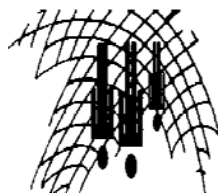


**IMMIGRATION AND REFUGEE BOARD
(REFUGEE DIVISION)**



**LA COMMISSION DE L'IMMIGRATION ET
DU STATUT DE RÉFUGIÉ
(SECTION DU STATUT DE RÉFUGIÉ)**

VA0-02806
VA0-02807
VA0-02808
VA0-02809
VA0-02810

CLAIMANT(S)

LAI Cheong Sing
TSANG Ming Na
LAI Chun Chun
LAI Ming Ming
LAI Chun Wai

DEMANDEUR(S)

DATE(S) OF HEARING

July 3, 2001
July 10, 2001
July 17, 2001
July 24, 2001
August 2, 2001
August 14, 2001
October 3, 2001
October 11, 2001
October 22, 2001

July 4, 2001
July 11, 2001
July 18, 2001
July 26, 2001
August 7, 2001
September 24, 2001
October 4, 2001
October 12, 2001
October 23, 2001

July 5, 2001
July 12, 2001
July 19, 2001
July 27, 2001
August 9, 2001
September 25, 2001
October 5, 2001
October 17, 2001
October 25, 2001

July 6, 2001
July 13, 2001
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July 31, 2001
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October 1, 2001
October 9, 2001
October 18, 2001
November 5, 2001

DATE(S) DE L'AUDITION

July 9, 2001
July 16, 2001
July 23, 2001
August 1, 2001
August 12, 2001
October 2, 2001
October 10, 2001
October 19, 2001
November 6, 2001

DATE OF DECISION

May 6, 2002

DATE DE LA DÉCISION

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INTRODUCTION

These are the reasons for decision of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB) of Canada as to the refugee claims of Lai Cheong Sing (also known as Lai Wu Xing and Cai Cheong Sing), Tsang Ming Na (also known as Tsang Mei Hao and Zeng Ming Na), Lai Chun Chun, Lai Ming Ming and Lai Chun Wai (also known as Kenny Lai). The country of reference is the People's Republic of China (China). Ms. Tsang Ming Na was the designated representative for her minor children, Lai Ming Ming and Lai Chun Chun. Lai Chun Wai is now an adult.

The hearing of these claims took place over five months and required some forty-five days of testimony during which the panel heard from approximately twenty-five witnesses. All of the witnesses' evidence has been considered. Several of the witnesses were put forward to give expert evidence. Many volumes of exhibits were filed, specific to the claimants and applying generally to China. Exhibits continued to be filed after the close of the hearing, and were considered by the panel. Lengthy oral and written submissions were also provided by the parties. All written submissions filed after the close of the hearing have also been considered by the panel.

In general terms, the basis for the refugee claim of Mr. Lai Cheong Sing as set out in his Personal Information Form is that he has been allegedly targeted by the government of China for refusing to falsely implicate an official in the central government, Mr. Li Ji Zhou, of criminal activity. Because of his refusal to cooperate, Mr. Lai is being pursued by means of false charges of activities such as smuggling and bribery, although he has always been an honest businessman. It is alleged that the government of China often targets successful business persons such as Mr. Lai. Ms. Tsang Ming Na allegedly faces persecution because of her political opinion and because of her relationship to Mr. Lai. It is alleged the children face persecution as members of

the Lai family. The eldest son also alleges he will be persecuted for reasons of political opinion.

If charged with criminal offences in China, it is argued that Mr. Lai and Mr. Tsang will not get a fair trial because the judicial system is highly politicized and controlled by the central government. It is alleged that the case against them has already been decided. It is also argued that the children will be persecuted as members of the Lai family.

Counsel for the Minister take the position that Mr. Lai and Ms. Tsang are common criminals who headed one of the largest smuggling operations that has ever existed in China, motivated by nothing more than greed.

Media reports from US sources allege that the scale of the smuggling over several years was in the range of \$6.4 billion dollars worth of goods, with unpaid tariffs and taxes totalling \$3.6 billion dollars.¹

General Organization of the Reasons

The reasons begin with a review of the applicable provisions of the *Immigration Act*. Next, there is a brief description of the inclusionary and exclusionary grounds in the claims.

The reasons continue with a review of the standards for determining credibility. The evidence concerning Mr. Lai, which is lengthy and many faceted, is then reviewed. The reasons continue with the evidence concerning Ms. Tsang and the children. The evidence from several other witnesses is reviewed in these sections.

¹ See for example, Exhibit C4.1, tab 1, page 2.

Several witnesses were presented as experts on various aspects of Chinese political and judicial system. The next section of the reasons deals with a diplomatic note given to Canada by China concerning this case, should Mr. Lai and Ms. Tsang be repatriated. Next, the testimony of four witnesses from China is reviewed at length. These witnesses included a police inspector, two prosecutors, and a defense counsel. The police inspector and one of the prosecutors were involved in the Chinese investigation (the “4-20 Investigation”) of the smuggling operations allegedly headed by Mr. Lai and Ms. Tsang. The second prosecutor was involved in the prosecution of the aforementioned central government official, Mr. Li Ji Zhou. The defense counsel represented two men charged as part of the 4-20 Investigation. He gave evidence on how criminal defense counsel practice in China.

The next section of the reasons refers to general documentation filed. The reasons continue with an outline of the submissions of counsel for the claimants and the Minister’s counsel. This is followed by an analysis of the law and the application of the findings of fact to that law. Exclusion is considered first, then inclusion. There is also a brief section on the issue of whether there should be a finding of “no credible basis”. Finally, the determination for all five claimants is set out.

The Minister’s counsel filed numerous court documents and investigation statements provided by the government of China. These materials were presented to establish the allegations that Mr. Lai and Ms. Tsang were involved in criminal activity. Counsel for the claimants filed a large number of documents, including documents concerning Mr. Lai and Ms. Tsang and reports from various media sources. Materials were also filed on general country conditions in China. These materials are referred to throughout the reasons.

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1. APPLICABLE PROVISIONS OF THE *IMMIGRATION ACT*

The following sections of the *Immigration Act* and *Convention Refugee Determination Division (CRDD) Rules* were of particular relevance in this claim. They are as follows.

2. “Convention refugee” means any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person’s nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person’s former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country, and

(b) has not ceased to be a Convention refugee by virtue of subsection (2),

but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof, which sections are set out in the schedule to this Act;

67. (1) The Refugee Division has, in respect of proceedings under sections 69.1 and 69.2, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

68. (1) The Refugee Division shall sit at such times and at such places in Canada as are considered necessary by the Chairperson for the proper conduct of its business.

Informal proceedings

(2) The Refugee Division shall deal with all proceeding before it as informally and expeditiously as the circumstances and the considerations of fairness permit.

Rules of evidence

(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

Where no credible basis for a claim

69.1 (9.1) If each member of the Refugee Division hearing a claim is of the opinion that the person making the claim is not a Convention refugee and is of the opinion that there was no credible or trustworthy evidence on which that member could have determined that the person was a Convention refugee, the decision on the claim shall state that there was no credible basis for the claim.

The Schedule to the *Immigration Act* applies where the Minister seeks to exclude a claimant from the definition of Convention refugee, as is the case in the claims of Mr. Lai Cheong Sing and Ms. Tsang Ming Na.

SCHEDULE

(Subsection 2(1))

SECTIONS E AND F OF ARTICLE 1 OF THE
UNITED NATIONS CONVENTION RELATING
TO THE STATUS OF REFUGEES

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[Emphasis added]

2. BASIS FOR INCLUSION IN THE DEFINITION OF CONVENTION REFUGEE

Lai Cheong Sing

Counsel for the claimants argued that Mr. Lai Cheong Sing faces more than a mere possibility of persecution in China by three potential methods: unfair trial, a disproportionate sentence and cruel treatment in prison. The nexus he relies on are “political opinion” and “membership in a particular social group”. He argues that Lai Cheong Sing faces a politically motivated prosecution because the case against him has

been highly politicized.² The particular “social group” he relies on is “prominent successful business people in China”.³

Tsang Ming Na

The basis for Ms. Tsang’s claim to refugee status in her amended Personal Information Form are political opinion and membership in a particular social group, “family member”.

Lai Chun Wai, Lai Ming Ming and Lai Chun Chun

The basis for the refugee claim of Lai Chun Wai, as stated in his Personal Information Form, are political opinion and membership in a particular social group, “family member”. The claims of the children Lai Ming Ming and Lai Chun Chun are based on their membership in a particular social group, family members of Lai Cheong Sing and Tsang Ming Na.

3. BASIS FOR EXCLUSION FROM THE DEFINITION OF CONVENTION REFUGEE FOR LAI CHEONG SING AND TSANG MING NA

The Minister’s counsel allege that Lai Cheong Sing and Tsang Ming Na should be excluded from the protection of the refugee convention because “the Minister is of the opinion that matters involving sections 1F(b) of Article 1 of the Convention and/or subsection 2(2) of the *Act* are raised by the claim herein.”⁴ The Minister alleges Mr. Lai and Ms. Tsang have committed serious non-political crimes, including smuggling, fraud, tax evasion and bribery.

² Written submissions of counsel for the claimant, page 137, paragraph D Nexus i) Political Opinion.

³ Written submissions of counsel for the claimant, presented November 5, 2001, page 140, paragraphs 11 and 12.

⁴ Exhibits C1 and C2, Notices of Intent to Participate.

The Minister does not seek to exclude the three children of Mr. Lai and Ms. Tsang.

4. STANDARD FOR ASSESSING A CLAIMANT'S EVIDENCE

The first issue to be determined in any refugee claim is the credibility of the claimant. The Federal Court of Appeal states in the *Maldonado*⁵ decision that when a claimant swears to the truthfulness of his or her evidence, a presumption exists that that evidence is true unless there is a good reason to conclude otherwise.

The Federal Court of Appeal has given further direction to the CRDD in *Rajaratnam*⁶ in which it states:

A refugee claimant is not, therefore, absolved of the duty of telling the truth. The tribunal hearing his evidence is entitled to disbelieve him and to base its decision on that assessment, but is required to give reasons for a finding of lack of credibility in 'clear and unmistakable terms'.

In the decision of *Shahamati*,⁷ the Federal Court of Appeal states:

Contrary to what has sometimes been said the Board is entitled, in assessing credibility, to rely on such criteria as rationality and common sense.

5. EVIDENCE CONCERNING LAI CHEONG SING

Lai Cheong Sing⁸ gave evidence at his hearing over the course of some sixteen days. The assessment of his evidence must take into account the fact that he was heard through the medium of interpretation.⁹ Having said that, the claimant was an

⁵ *Maldonado v. M.E.I.*, [1980] 2 F.C. 302, 31 N.R. 34 (C.A.).

⁶ *Rajaratnam, Punithavathy v. M.E.I.* (F.C.A., no. A-824-90), Stone, Mahoney, Linden, December 5, 1991.

⁷ *Shahamati, Hasan v. M.E.I.* (F.C.A., no. A-388-92), Pratte, Hugessen, McDonald, March 24, 1994.

⁸ Chinese names are set out according to Chinese custom, i.e., surname first, with given name or names following. Spouses do not use a common surname. The surname of a child is taken from the father. Alternative English language spellings often occur for the same person or place.

⁹ Two Mandarin language interpreters were used throughout the hearing. The claimants and the Minister's Representative each employed their own Mandarin interpreters to assist them throughout the hearing.

extremely garrulous and discursive witness. Few questions were answered without digression. A significant portion of his oral evidence was disjointed and difficult to follow. Much of what he had to say had little or nothing to do with the basis for his refugee claim. He had remarkable recall of names and some events. However, his ability to recall dates and details of business enterprises was much less apparent.

The claimant was much briefer in his Personal Information Form than in his oral evidence. Numerous important incidents described in the oral evidence are not mentioned in his Personal Information Form. His explanation for these omissions was often inadequate.

Reinterpretation and Amendment to the Personal Information Form of Lai Cheong Sing

The claimant appeared to have difficulty remembering the content of the Personal Information Form at the beginning of the hearing. Out of an abundance of caution, the document was retranslated to him and some corrections were made. Only after this process was complete did the claimant swear to the truth of its contents.¹⁰ He did not take the opportunity to elaborate significantly on the basis for his claim.

In assessing the importance of omissions from a Personal Information Form, it is important to review the instructions to claimants found in the Personal Information Form itself. It begins with the heading “Important Instructions”. The third paragraph states:

This form will be entered as evidence at a hearing for the purposes of determining your claim to be a Convention refugee. You may be asked questions at the hearing into your claim to be a Convention refugee pertaining to any or all of your answers in this form.

¹⁰ Exhibit A1.1, Original Personal Information Form of Lai Cheong Sing, and Exhibit A1.1(a), Amended Personal Information Form of Lai Cheong Sing.

