be a registered elector.[9] In the case of an Existing Village, this requires one to be a permanent Hong Kong resident who has resided in the listed village for at least three years.[10]And in the case of an Indigenous Village, one must meet the requirements specified for indigenous inhabitants and their spouses.[11]To be eligible for nomination as a candidate for an Existing Village, one must have resided in the village for six years.[12]

65. It follows that the lists of villages in the Schedules are fundamental to the scheme. Inclusion in the Schedules makes a named village an electoral constituency. The particular Schedule in which it is listed determines whether the election is for a resident representative or for an indigenous inhabitant representative. The listing also determines the conditions of eligibility to be an elector and to be nominated as a candidate.

Section 67, which is central to this appeal, provides for amendments to be

66. Section 67, which is central to this appeal, provides for amendments to be made to these Schedules. It states:

> "(1) The Secretary may, by order published in the Gazette, amend Schedule 1, 2 or 3.
>
> (2) An order under this section may contain such incidental, consequential, supplemental, transitional or saving provisions as may be necessary or expedient in consequence of the order."

*The applicant's case*

67. The applicant claims to be an indigenous inhabitant of a place called "Tsing Yi Hui" (青衣墟) which, he argues, should be, but is not, listed as an Indigenous Village in Schedule 2 of the Ordinance. He relies principally on the fact that Tsing Yi Hui was included as an Indigenous Village in a list prepared by the Heung Yee Kuk in 1991 in anticipation of steps to be taken to implement Art 40 of the Basic Law which provides for protection of the lawful traditional rights and interests of the indigenous inhabitants of the New Territories (which are presently not engaged and not in issue). However, Tsing Yi Hui was subsequently omitted from the 1999 electoral process and left out of the Schedules.

68. The applicant pressed the Secretary to add Tsing Yi Hui to Schedule 2 by exercising his powers under section 67. The TYRC objected, contending that Tsing Yi Hui is not an Indigenous Village. The Secretary declined to amend the Schedule as requested. In earlier correspondence, the Secretary had explained how the Schedules were compiled as follows:

> "The Schedules were compiled upon extensive consultation with Rural Committees and the Heung Yee Kuk. The basic principles are that villages eligible for inclusion in the 2003 Village Representative election should be those currently under the Village Representative system in the New Territories and those that are recognised by the respective Rural Committees.
>
> Tsing Yi Hui (青衣墟), though contained in the 'List of Established Villages' issued in 1991, is not a village recognized by Tsing Yi Rural Committee and village representative election has not been held there since the establishment of Tsing Yi Rural Committee in the 1950s. In the circumstances, Tsing Yi Hui is not in the Schedules of the Ordinance and is not included in the Village Representative election in 2003."

69. Evidence was filed by the government in the proceedings, explaining that after extensive consultations with NT interests, it was decided that:

> "An underlying principle for the proposed legislation was that the 2003 VR election should be held for indigenous villages (Indigenous Villages or Composite Indigenous Villages) and existing village settlements (Existing Villages) which were included in the village representation system in the New Territories and in the VR election in 1999."

*The scope of the Secretary's power under s 67*

70. It is evident that the legislature decided to adopt the abovementioned principle by listing in the Schedules only those villages that were included as constituencies for the 1999 elections. It was a decision embodied in primary legislation enacted after an extensive consultation process involving entities generally regarded as having authoritative views on New Territories' affairs.

71. The appellant's argument requires section 67 to be construed as containing a power enabling the Secretary to remove a 1999 village from, and to add a non-1999 village to, the Schedules. The section would accordingly have to be read as empowering him to redefine the electoral constituencies laid down in the Ordinance in a manner departing from the principle arrived at by the consultation process. It would mean that the Secretary could decide whether any particular village settlement is or is not eligible to form an electorate as an indigenous or existing village and to provide nominees for election. He would be regarded as empowered, by removing a village removed from the Schedules, to deprive residents of electoral rights which had been conferred by primary legislation and which engage protections under Article 21 of the Bill of Rights. I am wholly unable to accept that the legislative intent is to confer such powers on the Secretary. This is particularly so since no criteria for removing a 1999 village from the Schedule or for adding a non-1999 village are mentioned in the Ordinance.