Question 37 of the form asks the claimant to set out the basis for their refugee claim. Paragraph A of the directions to the claimant is as follows:

Set out in chronological order, all the significant incidents which caused you to seek protection outside of your country of nationality or former habitual residence. Please also make reference to any measures taken against you, your family members, or any other individuals in a similar situation.

[Emphasis added]

The expectations for the use of the Personal Information Form are clear. The claimant had experienced an able counsel assisting him in the original completion of the form. Much later, Mr. Lai was given an opportunity to amend his Personal Information Form at the start of the hearing. As stated in *Grinevich*,¹¹ where a refugee claimant fails to mention important facts in his or her Personal Information Form, this may legitimately be considered by the Board to be an omission that goes to lack of credibility. In our view, his failure to mention a significant number of major incidents without reasonable explanations damages his overall credibility.

For this and other reasons as discussed later in these reasons, we find that overall, Lai Cheong Sing was not a credible or trustworthy witness.

Background of Mr. Lai Cheong Sing

The claimant was born on 15 September 1958 and is now 43 years old. He was born in Shao Chu, Xiamen, China. He has four older sisters, two older brothers, and one younger brother. His parents are deceased. He is married to Tsang Ming Na and has three children with her: two sons, Chun Wai, age 19, Ming Ming, age 17 and one daughter, Chun Chun, age 15. The whereabouts of the claimant's fourth and youngest child by a different mother are unknown.

¹¹ *Grinevich, Vladimir v. M.C.I.* (F.C.T.D., no. IMM-1773-96), Pinard, April 11, 1997.

Mr. Lai has minimal formal education. Three or four years of formal education were disrupted by the upheavals of the Cultural Revolution. His first language is southern Fujianese. He also speaks Mandarin. He testified he is able to read Chinese characters to some degree but his ability to write is more limited.

List of Business Activities

The claimant's employment and business history as set out in question 18 of the Personal Information Form is extensive. The list of companies in his Personal Information Form that he claims to have participated in or owned is impressive. They are as follows:

From 1979 to 1985, Shao Chu Automotive Parts Plant, as owner,

From 1985 to 1991, Shao Chu Textile Machinery Factory, as owner,

1980's, Die Yan Garment Factory, as owner,

1980's Shao Chu Print Shop, as owner

1987 to 1991, Heng Li Umbrella Factory, Hong Kong joint venture,

1991 (later, part of Yuan Hua Co.), Mei Hao Co. Ltd., as owner,

1993 to present, Qing Yang Real Estate Development Co., as co-owner,

1993 to present, Yuan Hua Co. (Hong Kong), Chairman of the Board,

1993 to present, Yuan Hua Co. (Xiamen), Chairman of the Board,

1993 to present, Yuan Hua Electronics Factory (Xiamen), as co-owner,

1994 [approx.] to present, Hui Feng Container Shipping Co., as co-owner,

1995 [approx.] to present, Yuan Hua Real Estate Development Co., as co-owner,

1995 [approx.] to present, Xiamen Automotive Manufacturing Co., shareholder,

1995 to present, Yuan Hua Paper Products Co. Ltd., as owner,

1997 to present, Xiamen Tobacco Co. (Yuan Hua brand), as owner of the Yuan Hua brand,

1998 to present, Yuan Hua Movie Studio, as owner.

However, as noted by the RCO and the Minister's counsel, the list is incomplete. Mr. Lai's explanation was that to set out everything was too complicated and he just put down what he could remember at the time the Personal Information Form was drafted.¹² In our view, the omissions are the first of many examples of Mr. Lai's propensity for being deliberately vague and incomplete in his evidence.

History in Mainland China 1979 - 1990

Mr. Lai begins the narrative of his Personal Information Form with a discussion of his early years.¹³

I helped farm with my family from leaving school until about 1976. I then worked as a well-digger until about 1977. From about 1977 until about 1979, I apprenticed as a blacksmith with a farm equipment factory in Shao Chu.

In about 1979, with my savings and together with 4 other persons totalling [sic] about 1500 RMB, I began an auto parts business. The business was successful and quickly expanded into manufacturing. In about 1981, I diversified into textile machinery manufacturing, producing not only just parts but whole machines by 1985.

Through the 1980's, I diversified my business interests further, opening a garment factory, a print shop and an umbrella factory. These businesses were financed by reinvested profits from my initial ventures and loans from banks.

My businesses were all successful. I received a number of awards and recognitions. The businesses paid taxes as required and were held up as a model of the evolving Chinese economy by central Chinese political officials, who would come to visit. In this way, I met, among others, Han Bin Wang, then Vice Chair of the People's Congress and Ji Zhou LI, then Vice Minister for Public Security.

The claimant noted at his hearing that he began to do particularly well with the second business, manufacturing machinery for the textile industry. He was able to sell machines that cost him 25,000 RMB for 75,000 RMB, realizing a profit of 200% per machine. He made over 10 million RMB a year from the business.¹⁴ By any standard,

¹² Transcript, 16 July 2001, page 56, lines 38-41.

¹³ Exhibit A1.1(a), question 37, lines 11-23.

¹⁴ Transcript, 4 July 2001, page 33, line 40.

the claimant had been very successful, especially given his humble beginnings. However, this was just the start of his financial success story.¹⁵

He noted at his hearing that his calendar business was also extremely lucrative. However, he did not make a lot at the garment manufacturing business he was a partner in because he knew too many people. Members of Central Committees in Beijing and provincially pressured him to sell them suits at cost.¹⁶ He was asked if he would sell at this price for anybody. He replied that he did not. “Only those who are familiar with me would ask me for this favour, and as long as they are familiar with me, I would help them...”¹⁷

Shi Shi Electronics Business

In his oral evidence the claimant described a business he developed in Shi Shi City about 1987. He opened a store that sold electronics goods. The store itself was in the Hua Lin Hotel, owned and operated by the Fujian Provincial Department of Public Security. He obtained his stock in an unusual and round-about manner.

Visitors to the PRC were allowed to purchase televisions in the PRC duty-free, using a voucher system. The claimant would buy the vouchers from tour guides who had in turn purchased them from their clients. In turn he would use the vouchers to purchase the televisions without duty and sell them at a substantial profit. He made about 500 to 700 RMB per set at a cost of 500 RMB each. At the peak of this business he was purchasing 100 sets a day.

¹⁵ A table for currency conversion is contained in Exhibit B5.

¹⁶ Transcript, 4 July 2001, page 43, lines 22 - 24.

¹⁷ Transcript, 4 July 2001, page 44, lines 50 - 51.

The claimant was questioned by his counsel about deposition evidence given by his elder brother Lai Shui Qiang to Canadian authorities on March 24, 2001 in China. One portion of the interview concerned the claimant's television business. The following exchange took place between Grant Duckworth of Canada Immigration and Lai Shui Qiang:¹⁸

Mr. Duckworth

Q But nevertheless, you said your brother was in [Xiamen]¹⁹ smuggling TVs.

Lai Shui Qiang

A Yes, because at that time we were working in Shi Shi in garment factory and they imported a container of goods and reported it as fabric but in fact it was TVs, air-conditioning devices in the containers.

The claimant denied that he had ever smuggled televisions. He stated that his television business was limited to his selling televisions purchased with tourist vouchers. He stated later in the hearing that as far as he knew the business was legal. No one ever told him otherwise.²⁰

It is unclear from the transcript of the Lai Shui Qiang interview where he got the information. He either heard it from others or saw the televisions in a warehouse. The evidence of Lai Shui Qiang on this point is inconclusive.

Tax Dispute in Shi Shi

The claimant noted in his oral evidence that by 1990 he had left the Shi Shi area and relocated to Xiamen. He did so because he had a dispute with the local taxation office. The claimant then began a long explanation about the dispute. He stated that

¹⁸ Exhibit C14, tab 2, page 17, lines 12-17.

¹⁹ In original transcription of interview the location is noted as Beijing. The correction to Xiamen is noted in the transcript of the hearing dated 16 July 2001, page 63, lines 27-30.

²⁰ Transcript, 16 July 2001, page 56 line 43 - page 57 line 35

because he was a very successful entrepreneur, “So those taxation officials didn’t feel good – accused me of not going to bribe them.”²¹ According to the claimant, all government officials wanted to be bribed. If this sweeping statement is taken at face value, the claimant would have the panel believe that the entire Chinese bureaucracy is corrupt.

One Sunday, after having consumed some alcohol, two local tax authorities came to the house of the claimant’s brother. The brother was not home, so they demanded that the brother’s wife show them the account books for Mr. Lai’s businesses. When she refused, they threatened and assaulted her. The claimant alleges he arrived on the scene and demanded to see the identification of the two men. When they failed to do so, he called the police. One of the two men escaped and filed a complaint with the local police, saying the claimant interfered with their review of his accounts and had assaulted them.

He was charged with interfering in a tax investigation. It appears he counter-claimed for the tax official’s actions. Eventually he was exonerated by the courts but the investigation of his businesses continued. His brother looked after the conduct of the litigation as Mr. Lai did not attend the tax hearing himself.

The reaction of the tax office to the situation was to launch an investigation of Mr. Lai’s commercial operations in Shi Shi. His businesses were shut down, in the sense that he could not access necessary business records and forms, while an investigation was carried out. Earlier on, the claimant stated that he had no idea how much was paid in taxes for his Shi Shi business²² as all the tax arrangements and

²¹ Transcript, 5 July 2001, page 24, lines 16 and 17.

²² Transcript, 5 July 2001, page 24, lines 3 and 4.

payments were made by his business partner, the local brigade.²³ In cross-examination he repeated that he could remember little or nothing about the payment of taxes for his businesses.²⁴

In his oral evidence he stated that he got fed up with the problems in Shi Shi and Jinjiang and moved to Xiamen sometime in 1990. He left his business interests in the hands of two of his brothers. As mentioned, he left conduct of the tax dispute to his brother. Mr. Lai's exoneration occurred despite his view that all government officials are corrupt. No business records were filed in regard to this incident.

The claimant was asked by the Minister's counsel why he did not mention this sequence of events in his Personal Information Form. The claimant replied:²⁵

Yeah, that's right. Many things were not mentioned in it. So actually the stuff that I like to tell, many, many things.

In our view, Mr. Lai has not provided an adequate explanation for his failure to mention major events in his business life in China. This is of particular note in this instance as he alleges he was successful in his tax dispute, an indication that the legal system in China did work to his advantage.

Mr. Lai on the Move to Hong Kong

The claimant stated at his hearing that he moved to Hong Kong on 7 August 1991. He did so at the urging of an apparently casual acquaintance, Mr. Chen.²⁶ Mr. Chen was a Provincial Deputy Chief of Public Security for Fujian. He was

²³ The claimant described the brigade as similar to a municipal government.

²⁴ Transcript, 17 July 2001, page 23, lines 27-47.

²⁵ Transcript, 16 July 2001, page 73, lines 50-51.

²⁶ There was some confusion as to the full name of Mr. Chen in the Personal Information Form and Mr. Lai's evidence.

impressed by Mr. Lai's business skills, and told Mr. Lai he would be a success in Hong Kong. A subordinate of Mr. Chen by the name of Xu Wei Zhi later told Mr. Lai that: "Since the boss wanted you to go, then he will find out a way for you to go."²⁷

At first the claimant attempted to get permission to enter Hong Kong on the pretext of wanting to look for his older sister who lived there. Each province of China had a quota for such permits.

The claimant continued his explanation:²⁸

And Xu Wei Zhi told me that -- he said I was too famous. If they ask me to go to Hong Kong and do things for them, I ask him, "What kind of thing you like me to do?" At that time there was June 4th movement. A lot of student-movement students went out. They want me to go check for this. Through what channel I should go out? And also -- and in charge of taking care of the people who travel from Public Security department going to Hong Kong. I would take care of the meal and accommodation. I will look after the accommodation and the meal for them. That means I will put up with the expenses of their trip of accommodation and meal, and I agreed that I would do that.

It is odd that the claimant would be asked to conduct investigations of this sort in Hong Kong. He himself stated that the people of Hong Kong speak Cantonese, a language he does not know.²⁹ His explanation for his being chosen was that students associated with Tiananmen Square demonstrations were thought to be fleeing China from Fujian and that he was a native of that area.³⁰ The claimant was also asked why he did not mention the intelligence gathering on students in his Personal Information Form as a reason for moving to Hong Kong. He replied that he had not realized the Personal Information Form had to be that detailed.³¹ His explanation was inadequate.

²⁷ Transcript, 5 July 2001, page 40, lines 4 - 5.

²⁸ Transcript, 5 July 2001, page 40, lines 31 - 39.

²⁹ Transcript, 6 July 2001, page 36, line 25.

³⁰ Transcript, 20 July 2001, page 15, lines 14-49.

³¹ Transcript, 20 July 2001, page 15, line 1.

In any event, the PSB in Fujian allegedly wanted the claimant to move to Hong Kong so that he could check on participants in the Tianamen Square demonstrations who had left China for Hong Kong and look after PSB personnel while they were in Hong Kong. The claimant refused to do the former but agreed to do the latter.

When questioned by the Minister's counsel on the move to Hong Kong, Mr. Lai stated that there were two reasons for going to Hong Kong. He went to make money and because he had been encouraged to do so by Mr. Chen. He also noted he went because he was frustrated with the problems the taxation officials were causing him in Fujian.³²

The Minister's counsel asked Mr. Lai why a high ranking government official such as Mr. Chen would encourage him to go to Hong Kong when he had unresolved tax problems in Shi Shi. Mr. Lai replied that he did not mention his tax problems to Deputy Director Chen.³³

We find it implausible that the Provincial Deputy Chief of Public Security for Fujian would not know of Mr. Lai's tax problems in Shi Shi when asking Mr. Lai to engage in espionage in Hong Kong. We do not believe he was asked to engage in espionage.

Change of Name

The claimant went on to relate in his oral evidence³⁴ that because the attempt to get Hong Kong entry documents was going too slowly, it was suggested that

³² Transcript, 17 July 2001, page 9, lines 5-15.

³³ Transcript, 17 July 2001, page 10, lines 5-7.

³⁴ Transcript, 5 July 2001, page 40, lines 43 - 46.

he move to another province. He transferred his and his wife's household registry to Hunan. When he applied to get a permit to enter Hong Kong from Hunan, the quota for that year had already been used up.

He then pursued another avenue to get entry documents. He had a business acquaintance from Hong Kong by the name of Cai Wei Gong. Cai Wei Gong suggested his father Cai Wei Guo adopt Mr. Lai. Mr. Cai Wei Gong lived in Hong Kong and had business dealings in Jiangxi province to which he remitted money from Hong Kong.³⁵ As the son of Cai Wei Guo, Mr. Lai would be able to enter Hong Kong much faster than waiting for the next quota.

The evidence is somewhat muddled on this point. It appears that if Mr. Lai were the adopted son of Mr. Cai Wei Guo, he would be able to move to Hong Kong. Mr. Lai goes on to say:³⁶

Then Cai Wai Gong told me, "If you — if you want to go to Hong Kong, if you want to get a quota," he said that they have some investment in Chenxi, and Chenxi was a place very poor. According to the invest amount of money, that a government would be able to give them some special deal. That means it gave me -- it gave a quota to them for us to -- for me to use. But all the application procedures had to be done according to the normal form. And also I was told that those conditions, like a closer relationship or closer relatives, under this kind of category the application would be processed faster.

The following exchange took place between Mr. Lai and his counsel.³⁷

Counsel:

Q I see, okay. Now, this whole arrangement about your going to Hong Kong with Cai and so on, what -- what, if any, was the involvement of Chen in all this?

³⁵ Transcript, 5 July 2001, page 45, lines 27 - 28.

³⁶ Transcript, 5 July 2001, page 41, line 46 to page 42, line 2.

³⁷ Transcript, 5 July 2001, page 43, line 25 to page 44, line 2.

Mr. Lai:

A Okay. So he was the person who suggest me to apply going to Hong Kong from Hunan province because I was too famous in home province, so that I may have to change my name. If continue to use the same name, may not be appropriate.

Q Why would your name be a problem? Why is your name a problem in applying to go to Hong Kong?

A Because they want me to do something for them in Hong Kong.

Q All right. And they want you to do something for you [sic] in Hong Kong, but why did they want you to use a different name in Hong Kong?

A Chen himself did not personally tell me to do this. It was through to Mr. Xu, Xu Wei Zhi. He is also with the Public Security, so it was him who told me to do this.

Q Okay. Xu Wei Zhi, what was his title with Public Security?

A So he was a member intelligence section in the Public Security Bureau, so he belonged to that section.

Q Intelligence section, Security Bureau. Okay. So he -- he suggested you change your name.

A No, it was not his suggestion. So because my name was well known, so if I use my own name to -- to work for intelligence, it may not be very convenient.

Q Okay. So where did the suggestion come from to change your name?

A From Cai Wei Gong.

In the space of six questions, three different individuals are identified as the person who told Mr. Lai to change his name. Counsel for the claimant attempted to clarify the evidence later in his questions. The roles of Messrs. Chen and Xu were diminished. The primary responsibility for the name change again rested with Mr. Cai Wei Gong.

In any event, the claimant alleges he was adopted by Mr. Cai Wei Gong and took the name Cai Cheong Sing. Mr. Lai stated that it was a legal adoption and that he had all the legal documents.³⁸ After one year he changed his name back to Lai

³⁸ Transcript, 5 July 2001, page 48, line 5.

Cheong Sing. The reasons he gave in his evidence in chief was that Cai Wei Gong was concerned that given the laws of inheritance, Mr. Lai could lay claim to Cai Wei Guo's property.

In answer to questions by the Minister's counsel several days later, Mr. Lai stated that about a year after he arrived in Hong Kong he changed his name from Cai back to Lai by swearing and filing a declaration to that effect. However, he never took any steps to rescind the adoption.³⁹

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IN PUBLIC

The witness stated that the key issue was to get adopted by someone with foreign connections. Usually a person would be adopted by someone "...from their hometown, their own people."⁴¹ He had one cousin who had been adopted as a married man. He had heard of people having no connection entering into adoption arrangements such as the one described by Mr. Lai. He stated that a person adopted by an overseas

³⁹ Transcript, 16 July 2001, page 29, lines 16-22.
⁴⁰ *IN CAMERA* Transcript, 17 October 2001.
⁴¹ Transcript, 17 October 2001, page 21, line 51.

Chinese could not leave China until the adoptive parent had died and there was something to inherit.⁴²

There was no suggestion in the evidence that Mr. Cai Wei Guo had died. In fact, Mr. Cai Wei Gong, in one version of Mr. Lai's evidence, wanted to insure Mr. Lai would not be the heir of Cai Wei Guo. It would seem that the exit system described by the claimant's witness and what Mr. Lai did were at odds.

The Minister's counsel filed materials from the offices of ICPO-Interpol NCB China that allege Mr. Lai, under the alias Tsoi Cheong-Sing:

...went to Hongkong and resided there by holding a One-Way permit which was obtained by fraud. The Chinese Government already suspended his One-Way permit and his Hongkong permanent resident status. Due to this, his Hongkong I.D. card and his SAR passport should therefore be null and void. *[Reproduced as per original]*⁴³

Mr. Lai did not agree with this assessment that he obtained his Hong Kong entry documents by fraud.

No documentation was filed by the claimant in regard to the change of name to Cai or the change back to Lai. He alleged that as he had not planned to claim refugee status in Canada, he had not thought to bring any of the paperwork on the change back to "Lai" with him when he fled. Later, when more people were arrested by the 4-20 Investigation, he alleges it was impossible to get information from Hong Kong.⁴⁴

The Presiding Member asked Mr. Lai⁴⁵ why he would do what Mr. Chen had asked – host people in Hong Kong – since Mr. Chen provided no help in getting him into Hong Kong. Mr. Lai replied that Mr. Cai was quite familiar with Mr. Chen and he

⁴² Transcript, 17 October 2001, page 32, line 42 – 45.

⁴³ Exhibit C5, tab 1, page 5.

⁴⁴ Transcript, 20 July 2001, page 18, lines 1-39.

⁴⁵ Transcript, 20 July 2001, page 33, lines 16-38.

suspected the change of name was being arranged by Messrs. Cai and Chen without his knowledge. Mr. Lai only kept "...a small part of his word with them, just to host these people." In our view, his 'suspicion' is no more than speculation.

The Chinese security agency that allegedly suggested he move to Hong Kong to assist its members provided him with no assistance in obtaining the necessary paperwork to do so. His own evidence as to how he made the move is at odds with the evidence of his witness. The Chinese government alleges he obtained his status in Hong Kong by fraud.

The evidence on the change of name raises several questions. Mr. Lai was entitled to inherit from Mr. Cai on the date the adoption was finalized. Why this would become a concern sometime later when it was not initially is unclear. Second, Mr. Lai was first and foremost a businessman. It is reasonable to assume he would want to rely on his considerable reputation when entering the Hong Kong business environment, capitalizing on his name to promote himself. We do not find it plausible that he would want to disguise who he was just when he needed to further himself. Mr. Lai gave two contradictory explanations as to why he changed his name back to Lai. Mr. Chen did nothing for him, yet Mr. Lai "hosted" PRC bureaucrats at Mr. Chen's behest. We find his evidence in this area generally not credible. The explanations given by Mr. Lai for the change of name and the hosting activities in Hong Kong is given little weight.

Espionage Activities for the Ministry of National Security

Once he moved to Hong Kong Mr. Lai had very little to do with Xu and Chen. However, in early 1992 he was asked to do work for the PSB in Hong Kong by Zhuang Ru Shun, Deputy Director of the Foreign Affairs Office of the Fujian Provincial Department of Public Security. Mr. Lai had met Mr. Zhuang in Shi Shi.

At this point in his Personal Information Form, the claimant begins to describe his alleged contacts within the Taiwanese Nationalist Party and his subsequent recruitment by the National Security Ministry of the People's Republic of China.⁴⁶

In 1997, Hong Kong was handed back to PRC. Because of my high profile in Hong Kong and particularly my contacts and my Fujian background, Chen Han Hua, the head of covert intelligence for the Taiwanese Nationalist Party urged me to become head of the association for Hong Kong citizens originally from Fujian and Taiwan, both of whom use the Fujianese language. The party wanted support from this association and thought I might be able to deliver it.

The authorities in Beijing became aware of the overture from Chen. I was contacted and warned that the Taiwanese just wanted to use me. I was asked instead officially to join PRC's National Security Ministry. I became a cadre and was given an identity card, a uniform, a special travel plate allowing me to go anywhere in PRC and the right to make and order arrests.

The National Security Ministry, I was asked to provide intelligence on Taiwan, for example, the location of Taiwanese intelligence stations in Hong Kong and PRC, the types of weapons purchases Taiwan sought to make etc. I was able to provide this information due to contacts I had with Taiwanese intelligence officials, including Yue Bing Nan, head of Taiwanese military intelligence in Hong Kong.

According to Mr. Lai, Mr. Zhuang and his associates wanted the claimant to work for them. On this point the following exchange took place between Mr. Lai and his counsel.⁴⁷

Counsel:

Q All right. They wanted you to work for them.

Mr. Lai:

A Yes.

Q To do what?

A To see if I would be able to find somebody that -- a connection with the military authority in Taiwan. So it was quite coincident that not long after that, few month later, that I found somebody. I know a person called Cai Xing Jie. He was in Hong Kong.

⁴⁶ Exhibit A1.1(a), question 37, lines 54-66.

⁴⁷ Transcript, 5 July 2001, page 51, line 5 to 14.

Mr. Cai had a strong dislike for the Chinese government and had agreed to work on behalf of the Taiwanese government. Sometime in 1992, Mr. Cai introduced the claimant to a member of the Taiwan army, Mr. Chen Shou San, while Mr. Chen and his wife were in Hong Kong. Mr. Lai did some favors for Mr. Chen.

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PUBLIC HEARING

Fujian Association in Hong Kong

The claimant also described an incident in 1997 when Chen Han Hua and Xue Ru Ning asked him to run for the presidency of an organization Mr. Lai described as the “Fujian Association in Hong Kong”. Elections were to be held on 20 April 1999.⁴⁹ He noted that the people in the organization were “arranged by the government in Taiwan.”⁵⁰ Mr. Lai also stated in his evidence:⁵¹

So then at the time that they handed the election application form to me to fill out for membership in the Nationalist Party in Taiwan was sometime in '98. I need two of the people for me to introduce me to join this Nationalist Party. So my two introducing people were Chen Han Hua and Xue Ru Ning.

Mr. Chen was the highest person sent by the Taiwan government in Hong Kong. Mr. Xue was also from Taiwan.

The claimant was asked why the Chinese government wanted him to become involved in the organisation. He said it was so that he could “...find out all the Taiwan organisation in Hong Kong and the personnel information, as well.”⁵² By the time the election came around Mr. Lai had dropped all his activities.

Transfer of Files to China from Hong Kong

The claimant described an incident involving a man named Deng Ya Jun.⁵³ In 1997, when he approached Mr. Lai, he allegedly worked for the Chinese Ministry of National Security.

Mr. Deng allegedly asked Mr. Lai if his car and driver were available. Mr. Deng wanted to use the car and driver to take boxes of documents from Hong Kong to

⁴⁹ Transcript, 6 July 2001, page 25, line 40.

⁵⁰ Transcript, 6 July 2001, page 25, line 51.

⁵¹ Transcript, 6 July 2001, page 26, line 47 – 50.

⁵² Transcript, 6 July 2001, page 28, lines 50 - 51.

⁵³ Mr. Deng is also known as Danny Sgun.

Shenzhen.⁵⁴ With the use of Mr. Lai and his driver Mr. Deng was able to transport four boxes of documents.