72. In my view, the power of amendment given by section 67 must be understood to be exercisable only within the confines of the enacted legislative policy of including only the 1999 villages in the electoral scheme. It may be exercisable if, for instance, certain particulars set out in a Schedule are found to be incorrect, a power which the legislature might well have considered necessary given that the Schedules list 693 Existing Villages, 586 Indigenous Villages and 15 Composite Indigenous Villages, with five columns setting out details in respect of each.

73. It is true that section 67(1) is in wide and unqualified terms. However, adoption of a narrow interpretation is consonant with the plain legislative intent and involves a well-established approach to statutory construction. In *R (Edison First Power Limited) v Central Valuation Officer*[2003] 4 All ER 209, Lord Hoffmann (with whom Lord Millett and Lord Scott of Foscote agreed) described it as a:

> "...common sense principle of the construction of statutes by which courts will often imply qualifications into the literal meaning of wide and general words in order to prevent them from having some unreasonable consequence which it is considered that Parliament could not have intended: see *Stradling v Morgan*(1560) 1 Pl 199 and, for a more recent example, *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*[2002] 2 WLR 1299. The strength of the presumption depends upon the degree to

> which the consequences are unreasonable, the general scheme of the legislation and the background against which it was enacted." (§ 25)

74. In my view, section 67 should be construed as aforesaid to give effect to the clear objectives and intent of the Ordinance. It follows that the appellant's challenge necessarily fails. It therefore becomes unnecessary to consider the status of the findings made by the judge at first instance. I would accordingly also dismiss the appeal and concur with the orders as to costs referred to by Mr Justice Chan PJ.

**Lord Woolf NPJ:**

75. I agree with the judgment of Mr Justice Chan PJ and the judgment of Mr Justice Ribeiro PJ.

**Chief Justice Li:**

76. The Court unanimously dismisses the appeal with costs to the Secretary. Further, the Court makes an order for costs in favour of the TYRC against Mr Lai in relation to the arguments before this Court on the costs orders in the courts below and in this Court.

| | | |
|---|---|---|
| (Andrew Li)<br>Chief Justice | (Kemal Bohary)<br>Permanent Jukdge | (Patrick Chan)<br>Permanent Judge |
| (R A V Ribeiro)<br>Permanent Judge | (Lord Woolf)<br>Non-Permanent Judge | |

Mr Philip Dykes SC and Mr Kenneth K H Lee (instructed by Messrs K L Leung & Co) for the appellant

Mr John Bleach SC and Mr S H Kwok (instructed by the Department of Justice) for the 1st respondent

Mr Victor Dawes (instructed by Messrs Cheung & Yip) for the 2nd respondent on costs only

[1] (2000) 3 HKCFAR 459.

[2] Section 2.

[3] Schedules 1, 2 and 3.

[4] Section 3.

[5] Section 6.

[6] Section 5.

[7] Section 5(3).

[8] Section 6(4).

[9] Section 13.

[10] Section 15(4).

[11] Section 15(5).

[12] Section 22(1). Residency requirements for candidates at elections for Indigenous Villages are set out in s 22(2).

新界原有鄉村名册
List of Established Village
新界鄉議局翻印
一九九一年三月

# 序言

主席：劉皇發

自一九八八年三月由屋宇地政署擬備新界原有鄉村名册公布以來，經過三年長的時間進行反覆調查研究，並透過由屋宇地政署人員担任主席及成員包括鄉議局代表的工作小組協議，擬備了一份新的新界原有鄉村名單及分支鄉村名單。現本局特翻印成册，分發各鄉事委員會，村公所及旅居海外的鄉僑社團，以供查核。

在一九八八年公布的新界原有鄉村名册中，經本局的查對，發現漏列及錯列的鄉村有四十二條之多，爲此本局成立專責小組去處理這項工作。經過多方面的努力，專責小組協助該等鄉村搜集大量證明文件和有關資料，除極少部份鄉村不能提供有效之證明而自動放棄爭取之外，絕大部份已獲得解決，並已列入新界原有鄉村或分支鄉村名單之中。現尚有上水華山村及屯門新圍仔兩條村落有所爭議，但經本局的交涉，當局也答允接納華山村爲分支鄉村，而新圍仔則希望能獲更多的證據（當局謂：無論是否接納，但對原來三戶原居民身份是認可的）。雖然新界原有鄉村名單已有了初步的定稿，但也不否定仍會有所遺漏之錯，今後如果發現新的遺漏鄉村，只要能提供足夠的證據，相信仍可爭取增補列入名單之中。