...when Chen Shi saw me, so he pat my shoulder and said, "You are good." I said, "For what?" He said, "You did not know? So you did not know what is transported by your driver?" I said, "I have no idea." Then he told me. So he said, "That's something that our Ministry of National Security have been wanting for a long time. We didn't even dare to think about it."⁵⁵

The boxes allegedly contained the names of all the officials who stayed in the government after Hong Kong's hand-over from Britain to China on 1 July 1997. The claimant alleges he was told the Ministry of National Security would not undertake the task of transporting the materials because they were afraid it could be a trap set by British authorities.⁵⁶

There was nothing in the evidence to suggest that the identity of civil servants working for the government of Hong Kong was in any way confidential information, particularly when authority for Hong Kong was being transferred to the People's Republic of China. Further, there was no reason given in the evidence as to why the Chinese government would fear being trapped by the British when obtaining non-controversial information about the peaceful hand over of Hong Kong to the People's Republic of China.

Evidence of Deng Ya Jun, also known as Danny Sgun

Mr. Deng was called to give evidence by Mr. Lai's counsel. He was at times very hesitant in giving his evidence and at others very forceful. As was the case with Mr. Lai, Mr. Deng is in the import and export business. He stated at the hearing that

⁵⁴ Shenzhen is a major commercial centre in China immediately adjacent to Hong Kong.

⁵⁵ Transcript, 6 July 2001, page 32, lines 8 - 12.

⁵⁶ Transcript, 6 July 2001, page 32, lines 40 - 45.

he had known Mr. Lai socially for about ten years. Shortly after Mr. Lai and his family came to Vancouver, they moved into the Deng home. After several months of living together, Mrs. Lai purchased Mr. Deng's home. Despite their long association, Mr. Deng alleged that he had never discussed or done business with Mr. Lai. Mr. Deng gave his evidence in a cautious manner when describing his relationship with Mr. Lai in Hong Kong and Vancouver.

Mr. Deng noted that while in Vancouver, Mr. Lai asked him on several occasions for money to use for gambling. Mr. Deng lent him "...no more than \$60,000."⁵⁷ He also noted that the money used to purchase his home (\$1.3 million Cdn) came from Ms. Tsang. He said she appeared to be looking after household expenses.

Also entered into evidence was a solemn declaration completed by a Canadian Immigration Enforcement Officer about Mr. Deng's relationship with Mr. Lai.⁵⁸ The declaration is generally consistent with Mr. Deng's evidence at the hearing, but differs as to the date on which they first met and the number of times they met.⁵⁹

In both the declaration and his own evidence, he categorically denied he had been an agent of the Chinese Ministry of State Security, or that he obtained documents for Mr. Lai from the Hong Kong Immigration Department.⁶⁰

We do not find the evidence of Mr. Lai Cheong Sing about the transfer of documents from Hong Kong credible, for two reasons. First, it is implausible that the government of China would want to obtain non-controversial information in the manner

⁵⁷ Transcript, 25 October 2001, page 42, line 30.

⁵⁸ Exhibit C52. The information in the declaration is a recital of what Mr. Deng told the officer.

⁵⁹ Some of the information in the declaration is not relevant to the issues before the panel, in particular paragraph 7.

⁶⁰ Transcript, 25 October 2001, page 33, lines 32.

alleged. A second consideration is that a witness the panel found credible on this point, Mr. Deng, categorically denied he was ever involved in such a scheme.

Chinese Government's Description of the Claimant's Activities in Hong Kong

The Minister's counsel filed a translation of a Chinese language document into evidence.⁶¹ The original was received by Colin Walker, RCMP Liaison Officer in Beijing from Zhang Jing, MPS (possibly the Chinese Ministry of Public Security). The heading on the document is "The explanation to the question if Lai Cheong Sing was asked to take part in the Chinese state security authority."

The body of the document reads as follows:

Lai, Chang Xing was the president of Hong Kong Yuan Hua international company limited between March '98 and May '99. He voluntarily provided some information regarding the circumstances of Hong Kong and Taiwan to the Chinese state security authority. Lai was not asked to be a member of the Chinese State Security Authority.

Mr. Lai was asked by his counsel whether he agreed or disagreed with the statement. Mr. Lai answered "Let me tell you that I did not tell them I wanted to join then, but they wanted me to join them."⁶² He was asked in what capacity was he asked to join. He replied "So joined means that I have an employee certificate."⁶³ He said it also meant his information would be in the database of the Ministry of National Security.

Hong Kong Real Estate Holdings

According to his Personal Information Form, by the time Mr. Lai left for Hong Kong he had amassed a fortune of 30 million RMB. Once in Hong Kong, Mr. Lai alleges that he began to buy real estate by paying 10% of the purchase price and

⁶¹ Exhibit C18, tab 3, (unnumbered page 2).

⁶² Transcript, 6 July 2001, page 34, lines 43 – 44.

⁶³ Transcript, 6 July 2001, page 34, line 49.

borrowing the remainder from Hong Kong banks. Mr. Lai was assisted in purchasing property by Mr. Wang Song Yi. Mr. Lai made a substantial profit on the real estate he bought as its value increased significantly while he owned it. In examination by his counsel, Mr. Lai said he did not know the addresses of the real estate he purchased. He stated that only Mr. Wang would know that information.

When Mr. Lai was questioned about his real estate holdings in Hong Kong by the Minister's counsel, he continued to have difficulty remembering details. He said early in his evidence that by 1993, he had amassed about \$100 million HK.⁶⁴ He said the best period for making money in Hong Kong real estate had been from 1991 until 1993. He could not remember what, if any, money he made in the Hong Kong real estate market from 1993 until 1999.⁶⁵ Mr. Lai did not know how much real estate he owned, where it was located, what value it had over the years or what its current value was. He did not know which real estate was purchased in his own name, or in the names of companies he owned. He said his assistant Mr. Wang might know the details of his real estate holdings, but Mr. Wang's whereabouts are also unknown. In re-examination by his counsel, Mr. Lai mentioned the general location of some of his Hong Kong holdings (Beverly Hills, Hong Shan Peninsula, Elizabeth, and Le Cui Terrace).⁶⁶ No documents were filed at the hearing by Mr. Lai Cheong Sing concerning the purchase, financing, ownership, or sale of the real estate he alleges he bought.

In answer to questions by the Minister's counsel, he stated that by 1993 he had made \$300 HK million on Hong Kong real estate. He said that he knew taxes were paid on his behalf by his accountants in Hong Kong, but he had no idea as to how much

⁶⁴ Transcript, 6 July 2001, page 37, lines 11-13.

⁶⁵ Transcript, 17 July 2001, page 30, lines 44-51.

⁶⁶ Transcript, 23 July 2001, page 13, lines 36 to page 14 line 7.

or for what. He confirmed that he had no records to verify anything about what he was saying in regard to Hong Kong taxes. He claimed people were too frightened to have anything to do with his requests for confirming documentation.⁶⁷

We do not find it credible that Mr. Lai has almost no recollection of his real estate holding in Hong Kong. The fact that he has no records of any type – personal, title or tax related – is of particular note.

The claimant also discusses his decision to move to Hong Kong and his change of name in his Personal Information Form.⁶⁸

By 1991, I had accumulated a fortune of tens of millions of RMB. I was encouraged at this time by Deputy Department Chan of the [Fujian] provincial department of Public Security to move to Hong Kong, where he said I would enjoy more business opportunities.

I wanted to go to Hong Kong as I agreed that it would provide more business opportunities and was prestigious for someone with my background. As a peasant from Fujian, however, I would not have qualified to immigrate to Hong Kong, even despite very considerable wealth.

Deputy Department Chan facilitated a change of family name for me to Cai (in Mandarin phonetics) (wife's maternal [sic]). I acquired identity documents in this new name indicating provenance from Shaanxi Province rather than Fujian. In return, Deputy Department Chan asked me to look after his officials when they visited, providing hotels, meals, transportation and the like.

When I left PRC, I handed control of my Shao Chu-based companies over to my brothers. In Hong Kong, not yet knowing the business market well, I incorporated the Mei Hao Co. Ltd., through which I bought real estate. Generally, I bought properties with about 10% of the purchase price, the remainder mortgaged. Property values accelerated very dramatically through 1992 and I made very substantial amounts of money.

About a year after moving to Hong Kong, I changed my name back to LAI and sponsored my family members to immigrate.

⁶⁷ Transcript, 17 July 2001, page 37, lines 18-44.

⁶⁸ Exhibit A1.1(a), question 37, lines 24-39.

Formation of the Yuan Hua Company

The next section of his Personal Information Form describes the founding of the Yuan Hua Company in 1993, first in Hong Kong and shortly thereafter in Xiamen.

In about 1993, I started another company, called Yuan Hua Co. (HK). Shortly afterwards, I incorporated Yuan Hua Co. in Xiamen, PRC. Because of its base in Hong Kong, Yuan Hua was at the time considered a foreign company. Yuan Hua Co. (HK) grew into a conglomerate of approximately eight companies focused on real estate and trade.

With all of these companies, my wife and I were the co-owners. I actively oversaw the business of the companies. My wife had nominal directorship in them. Other directors included my brothers and outsiders.

With Yuan Hua Co.'s success, I was able to establish new business in PRC: an electronics factory in Xiamen in about 1993; a container company in Shanghai in about 1994; an automotive manufacturing company in Xiamen in about 1995; a paper products company in Xiamen in about 1995; Yuan Hua Brand Cigarettes on renewable contract in about 1997 and a movie studio in Xiamen in about 1998.

In about 1996, I won recognition from Xiamen city as an Honourable Citizen for donations I had made allowing the building of schools, roads, old people's homes and for disaster relief. In 1997, I won an award in Hong Kong as one of the twenty most outstanding young persons.

Mr. Lai showed the panel a car radio and stated it had been made at his factory.

Mr. Li Ji Zhou, Vice Minister and Assistant Minister of the Ministry of Public Security

Mr. Lai sets out the main reason he is claiming refugee status at line 67 of the narrative statement of his Personal Information Form.⁶⁹ This statement is critical to his claim.

The problems which ultimately led me to claim protection in Canada began in about beginning 1998. At that time, Jia Chun Wang, Minister of National Security, replaced Si Ju Tao as Minister of Public Security. My long time acquaintance, Ji Zhou Li worked under and was loyal to Tao. Jia want to replace Li and had him arrested. Li was detained over a year and investigated by the Special Prosecutor for government officials, He Yong.

⁶⁹ Exhibit A1.1(a), Personal Information Form of Mr. Lai Cheong Sing, question 37.

HE sought evidence of wrongdoing by Li but despite very considerable efforts came up with nothing. There had been an allegation by Yao Hua Liang, an car smuggler, that he had given Li HKD \$4 million but the investigation showed that this was not so. Liang had indeed given HKD \$4 million, but to Li's mistress and not to LI. Since to come up empty on Li would represent a significant loss Li face for HE, he came to me seeking information against Li.

[Emphasis added]

Mr. Lai's counsel asked Mr. Lai why Mr. Li was arrested. Mr. Lai explained that the Minister for National Security, Jia Chun Wang, was replacing a retiring minister by the name of Tao Xü Jü. Mr. Tao was Mr. Li's superior. Prior to Mr. Li becoming a Deputy Minister, a person by the name of Mu Xin Sheng had also been appointed to the same position. However, Mr. Tao favoured Mr. Li over Mr. Mu. As a result, Mr. Mu and Mr. Li became hostile to each other. When Mr. Jia came to the Ministry of Public Security he wanted to bring in his own people. If he wanted to replace Li Ji Zhou, he had to have sufficient reasons. He therefore set into motion the process for the arrest of Mr. Li.

Counsel for the claimant asked Mr. Lai why Mr. Jia's plan to remove Mr. Li necessitated Mr. Li's arrest.

Mr. Matas:

Q ...why was it necessary for Jia Chun Wang to arrest Li Ji Zhou in order to get Li Ji Zhou out of Li Ji Zhou's position? Why couldn't Jia Chun Wang just fire Li Ji Zhou?

Mr. Lai:

A So that's something that I don't understand.⁷⁰

No witness ever presented a cogent explanation as to why it was necessary for Mr. Jia to instigate such a complex, expansive and costly process to rid himself of Mr. Li Ji Zhou. No explanation was ever put forward as to why Mr. Li Ji Zhou was not

⁷⁰ Transcript 10 July 2001, page 42, lines 44-48.

simply reassigned or fired. This scenario flies in the face of the claimant's suggestion that the Chinese state can do anything it wants.

Mr. Li Ji Zhou was questioned by Canada Immigration authorities about the circumstances of the replacement of Mr. Tao by Mr. Jia.⁷¹ When asked if there had been a power struggle between Mr. Jia and Mr. Tao, he said no such thing had ever happened. He went on to say:

Because this is a change in government, one person can never be in the same position forever. And at this time, Minister Tao was over 60 years old already.

The Refugee Claims Officer asked Mr. Lai Cheong Sing why Mr. Li Ji Zhou would say this to the Canadian Immigration officials. He replied that Mr. Li said it because he was in custody.⁷²

The Refugee Claims Officer also asked Mr. Lai why the first version of his Personal Information Form mentioned the one loan paid back by Mr. Li, but not the two large loans that were never repaid (discussed later in these reasons). He replied that the investigators from the Chinese Central Discipline Committee had questioned him about this amount of money.⁷³ Why this would result in him not mentioning two substantial unpaid loans in the first filed version of his Personal Information Form was not satisfactorily explained.

The Refugee Claims Officer also asked Mr. Lai why the investigation turned to him instead of continuing on with Mr. Li. His answer was difficult to follow. One reason he gave was that the investigators questioned a businessman by the name of

⁷¹ Exhibit C14, tab 1, page 48, line 25, to page 26 line 17.

⁷² Transcript, 19 July 2001, page 43, lines 33-37.

⁷³ Transcript, 19 July 2001, page 41-48.

Mr. Lin Wen Kan about a demand letter he had written to Mr. Li's wife, Ms. Cheng Xin Lian. Mr. Lin told the investigators that Mr. Lai had provided the money owed by Ms. Cheng. It was then that the focus changed to Mr. Lai.⁷⁴

First Investigation of Li — Loan from an Alleged Automobile Smuggler

Mr. Lai related the incident mentioned in his Personal Information Form that led to Mr. Li first being investigated in 1998. A person named Liang Yao Hua was arrested by the Central Discipline Committee on suspicion for automobile smuggling. During the course Mr. Liang's interrogation, he told officials that he had lent between \$2 and \$3 million HK to Mr. Li Ji Zhou through Li Sha Na, Mr. Li's lover.

Mr. Lai allegedly got his information from a friend named Xu Bin, an investigator in the Central Discipline Committee.⁷⁵ Mr. Lai alleges he took it upon himself to investigate the accusation because he did not believe Mr. Li would have taken the money from Mr. Liang as "he was not that type of person".⁷⁶ What this meant is not at all clear. Mr. Li and his family were in the habit of receiving large sums of money from Mr. Lai himself.

Mr. Lai alleges he found out that Ms. Li Sha Na had indeed received the money, but had used it to purchase a house in Hong Kong for herself. Mr. Lai obtained this information from Ms. Li by simply asking her if she knew about the alleged loan to Mr. Li. The evidence suggests that she was not a personal friend or confidant of Mr. Lai's, although she did know who he was.⁷⁷ Why Ms. Li would divulge this information to Mr. Lai is not clear. She was incriminating herself.

⁷⁴ Transcript, 19 July 2001, page 49, line 45 to page 50, line 22

⁷⁵ Transcript 10 July 2001, page 48, line 15.

⁷⁶ Transcript 10 July 2001, page 51, line 9.

⁷⁷ Transcript 10 July 2001, page 50, line 52.

In any event, Mr. Lai says he passed the information on to his friend, Mr. Xu Bin. Mr. Xu reported the information to his superior, Mr. He Yong, the Deputy Secretary of the Central Discipline Committee (and eventual group leader of the 4-20 Investigation). According to Mr. Lai, Mr. He was unhappy when he found out that Mr. Lai had helped clear Li Ji Zhou of the accusations of Mr. Liang. The exoneration meant that Mr. Li Ji Zhou could not be arrested. It was at this point that Mr. He allegedly began to focus his interest on Mr. Lai. The following exchange took place between Mr. Lai and his counsel.

Counsel

Q ...what impact did it have on you that He Yong found out that you helped clear somebody he was trying to arrest, meaning Li Ji Zhou?

Mr. Lai

A So then all the focus move to me.

The claimant was asked why his efforts to exonerate Mr. Li were not mentioned in the Personal Information Form.⁷⁸ He replied that he was not able to give the details on everything. His explanation is inadequate, given that his effort is alleged to have precipitated the focus of the investigation on him.

It is not clear why the information that Mr. Lai provided would exonerate Mr. Li. Why would the Central Discipline Committee drop its investigation on such second hand, unverified, and anecdotal evidence? In any event, despite the alleged exoneration, Mr. Li was charged with accepting the money. Much later, the charge was dismissed.⁷⁹

⁷⁸ Transcript, 19 July 2001, page 59, lines 29-38.

⁷⁹ Exhibit C56, The First Intermediate People's Court of Beijing City, Judgement for a Criminal Trial, accused Li Ji Zhou, page 16, lines 10-14.

In cross-examination by the Minister's counsel,⁸⁰ Mr. Lai agreed that Mr. Xu would be in serious trouble with Mr. He for divulging investigation information to Mr. Lai. He could face discipline or arrest. In answer to his counsel's question, Mr. Lai stated that Mr. Xu gave him the information because Mr. Xu knew Mr. Lai was close to Mr. Li. Mr. Xu told Mr. Lai that the investigation had to do with a power struggle. All of Mr. Li's friends were to be checked out. Mr. Lai also thought Mr. Xu believed he too would eventually get caught up in the arrests, which turned out to be the case.⁸¹ In our view, none of this explains why Mr. Xu was passing along such information. Based on what Mr. Lai alleges, Mr. Xu had nothing to gain by doing so. In any event, if Mr. Lai's evidence is taken at face value, his intervention in the investigation was likely known to Mr. He.

In our view, Mr. Lai's evidence on his role in the investigation of Ms. Li Sha Na does not stand up to scrutiny and is not credible.

Mr. Li was asked about his relationship with Mr. Liang during his interview with Canada Immigration officials. He refused to answer the questions put to him on the basis that it had nothing to do with his dealings with Mr. Lai.⁸²

Second Investigation — Li Shi Zhou Investigation for Sale of Position

The next incident that Mr. Lai relates occurred at the end of 1998. Mr. Lai heard that Jia Chun Wang, the Minister for National Security, gave a director in the supervisory committee in the Ministry of Public Security a note accusing Mr. Li of selling a position for 500,000 RMB. Mr. Jia told the official to pass the note along to Mr.

⁸⁰ Transcript, 18 July 2001, page 15, lines 34-47.

⁸¹ Transcript, 23 July 2001, page 24, line 32 to page 25, line 3

⁸² Exhibit C14, tab 1, interview with Li Ji Zhou, beginning at page 50, line 12 to page 51, line 18.

He Yong. Again, Mr. Lai allegedly got this information second-hand from a person by the name of Xu Gan Lu who told him that Jia Chun Wang "...did not want to use Mr. Li anymore."⁸³

Mr. He instructed Mr. Xu Bin, Mr. Lai's friend, to investigate the accusation. Mr. Xu Bin told Mr. Lai that there was nothing to the case in about January 1999.⁸⁴ However, despite Mr. Xu's opinion, Mr. Li was arrested and detained.

Mr. Lai's counsel again asked Mr. Lai why the investigation of Mr. Li Ji Zhou turned towards him. Mr. Lai responded that in the investigation of Li Ji Zhou, it was ascertained that Mr. Lai was his good friend and that Mr. Lai was a smuggler. The claimant was asked if he knew where this allegation came from. He did not answer the question directly but said that investigators were sent to Shenzhen to look into the allegations against him but found nothing. This appeared to have all taken place after the investigation of the allegation that Mr. Li had sold a position.⁸⁵

The sequence of events, as best can be gleaned from the transcript of Mr. Lai's evidence, is as follows:

1. Sometime in 1998 Mr. Lai heard from Mr. Xu Bin of the alleged \$2 and \$3 million HK payment to Mr. Li Ji Zhou from Mr. Liang Yao Hua.⁸⁶
2. One to three months after the meeting with Mr. Xu Bin Mr. Lai met with Mr. Li Ji Zhou.⁸⁷
3. A few days after the meeting with Mr. Li Ji Zhou, Mr. Lai Cheong Sing contacted Ms. Li Sha Na and reported his findings of their conversation to Mr. Xu Bin.⁸⁸

⁸³ Transcript 10 July 2001, page 59, lines 16-19.

⁸⁴ Transcript 10 July 2001, page 60, lines 43-51.

⁸⁵ Transcript 10 July 2001, page 61, lines 3-36.

⁸⁶ Transcript 10 July 2001, page 45, line 14.

⁸⁷ Transcript 10 July 2001, page 58, line 19.

⁸⁸ Transcript 10 July 2001, page 58, line 37-38.

4. At the end of 1998 Mr. Xu Gun Lu told Mr. Lai about an allegation that Mr. Li Ji Zhou sold a position for 500,000 RMB.⁸⁹
5. At about the end of January 1999, Mr. Xu Bin told Mr. Lai there is nothing to the accusation that Mr. Li Ji Zhou sold a position and that Mr. Li Ji Zhou would probably be released in time for Chinese New Year.⁹⁰
6. Only after the conversation with Mr. Xu Bin in January 1999, does Mr. He Yong send investigators to Shenzhen about Mr. Lai.⁹¹
7. Or, in August of 1998 Xu Bin first tells Lai that investigators were sent to Shenzhen to look into Lai's affairs.⁹²
8. In January or February 1999 Xu Bin tells Lai nothing was found in the Shenzhen investigation.⁹³

Items 6 and 7 are inconsistent. In our view Mr. Lai's evidence as to when the alleged Shenzhen investigation took place and when he learned of it, is confused and unreliable.

Relationship with Li Ji Zhou

As noted previously, Mr. Lai's relationship with Li Ji Zhou is pivotal to his refugee claim. He was questioned at length on the topic.⁹⁴ Again, his testimony regarding Mr. Li was extremely convoluted. Some of his evidence was not credible.

Transfer of Funds to Li Ji Zhou and other Public Officials

Mr. Lai stated that he first met Mr. Li Ji Zhou in about 1989. After their first introduction, Mr. Lai did not see him again until about 1994. By then Mr. Li was the Deputy Minister to the Minister of Public Security, Mr. Tao Xü Jü.

⁸⁹ Transcript 10 July 2001, page 59, line 29.

⁹⁰ Transcript 10 July 2001, page 60, lines 50-51 and page 64, lines 1-7.

⁹¹ Transcript 10 July 2001, page 61, lines 3-22.

⁹² Transcript 10 July 2001, page 63, lines 38-42.

⁹³ Transcript 10 July 2001, page 63, line 38 to page 64, line 7.

⁹⁴ Transcript, 10 July 2001, beginning at page 19, line 23.

Mr. Lai confirmed that from 1994, large amounts of money passed from him to Mr. Li, his wife and daughter. Mr. Lai agreed he had:

1. loaned Mr. Li's wife, Ms. Cheng Xin Lian, 1 million RMB sometime in 1994 to start a restaurant, which was not repaid;
2. loaned Mr. Li's daughter, Ms. Li Qian, \$500,000 US to assist her in the US,⁹⁵ which was not repaid;
3. loaned Mr. Li's wife, Ms. Cheng Xin Lian, \$5.6 million HK in 1997 or 1998, which was repaid in 1998 (the only amount originally noted in the Personal Information form narrative before it was amended);
4. was at first unsure if he had given \$30,000 HK in cash to Mr. Li. Later in his evidence, he stated that while he did not recall the transaction, it was something that he would have done had Mr. Li requested it.⁹⁶ In re-examination, he stated that Liu Xiao Hui, a member of the 4-20 Investigation who met with him in Vancouver, told him about the transaction.⁹⁷
5. Gave Ms. Cheng Xin Lian access to a company credit card with a "\$10,000"⁹⁸ limit. He gave instructions that she could use it for shopping, but he did not know what, if anything, she bought.⁹⁹

The commentary of Mr. Li Ji Zhou on the first loan listed is of note. He states in an interview with Canada Immigration officials in Beijing:¹⁰⁰

In the beginning of 1995, Lai came to Beijing and I went to visit him. I told him that you loan my wife 1 million, but she does not know how to do business. He said that, well, even if she does not know how to do business, once she lost money, she will learn a lesson from that.

⁹⁵ Mr. Lai stated that the money was to be returned to him (transcript, 10 July 2000, page 24, lines 15-16) but it never was.

⁹⁶ Transcript, 18 July 2001, page 56 line 16, to page 57 line 34.

⁹⁷ Transcript, 23 July 2001, page 34, lines 45-46.

⁹⁸ Currency was not specified.

⁹⁹ Transcript, 18 July 2001, page 60, line 8 to page 62, line 25.

¹⁰⁰ Exhibit C14, tab 1, transcript of an interview with Mr. Li by Canadian Immigration officials, page 14, lines 1-15.

Lai didn't clearly say that his money is not needed to be returned, but according to what he said, that if she lost money in business, it is a lesson, I believed that means that the money need not to be returned. He didn't clearly said his intention at the time, but what I understood from him is the money did not require to be returned, and we did not return that money to him. This is one incident.

Later in the interview the following exchange took place:¹⁰¹

Q Did you understand this money to be a bribe?

A According to our law, it is, because we did not return -- do not return this money.

Mr. Li also confirmed that sometime after October 1996 Mr. Lai gave \$500,000 US to Mr. Li's daughter who was living in the US. When Mr. Li later expressed a concern to Mr. Lai that his daughter might misspend the money, Mr. Lai told him it was none of his concern.