下一步的工作將會是新界原居民的登記事宜，這是一項非常重要而又非常艱巨的工作，希望各鄉事委員會能夠廣泛宣傳，尤其是要加深屬下旅居海外鄉儒對此工作的認識，喚醒大家關心和重視，同心合力做好這一項工作。

對於有些認可鄉村名册中的一八九八年後的鄉村，雖然不能列入新界原有鄉村名册中，祇是不能根據一九八八年新界土地契約(續期)條例享受租金優惠，但政府在執行小型屋宇政策時，將會繼續認可該等一八九八年後的鄉村。

現編印的名册只供參考，正式名册應以政府當局完成立法程序後公布爲准。

一九九一年三月十五日

劉主席：

## 根據新界土地契約(續期)條例
## 「原有鄉村」的定義

貴局曾於去年十一月二十一日來信，述及上述事宜。政府已着手修改新界土地契約（續期）條例內「原有鄉村」的定義，日後會知會鄉議局有關此事的進展。

現函信附上原有鄉村名單及分支鄉村名單各一份。這兩份名單是由成員包括鄉議局代表，並由屋宇地政署人員擔任主席的工作小組擬備。雖然政府希望這是定稿，但仍然十分歡迎貴局進一步提出意見。不過，我要強調一點，政府仍未就原有鄉村一事諮詢中英土地委員會。有關這方面的發展，政府將知會貴局。

規劃環境地政司理證主
（梁寶榮代行）

一九九一年一月二十三日



## 在集體契約內登記之鄉村名單

| District 地區 | | No. of villages appeared in BL |
|---|---|---|
| 1. Islands | 離島區 | 84 |
| 2. Kwai Tsing | 葵青區 | 9 |
| 3. North | 北區 | 107 |
| 4. Sai Kung | 西貢區 | 85 |
| 5. Sha Tin | 沙田區 | 62 |
| 6. Tai Po | 大埔區 | 122 |
| 7. Tsuen Wan | 荃灣區 | 44 |
| 8. Tuen Mun | 屯門區 | 21 |
| 9. Yuen Long | 元朗區 | 118 |
| Total: 總數 | | 652 |

## List of Villages recorded in the Block Lease– Kwai Tsing District 在集體契約內登記之鄉村名冊– 葵青區

| Village Name 村名 | | Sub-District 分區 | | Remarks 備註 |
|---|---|---|---|---|
| 1. HA KWAI CHUNG | 下葵涌 | KWAI CHUNG | 葵涌 | Resited in 1964. Incl. TAN CHEONG, WAI KEK, WANG LUNG TSUI in BL 1964 年徙村，集體契約中包括崁窩，圍瀧，橫龍仔。 |
| 2. KAU WA KENG | 九華徑 | KWAI CHUNG | 葵涌 | Known as KAU PA KANG in BL |
| 3. CHUNG MEI | 涌尾 | TSING YI | 青衣 | Known as TSING YI in BL, resited in1979 Incl. UPPER & LOWER CHUNG MEI 集體契約中稱作青衣，1979年徙村 |
| 4. LAM TIN | 藍田 | TSING YI | 青衣 | Known as TSING YI in BL, resited in 1984 Incl NEW & OLD LAM TIN 集體契約中稱作青衣，1984年搬村 包括新藍田村。 |
| 5. LO UK | 老屋 | TSING YI | 青衣 | Known as TSING YI in BL, resited in 1979 集體契約中稱作青衣，1979年搬村 |
| 6. SAN UK | 新屋 | TSING YI | 青衣 | Known as TSING YI in BL, resited in 1984 集體契約中稱作青衣，1984年搬村 |
| 7. TAI WONG HA | 大王下 | TSING YI | 青衣 | Known as TSING YI Incl. TAI WONG WU, CHAN UK, CHEUNG UK & TANG UK. 集體契約中稱作青衣，1984年搬村，包括大王湖，陳屋，張屋與鄧屋。 |
| 8. TSING YI TOWN | 青衣墟 | TSING YI | 青衣 | Old market town, known as TSING YI in BL, resited in 87 &90 to FUNG SHUN WO VILLAGE RESITE 舊墟鎮，集體契約中稱作青衣，1987年與 90年搬村於楓樹窩村 |
| 9. YIM TIN KOK | 鹽田角 | TSING YI | 青衣 | Known as TSING YI in BL, resited in 1984 集體契約中稱作青衣，1984年搬村 |







16


青衣墟
青衣商會


青衣墟
一九九二