He said this is something only between me and your daughter. Just tell her not to be cheated by other people. What I understand he was giving this money for my daughter to use, because LAI Chang Xing, he did not clearly spell out his intentions, but what I understand is he provided this money for our daughter to spend.¹⁰²

Mr. Li also described in some detail the circumstances of the \$30,000 HK in cash he alleges Mr. Lai gave him sometime in early 1997.¹⁰³

Mr. Lai's "loans" to Mr. Li were not unique. Mr. Lai gave money to a variety of people. He described several specific transactions with Chinese officials.

He loaned Mr. Lan Pu, a deputy mayor of Xiamen, \$300,000 Australian to help Mr. Lan's son build a home in Australia. The money was never repaid. His counsel

¹⁰¹ Exhibit C14, tab 1, transcript of an interview with Mr. Li by Canadian Immigration officials, page 19, lines 12-14.

¹⁰² Exhibit C14, tab 1, transcript of an interview with Mr. Li by Canadian Immigration officials, page 21, lines 14 – 21.

¹⁰³ Exhibit C14, tab 1, transcript of an interview with Mr. Li by Canadian Immigration officials, page 12, line 11, to page 28, line 10.

asked him why he did not "...chase after him afterwards to pay it back?"¹⁰⁴ Mr. Lai replied as follows:¹⁰⁵

A So I believed that it would be difficult to get back. So if he does have the money, I believe that he would give it to me.

Q Why did you lend it to him at all if you thought it would be difficult to get it back?

A That's why that I said I dislike him. So he's just a deputy mayor. *He thought he's a big guy, so he always, you know, came to me if I need any help from him. ...*

...

A In my mind, no, I don't want to be good friend of him though. But as for his request, so I only satisfy with him with only small amount. I do not have any deal with him.

Q All right. But what -- why not just say, "No"?

A Just give him some face.

[Emphasis added]

In sum, Mr. Lai alleged that Mr. Lan was a braggart who asked him for a large sum of money because Mr. Lan pretended to have influence. Not liking Mr. Lan, Mr. Lai allowed him to save face by lending him only the "small amount" of \$300,000 Australian.

The potential to "help" Mr. Lai was the pretext for Mr. Lan seeking a "loan" in the first place. It would appear that Mr. Lai was not repulsed by the proposal because he was shy of Mr. Lan's suggestion of influence peddling, but because he did not think Mr. Lan could deliver anything of note. In any event, there was clearly little if any expectation on Mr. Lai's part for repayment.

¹⁰⁴ Transcript 10 July 2001, page 40, lines 38.

¹⁰⁵ Transcript 10 July 2001, pages 40-41, lines 38-19.

Mr. Lai also loaned the Xiamen Custom Intelligence Section Chief, Mr. Cai Hai Peng 150,000 RMB in 1995 or 1996. The money was used to pay what Mr. Lai described as a “land fee”.¹⁰⁶ The following exchange took place between the claimant and his counsel regarding this and other loans to public officials.

Mr. Lai

A I said that, “In the future, whenever you [Mr. Cai] have a problem, just go to my younger sister -- younger brother [Lai Chang Tu], you don’t need to come to me directly, and everything will be fine.”

Mr. Matas:

Q *Okay. Do you know if he paid back his loan?*

A *I have no idea.*

Q All right.

A This amount of money was not given to him directly by me. *I believe this money will be returned, too.*

Q So who gave this money to the Cai Hai Peng?

A Lai Chang Tu.

...

Q All right. Any other loans to government officials?

A *Yeah, I cannot recall from my memory.*

[Emphasis added]

Mr. Lai stated that over the years he had “loaned” and given money to a large number of people. He explained that he had different criteria for making “loans” to business people and government officials. He loaned money to business acquaintances if he felt they could pay him back.¹⁰⁷ He loaned money to government officials if he thought the request for money was “reasonable”.¹⁰⁸ At another point in the hearing, Mr. Lai changed his criteria for giving loans. He said that he wanted nothing in return for the

¹⁰⁶ Transcript 10 July 2001, page 33, line 7.

¹⁰⁷ Transcript, 10 July 2001, page 29-30, lines 52-2.

¹⁰⁸ Transcript, 10 July 2001, page 30, lines 4-16.

“loans” except repayment.¹⁰⁹ Despite his wishes, most of the large “loans” he described were never repaid. His comments on the loan of 1 million RMB to Ms. Cheng Xin Lian suggest that neither the reasonableness of the enterprise nor repayment were relevant criteria.

Mr. Lai also stated several times that normally he did not enter into written agreements for the “loans”. When asked why not, one of his reasons was that as he did not do the bookkeeping, he might lose the paperwork. Another reason was that he based his “loans” on trust.¹¹⁰

As is clear from the evidence, he could not keep track of these transactions from memory alone. Lack of means to record these transactions suggests they were *de facto* gifts as opposed to “loans”.

In addition to “loans” to public officials, Mr. Lai stated that he was in the habit of giving what he described as small amounts of money to Chinese officials passing through Hong Kong on trips abroad.¹¹¹ The amounts would be between 2,000 and 8,000 RMB per person, sometimes as high as \$10,000 HK. Some of the people he gave money to he did not know.¹¹² There was no apparent criteria for this type of largesse.

On the other hand, there were government regulations severely limiting the receipt of gifts by government officials. These regulations clearly prohibited the sums Mr. Lai handed out.¹¹³

¹⁰⁹ Transcript 10 July 2001, page 30, lines 44-46.

¹¹⁰ Transcript, 20 July 2001, page 36, line 52 to page 38, line 6.

¹¹¹ Transcript 18 July 2001, from page 66, lines 44 to page 68 line 44.

¹¹² Transcript, 18 July 2001, page 67, line 2 to page 68, line 2.

¹¹³ Exhibit C40 contains 4 sets of regulations concerning the receipts of gifts by government officials.

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PUBLIC HEARING

Mr. Lai stated that from 1991 to 1997, he gave gifts to Public Security and, to a lesser extent, Customs staff, amounting to 15 million RMB. He agreed that the amounts he gave were substantial in comparison to the amounts the recipients earned at their jobs.¹¹⁸ In these circumstances, he expected no repayment. The following exchange took place between the Member and Mr. Lai.¹¹⁹

Q All right. So you gave over a million, approximately two million a year over those eight years?

A Yeah, approximately.

Q And you didn't expect any favours from anyone as a result of that, the two million dollars, or two million RMB?

A No, I never make deal with them, yeah, purely from friends.

Mr. Lai "loaned" very large amounts of money to at least three government officials with no reasonable expectation of repayment. There were no apparent sound business proposals behind most of the "loans". By his own admission, Mr. Lai gave large sums to numerous bureaucrats passing through Hong Kong with no expectation of repayment. Sometimes he did not even know to whom the money was given. Many of the people who got "loans" from Lai were in positions that could be of use to him if he were engaged in smuggling.

The amounts of money that changed hands between Mr. Lai and Mr. Li were far beyond the latter's ability to repay on his relatively small salary.¹²⁰ It is difficult to understand how these transactions with Mr. Li and his family could be described as *bona fide* "loans". Nothing was reduced to writing. There was no security for the

¹¹⁸ Transcript, 20 July 2001, page 36, lines 40-45.

¹¹⁹ Transcript, 20 July 2001, page 26, lines 39-47.

¹²⁰ There is a discussion with Mr. Li as to his salary in Exhibit C14, transcript of an interview with Mr. Li by Canadian Immigration officials, page 9, line 6 to page 10, line 19. Up until 1998, Mr. Li earned less than 2,000 RMB per month.

“loans”. There were no terms for repayment. Interest was not an issue. It is implausible that Mr. Lai did not know that what he was doing, given its scale, could be seen as an illegal activity. Taking all these aspects into account, we find, on the balance of probabilities, that these were not loans but payments by Mr. Lai to Mr. Li with the implicit expectation of future consideration from the recipient. In two incidents described below – the intervention of Mr. Li for the special licence and the release of a cargo of oil – there was actual consideration.

Benefit to Mr. Lai for Loans to Mr. Li

The issue of what benefit Mr. Lai may have received for the loans to Mr. Li Ji Zhou was canvassed at the hearing. Mr. Lai confirmed that he once asked Mr. Li for a small favour – he asked Mr. Li to assist him in getting a special licence plate for travelling between Hong Kong and Mainland China. Mr. Li confirmed that he helped speed up the process for Mr. Lai.¹²¹

On another occasion¹²² Mr. Lai heard from a business acquaintance, Mr. Cheng Guang Hui, that a 30,000 tonne shipment of diesel fuel owned in part by Mr. Cheng, was seized by marine police and was subject to forfeiture. Mr. Lai contacted Mr. Li to complain of the situation. Mr. Li was able to influence the matter so that the seizure was dealt with as a customs matter, rather than a police matter. This designation saved Mr. Cheng a great deal of money and trouble. Mr. Lai claims he had little to do with Mr. Cheng after he made the call to Mr. Li Ji Zhou. He alleged he got involved because his sense of fairness was offended. Mr. Li Ji Zhou confirmed that he intervened with his

¹²¹ Exhibit C14, tab 1, interview with Li Ji Zhou, beginning at page 29, lines 19. Transcript, 10 July 2001, page 33, line 39 to page 35, line 45.

¹²² Description of incident found in 10 July 2001 transcript, pages 36, line 1 to page 38, line 27.

subordinates about the seizure after receiving a telephone call from Mr. Lai Cheong Sing.¹²³

Statement of Li Ji Zhou to Canadian Officials in China

As noted previously, a Canadian Immigration official, Mr Grant Duckworth, interviewed Mr. Li Ji Zhou¹²⁴ and Mr. Lai Shui Qiang in China.¹²⁵ Mr. Li was interviewed on 24 March 2001 while in custody in Beijing. During the interview, other employees of the Canadian government were present, including counsel for the Minister and a Mandarin language interpreter. A female PSB officer was also present. Mr. Li appeared to be self-assured and at ease in the video tape of the interview. He was at times somewhat argumentative.

At the time of the interview, Mr. Li had been in custody for over two years. He was “separated for investigation” on 17 December 1998 and arrested 29 October 1999. The prosecution was initiated with the court on 22 January 2001. On 22 October 2001 he was convicted and sentenced to death, with his sentence suspended for two years.¹²⁶ Some of the findings of the court¹²⁷ were that he:

...took advantage of his position as a government functionary, obtained benefits for others and unlawfully accepted money in return, the sum involved is especially large and the circumstances are especially serious. Based on the provisions of article 385, article 386, article 383(1) of the <Criminal Law of the People’s Republic of China> this constituted the crime of accepting bribes.

¹²³ Exhibit C14, tab 1, interview with Li Ji Zhou, page 35, line 25 to page 45, line 6.

¹²⁴ Exhibit C23.2, videotape of interview with Li Ji Zhou, and Exhibit C14, tab 1, transcript of interview..

¹²⁵ Exhibit C23.1, videotape of interview with Lai Shui Qiang, and Exhibit C14, tab 2, transcript of interview.

¹²⁶ According to the Chinese Criminal Code, if he does not commit an offence during that two year period his sentence will be reduced to life imprisonment. See Exhibit C22, Criminal Law of the People’s Republic of China, article 48 and 50.

¹²⁷ Exhibit C56, The First Intermediate People’s Court of Beijing City, Judgement for a Criminal Trial, page 4 of English translation.

Most of Mr. Lai's recital of his financial dealings with Mr. Li, his wife and daughter are set out in the judgement. Mr. Lai's version of what happened differs as to the intent of the transactions, not their existence.

Of note in the judgement is the recital of the defences raised by Mr. Li about the charges against him.¹²⁸

During the examination stage of the trial proceeding, the accused Li, Ji Zhou had admitted and confessed the allegation charged by the public prosecution authority, including his acceptance of money from Lai, Chang Xing, acceptance of assistance requests and thereafter demanded the Frontier Defence Bureau of Hai Nan Province to hand the seized Olympic Warrior oil vessel over to the customs for dispensation. The subject confessed that he assisted the Yuan Hua Co. in arranging a set of license plates for Hong Kong and The Mainland. However, [the accused] argued that the Olympic Warrior oil vessel was not owned by the Yuan Hua Co., and the Yuan Hua Co. had completed the application procedure for the license plates; it was supposed to be processed. Therefore, the determination of him taking advantage of his authority to secure benefits for Lai, Chang Xing is groundless. ...

In answer to part of the defence raised, the court states "the legitimacy of benefits does not effect the finding of the crime of accepting bribes."¹²⁹ As noted earlier, the court does accept the defence of Mr. Li that 3 million HK given to Ms. Li Sha Na by Mr. Liang Yao Hua was not accepted jointly by Ms. Li and Mr. Li.¹³⁰ Clearly, the issue was not dropped by the authorities in China as a result of Mr. Lai's intervention.

In the judgement, it is noted that Mr. Li admitted and confessed to some of the allegations charged by the public prosecutor. However, the judgement states that contrary to the arguments his counsel raised, he did not "voluntarily surrender" or

¹²⁸ Exhibit C56, The First Intermediate People's Court of Beijing City, Judgement for a Criminal Trial, page 4 of English translation, lines 11-22.

¹²⁹ Exhibit C56, The First Intermediate People's Court of Beijing City, Judgement for a Criminal Trial, page 15 of English translation, lines 12-13.

¹³⁰ Exhibit C56, The First Intermediate People's Court of Beijing City, Judgement for a Criminal Trial, page 16 of English translation.

perform “major meritorious service”. The court states that he did co-operate in aspects of his case and it “may consider the circumstances in sentencing.”¹³¹

At the start of the interview, Mr. Duckworth made the following statement to Mr. Li before asking him any questions:

This is being videotaped and recorded. The information being collected is to be used at an Immigration hearing for Lai Chang Xing, and is not being used against you in any way. You do not have to answer our questions. A copy of the tape will be provided to the legal counsel for Mr. Lai, and it will be introduced at an Immigration hearing in Canada. We cannot guarantee you that, as a result of this disclosure, that the information will not be made public.¹³²

Mr. Li responded that he was prepared to answer the questions Mr. Duckworth was going to ask, and took an affirmation to tell the truth. Mr. Duckworth asked Mr. Li if anyone had promised him anything as an incentive for his co-operation. He replied that no one had.

As previously noted, at one point Mr. Li refused to answer a series of questions about a Mr. Liang Yao Hua on the basis that the questions had nothing to do with the case about which he was being interviewed.¹³³

There was no evidence presented as to how Mr. Li came to participate in the interview. Having said that, there was no suggestion in the transcript or video recording of the interview that Mr. Li was coerced into making a statement against Mr. Lai by his interviewers. The Canadian officials present did not offer inducements for him to speak, nor could they do so. The Canadian officials did not intimidate, threaten or abuse Mr. Li during the interview. On the other hand, it would be naïve to think that his

¹³¹ Exhibit C56, The First Intermediate People’s Court of Beijing City, Judgement for a Criminal Trial, page 16 and 17. In the decision, the court reviews the concepts and determines that they do not apply. “Voluntary surrender” and “meritorious service” are specific acts recognised in Chinese criminal law that can have a major impact on sentencing.

¹³² Exhibit C14, tab 1, transcript of interview with Li Ji Zhou, page 2, lines 2-10.

¹³³ Exhibit C14, tab 1, transcript of interview with Li Ji Zhou, page 50, line 12 to page 51, line 19.

co-operation might not benefit him when he was sentenced for the charges then outstanding against him.

In our view, there is no probative evidence that Mr. Li was forced to say what he did, or that he was in any way mistreated before the statements were taken. The fact that counsel for the claimants was not present does not make the statements inadmissible. The absence of counsel for the claimants goes to weight.

The following exchange took place early on in the interview:¹³⁴

Questioner:

Q I understand you are in custody right now. Can you tell me the circumstances concerning your detention?

Li:

A I broke the People's Republic of China law. I have committed the crime of accepting bribes.

On reviewing the interview materials as a whole, Mr. Li appeared to be candid about the money he and his family received while at the same time making no attempt to exaggerate the favours Mr. Lai is alleged to have received from him. If he was attempting to please Chinese authorities by providing them with a sensational expose of Mr. Lai's largesse and his own response, it is certainly not apparent in the materials filed.

We find Mr. Li Ji Zhou was credible as to his relationship with Mr. Lai Cheong Sing.

¹³⁴ Exhibit C14, tab 1, page 11, lines 1 – 4.

Meetings with Prosecutor He

The claimant goes on in his Personal Information Form to describe his meetings with the Special Prosecutor He. The Personal Information Form narrative states:¹³⁵

I was required to meet with He's officials three times. The first occasion was in Beijing in about February or March 1999. I met with five of the officials responsible for investigating LI, two of whom were from the Special Prosecutor's office and three of whom were from the Central Discipline Committee. They were very candid. They said they were caught up in a power struggle and needed my help. They said if I did not help, I would be made bankrupt.

LI was in charge of issuing auto licence plates and border control for PRC. The five officials wanted me to say that LI had given me licence plates to put on cars smuggled into PRC and that he had given me one-way entry permits into Hong Kong to sell. These things were not true and I refused.

The next meeting was about ten days later, in Shen Zhen, Guangdong Province, PRC. I met with the same five officials. They renewed their demands that I provide them with damning information about LI. They also asked for and I gave them information concerning repayments of loans I had made to LI's wife. LI's wife had repaid approximately 5 million in cash and the balance in security equipment. [In total, I loaned LI's wife 1 million RMB, 500 thousand U.S., 5.6 million HK.]

The third meeting was about ten days later in Xiamen, at the Yuan Hua Co. (Xiamen) office. The PRC officials wanted to see the security equipment accepted in partial satisfaction of the loans to LI['s wife]. I showed the equipment to them. The equipment, incidentally, was used by private security companies I engaged to protect my various construction sites in PRC.

After the third meeting, I learned from contacts within He's team that HE had ordered an investigation into me. He dispatched investigators to talk with five Shen Zhen customs supervisors. The investigators reported back that there was no evidence of Yuan Hua being involved in smuggling or wrongdoing. He apparently remarked that this was because I was sophisticated in smuggling and told his investigators to keep looking, that he wanted to get me and he would get me.

[section in brackets added on first day of hearing]

Zhu Niu Niu Attempts to Blackmail Mr. Lai

A major event not described at all in the Personal Information Form arose at about this time. According to Mr. Lai, a business acquaintance of his by the name of

¹³⁵ Exhibit A1.1 (a), question 37, lines 82-104.

Zhu Niu Niu was known to gamble in Macao.¹³⁶ Needing money, Mr. Zhu borrowed \$14 million HK dollars from a person by the name of Wu Da Cao. Mr. Wu was from the “Liaison Department of General Politic (sic) Ministry in the military”.¹³⁷ Mr. Zhu pretended that he and Mr. Lai were borrowing the money by faking Mr. Lai’s signature.”¹³⁸ When the money was not paid back as agreed, Mr. Wu sued Mr. Zhu Niu Niu and Mr. Lai in Hong Kong. Mr. Lai was able to verify that he was not in Hong Kong at the time suggested in the lawsuit, and the suit against him came to a halt.¹³⁹

Mr. Lai subsequently found out that when Mr. Wu confronted Mr. Zhu about the money, Mr. Zhu responded by telling Mr. Wu he would be able to get 100 million RMB or Hong Kong dollars in a week’s time.¹⁴⁰

In about March 1999, Mr. Zhu tried to blackmail Mr. Lai. Mr. Zhu said he would file a report with the Central Committee alleging Mr. Lai was guilty of bribery and smuggling unless Mr. Lai gave him 100 million RMB or Hong Kong dollars.

Mr. Lai alleges that he obtained a copy of the report. As it was very large, he only read the first two pages. It is unclear if he kept a copy, and if so, what happened to it. Why he would be shown a copy is also unclear.

In any event, Mr. Zhu brought Mr. Wu with him to Beijing around the time when repayment of the loan was due. Mr. Zhu kept telling Mr. Wu and “the people

¹³⁶ Transcript 10 July 2001, page 67, lines 38-51.

¹³⁷ Transcript 10 July 2001, page 68, line 23 -

¹³⁸ Transcript 10 July 2001, page 68, line 34.

¹³⁹ Transcript 10 July 2001, page 68, line 50 to page 69, line 1.

¹⁴⁰ Transcript 10 July 2001, page 70, lines 32-33.

around”¹⁴¹ that Mr. Lai would come up with the money soon. Mr. Zhu believed he could use the report to force Mr. Lai to pay the money Mr. Zhu owed to Mr. Wu.¹⁴²

Mr. Lai was asked where he got his information about Mr. Zhu’s activities in Beijing. He replied that he heard from friends in the Central Committee. Everybody knew Mr. Lai was being blackmailed. The claimant never adequately explained why he was being given the information by members of the very organization that turned on him.

Mr. Wu thought the contents of the report that Mr. Lai was involved in smuggling were true.¹⁴³ If Mr. Lai’s evidence is taken at face value, Mr. Wu was willing to use extortion of Mr. Lai to get repayment from Mr. Zhu.

The report itself was written by Mr. Zhu and a person by the name of Wang Jian Dong. Mr. Wang was a former manager in an “in bond” company, owned by a man named Chen Guang Hui. Mr. Wang had been fired because he had lent “62 million” to Mr. Zhu, money that again Mr. Zhu did not repay.

Mr. Lai’s response to the threat to file the report was to say that if Mr. Zhu had a report to file, he should go ahead and file it.

Mr. Zhu allegedly handed the report in to a government official who in turn gave it to the Central Discipline Committee and the General Administration of Customs. The report indicated that *both* Li Ji Zhou and Zhu Niu Niu were involved in smuggling along with Mr. Lai.¹⁴⁴ Mr. Lai was asked why Mr. Zhu would think he could use a

¹⁴¹ Transcript 10 July 2001, page 82, lines 38.

¹⁴² Transcript 11 July 2001, page 7, lines 48-49.

¹⁴³ Transcript 11 July 2001, page 6, lines 13-16.

¹⁴⁴ Transcript 11 July 2001, page 11, lines 27-31.

fabricated report to extort money from Mr. Lai. Mr. Lai replied that Mr. Zhu was a stupid fool who did it just to make other people suffer.¹⁴⁵

Mr. Lai was asked again why Mr. Zhu would use a report that implicated himself when trying to extort money from Mr. Lai. Mr. Lai said that he met with Mr. Zhu after the report was filed. Mr. Zhu told him that he filed it because he had no choice, he was being pressured by Mr. Chen Guang Hui.¹⁴⁶ This does not explain why Mr. Zhu would incriminate himself in the first place.

The following exchange took place between Mr. Lai and the Refugee Claims officer.¹⁴⁷

Q Okay. You also didn't mention anything about the blackmail attempt, the extortion attempt, which would seem to be fairly important. So why isn't that in your Personal Information Form?

A Okay. Because I feel that I was applying for the political asylum, so that I -- that's something that I would have to continue to tell the story.

Q So an extortion attempt wouldn't be important to tell the panel who's looking at the way that you were mistreated in China?

A So, yes, at that time I thought I would tell the story in the court.

Q But you didn't tell it in your form.

A That's right, I didn't mention it.

We find it implausible that Mr. Zhu would use a report that implicates himself as a means to extort money from Mr. Lai. We also find it implausible that Mr. Zhu would implicate a man with whom he had no known relationship — Mr. Li. Finally, Mr. Lai has not adequately explained why a key event in his story was completely missing

¹⁴⁵ Transcript, 19 July 2001, page 61, lines 5-8.

¹⁴⁶ Transcript, 20 July 2001, page 40, lines 5-7.

¹⁴⁷ Transcript, 19 July 2001, page 59, line 40 to page 60, line 1.

from his Personal Information Form. We do not find the evidence regarding the Zhu Niu Niu report credible.

Allegation of Smuggling

At this point in the narrative it is a logical to review the evidence on the Red Mansion, the alleged smuggling interests of Mr. Lai and Ms. Tsang, and the Haixin Container Yard.

The Red Mansion

According to Mr. Lai, the Red Mansion was built in 1996 as a hotel and office building. It is located on Huli District Public Security Bureau (PSB) land in Xiamen. Mr. Lai paid for the cost of construction in return for a 50-year lease. Mr. Chen Rong Xi, Chief of the Huli PSB, initially approached him about the development because the land was next to one of Mr. Lai's factories. No documentation was filed regarding the ownership of the Red Mansion or the lease agreement.

The PSB allegedly gave Mr. Lai a hotel licence to operate the building. As part of the arrangement, however, the PSB was given use of one small room in the building on the seventh floor for its operations. When asked why the PSB used the building, Mr. Lai replied that it was a station used by the Xiamen PSB. They needed a sub-office to collect information. He was not sure what type of information they were looking for.

At the hearing, Mr. Lai gave a floor by floor description of the building.¹⁴⁸

As well, floor plans of the building and a video recording of the interior were entered as exhibits.¹⁴⁹

The ground floor of the Red Mansion contained a reception area and lobby, mechanical rooms and kitchen facilities. The second floor held four dining rooms. The third floor had four massage rooms, two with adjoining Jacuzzi baths, a sauna and steam room, a fitness room, and projection hall. The fourth floor had a forty-seat movie theatre, a bar and three karaoke rooms, each with small dance floors. The fifth floor contained 4 hotel-style rooms, 501 through 504. Room 502 was a suite. The sixth floor was taken up by a large two bedroom suite, with living room, dining room, lounge, and servants' quarters. The seventh floor, with the exception of the alleged PSB office, was Mr. Lai's office space. The floor included a reception area, a large office for one, an office for two, a boardroom, a single massage room, kitchen, bathrooms and storage.

The building contains one elevator and two staircases. The main staircase is located next to the elevator. The secondary staircase is external. The PSB office on the seventh floor could be accessed by entering the reception area, riding the elevator or taking the main stairs seven floors, then in either case, walking through Mr. Lai's office area. The office could also be accessed by taking the secondary stairs seven flights. The space allegedly set aside for PSB operations is small. It contains, according to the diagram and video recording, a small sofa, a massage chair, bathroom, wall cabinetry and a television. The basic accoutrements of an office – desk, desk chair, filing cabinets – are absent. Mr. Lai stated late in his evidence that there were no desks in the room because the occupants were involved in intelligence business. He went on to say he was the only

¹⁴⁸ Transcript, 9 July 2001, beginning at page 7.

¹⁴⁹ Exhibits C42 and C43. C47 is an English translation of the floor plan.

person in the company who knew what the PSB officers were doing with the space. They explained to Mr. Lai that there was no desk in the room because it was “too sensitive”. They did not want the company’s employees to know that it was their office.¹⁵⁰ Late in his evidence, Mr. Lai stated that the PSB seldom used the office. He also stated that they might have had the office in the building to show that they owned it.¹⁵¹

Despite the close proximity of the PSB office to his and his propensity for seeking out inside information, Mr. Lai alleges he knew nothing of what was done in the office.

Mr. Lai’s evidence as to the use of the seventh floor office/massage room by the PSB is implausible and not credible. We do not accept Mr. Lai’s allegation that he was ignorant of the office’s operations. We do not accept his speculation that the PSB wanted to establish a presence in the facility while at the same time keep their presence secret. If the PSB wanted a discrete location for intelligence work, it would not likely use a massage room in an entertainment complex frequented by large numbers of people. Little investigative police work of any value could be done in such an inappropriate facility.

According to Mr. Lai, the Red Mansion was a busy place. Guests regularly stayed overnight. The entertainment facilities were well used. He and his wife stayed on the 5th floor frequently. However, there was no evidence that the facility was operated as a commercial enterprise. Mr. Lai told the PSB officials when it was being built that he would use the Red Mansion to host his guests and for his business. No one apparently paid to stay at the Red Mansion.¹⁵² There was no evidence that anyone paid to eat in the

¹⁵⁰ Transcript, 17 October 2001, page 49, lines 19-34.

¹⁵¹ Transcript, 17 October 2001, page 65, lines 26-43.

¹⁵² Transcript, 17 July 2001, page 52, lines 3-6.

restaurants or use the saunas, massage rooms, karaoke facilities, or theatre. The guests were personal friends, business people from China and Hong Kong, along with government officials from the State Ministry of Security.

There were suggestions from a variety of media sources in China and Hong Kong that the Red Mansion was a pleasure palace where sexual encounters were common. Secret video recordings were allegedly made of guests in compromising situations, later to be used in blackmail. However, no probative evidence was led that such was the case. In fact, one of the officers from the 4-20 Investigation who attended the refugee hearing testified that he searched for signs of clandestine recording, but found nothing.

Genesis of Yuan Hua Shipping Documents

The Minister's counsel questioned Mr. Lai about several documents purported to be records from the alleged Yuan Hua smuggling operation found in the Red Mansion.¹⁵³ These documents were particularly contentious exhibits. The documents included:

1. Invoices to Xiamen Kai Yuan Foreign Trade Group shipped on the vessel Qing Hua, voyage number 9906.¹⁵⁴
2. Cargo Manifests, "Lico Shipping Ltd."¹⁵⁵
3. "Arrival Notices".¹⁵⁶
4. Cigarette Delivery Report.¹⁵⁷

¹⁵³ Transcript, 12 July 2001, page 54, line 28 to page 58, line 40, referring to Exhibit C9, tabs 8 and 9.

¹⁵⁴ Exhibit C9, tab 8.

¹⁵⁵ Exhibit C9, tab 8.

¹⁵⁶ Exhibit C9, tab 9.

¹⁵⁷ Exhibit C9, tab 9.

Mr. Lai said he was not familiar with the form or content of any of these documents. The last page of this document states, “This list was extracted from the safe of Zeng Ming-Na”.¹⁵⁸

One of the forms in the exhibit was a Customs assessment of the amount of duty evaded through smuggling. It sets out, according to the 4-20 Investigation, the amount of money payable as duty evaded in one transaction. According to the form, the duty that should have been paid for the shipment of cigarettes was 154,270,598 RMB. The amount paid for the allegedly “switched goods” was 430,804 RMB. The evaded duty for this transaction was 153,839,794 RMB.

Mr. Lai noted that he had seen the notation “Red Mansion 503, Tsang Ming Na’s office” on the document in question. Room 503 was not his wife’s office, but was a bedroom. He also stated that there was a small safe in the room, but if the papers were as important as alleged, someone would have removed them before the 4-20 Investigation team searched the premises.

Mr. Lai was questioned about a series of statements taken from three individuals¹⁵⁹ about how the records of Yuan Hua were allegedly compiled to disguise the importation of a variety of goods. The statements are from Wu Ming Shen, manager of the bonding division of Kai Yuan Trade Group, Limited; Wu Jia Ying, a customs dealer for the Kai Yuan Trade Group; and Zhang We Qun, an employee of Yuan Hua (Hong Kong). The claimant states he does not know the first two persons named, but that he recalled that Ms. Zhang worked for him in 1997.

¹⁵⁸ Exhibit C9, tab 9, unnumbered page 37.

¹⁵⁹ Transcript, 12 July 2001, page 65, line 24 to page 73, line 4, in reference to Exhibit C9, tabs 4 (unnumbered page 35) and 5 (unnumbered page 31), and Exhibit C5, tab 9 (unnumbered page 18).

These three people are reported to have described the documentation allegedly found in Tsang Ming Na's office in their statements to the 4-20 Investigation team in some detail, explaining how it was falsified. Mr. Lai stated that the documents referred to were all forged by the 4-20 Investigation. He was asked why, if the object of the exercise was to frame him, the explanations of these three people were so detailed. He replied rhetorically:¹⁶⁰

Otherwise, why do they need 1,200 people in the 4-20? So they -- they need so many people to fabricate it. So they only mentioned the things was handed to Yuan Hua, but didn't mention handed to who in Yuan Hua.

He again denied he had seen any documents of the sort contained in the exhibits. When asked what documents he did have concerning his cigarette import and export business, his answer was confused. Mr. Lai stated that he did not keep any documents from his legitimate cigarette business as it was done through a privately held business.¹⁶¹ He stated that he relied on memory for his business (which elsewhere has been shown to be poor). He also stated that he kept no documents once a deal was completed. He stated again that as the company was privately held, he had no need to do so.¹⁶² In our view it is implausible and not credible that a multimillion RMB enterprise, whether private or public, would keep no records of its transactions.

¹⁶⁰ Transcript, 12 July 2001, page 70, lines 12-14.

¹⁶¹ Transcript, 12 July 2001, page 61, line 34 to 40.

¹⁶² Transcript, 12 July 2001, page 73, line 8 to page 75, line 25.

Mr. Lai's Evidence on the Cigarette Delivery Report

Mr. Lai was recalled late in the hearing¹⁶³ to respond to the evidence on the Cigarette Delivery Report allegedly found in Ms. Tsang's room at the Red Mansion given by the 4-20 Investigation team member, Inspector Wu Jiang Ping.

He stated that the safes were installed in rooms such as room 502 when the rooms were decorated. Service staff had access to the safes. He did not normally keep any business documents on the 5th floor, but left them in his office on the 7th floor. The keys to the room would normally be left at the front desk of the Red Mansion. When Mr. Lai was working at the Red Mansion, the room would be left open for him.

It is reasonable to conclude that occupants of the room other than Mr. Lai would also have access to the safe.

Mr. Lai stated that the safe in room 502 was left open and that there were instructions on it about how to set its code. However, he never used it.¹⁶⁴ He paid no attention to whether it was open or closed. Later he stated that it was never locked. When it was suggested to him that he would not know if someone had locked the safe since he never checked it, he did not answer the question but began to talk about errors he noticed in the evidence of inspector Wu Jiang Ping.¹⁶⁵

While viewing a video recording of the Red Mansion, Mr. Lai identified an office on the 7th floor with two desks as being that of his assistant, Ms. Lau Lang Sang.

¹⁶³ Transcript, 17 October 2001, pages 43-66.

¹⁶⁴ Transcript, 17 October 2001, page 44, lines 5-43.

¹⁶⁵ Transcript, 17 October 2001, page 52, lines 13-41.

The other desk was used by a woman Mr. Lai described as a helper. Mr. Lai stated that a Ms. Tao Mi never used the office.¹⁶⁶ Her evidence is discussed later in these reasons.

Haixin Container Yard

The Haixin Container Yard in Xiamen is a key location in the smuggling allegations against Mr. Lai Cheong Sing. Mr. Lai stated he owned 75% of the company and was its chairman. He confirmed that goods were transferred from one container to another in the Haixin yard, and that the work was conducted according to the laws of China. However, he initially stated he had no idea what the detailed rules were for the operating system of the yard.¹⁶⁷ Of note is the fact that Mr. Lai does not mention the Haixin Container Yard anywhere in his Personal Information Form, although he does mention a container yard he owned in Shanghai.

There was difficulty in getting Mr. Lai to describe the relationship of the Haixin Container Yard and Xiamen customs coherently. Mr. Lai stated that Xiamen customs asked to set up an office in the Haixin Container Yard, then reversed himself and said it was the other way around — Haixin Container Yard requested that Xiamen Customs office set up a customs office in the Container Yard. Mr. Lai was asked why Xiamen customs needed a presence in the Haixin Yard. He first said he knew nothing about why the request was made. He then said it was suggested by the general manager of the yard, Mr. Shao Jia Xi, on the advice to Mr. Lai that the business would do better with such an arrangement. He finally said it was done so that the Haixin Container Yard could be used for import and export of containers instead of just being a storage yard for empty containers.¹⁶⁸ When asked why Xiamen Customs needed an office in his yard, he

¹⁶⁶ Transcript, 17 October 2001, pages 47, lines 11-48.

¹⁶⁷ Transcript, 13 July 2001, page 32, lines 36-37.

¹⁶⁸ Transcript, 13 July 2001, page 40, line 47 to page 42, line 45.

replied that he had no idea. When asked why he did not give this answer initially, he replied that he did not understand the question when it was first asked.¹⁶⁹ To confuse matters more, in re-examination, Mr. Lai stated that the Haixin Container Yard could not function unless there was a customs office on the premises. Any goods in the yard had to be under the supervision of Customs.¹⁷⁰ His evidence about the Haixin Yard and the arrangements to set up a customs office was confused and not credible.

Statements Given to 4-20 Investigation

Mr. Lai was asked about several individuals who gave statements to the 4-20 Investigation about the Haixin Container Yard operations.

Huang Ke Zehn, the son in law of his eldest brother, is quoted as telling the 4-20 Investigation of the following:¹⁷¹

Lai Cheong Sing smuggled cigarettes, vehicle, oil, chemicals. My responsibility is to help Lai Cheong Sing with the goods, delivering and dispatching.

The Xiamen Yuan Hua electric factory opened in 1994, and the later established Yuan Hua group are all for covering his smuggling business.

...

The way of his smuggling was to declare to Customs as wood pulp or plastics, which are all low-taxation stuff. Before the Customs examination to the cigarette containers, Chen Wen Yuan and Chen Guo Jun commanded workers to remove the cigarettes out of the container and to put some wood pulp and plastics inside. These cigarette containers were stored in Haixin storage after they arrived in Xiamen. And Hou Xiao Hu and Hou Zhan Wu they were in charge of bribing the Customs for a smooth passing.

Mr. Lai stated that he did not think the statement was truthful. Mr. Huang Ke Zhen was not the person responsible for clearing Customs, and therefore did not know

¹⁶⁹ Transcript, 13 July 2001, page 41, line 48 to page 42, line 45.

¹⁷⁰ Transcript, 20 July 2001, page 64, lines 24-33.

¹⁷¹ Transcript, 13 July 2001, page 48, line 40 to page 49, line 22, from Exhibit C5, tab 10.

the detailed procedure of that operation. Further, he noted that Messrs. Hou Xiao Hu and Hou Zhan Wu did not name whom they were bribing.

Mr. Lai was asked about a statement given by Mr. Chen Guo Jun to the 4-20 Investigation.¹⁷² Mr. Chen told the investigators that he was the manager of the Haixin Container Yard, although Mr. Lai stated he did not know anyone by that name. Mr. Chen is alleged to have stated:¹⁷³

I am in charge of the yard administration at the Haixin storage yard. I also manage the smuggling containers according to Yuan Hua group's instructions.

Mr. Lai stated that what Mr. Chen alleged could not have happened because the Yuan Hua group did not have the authorisation to do import and export.

Mr. Chen is then quoted as to the method used to switch goods.¹⁷⁴

The method we use is first the containers, which have just been brought in are placed beside empty containers which have already passed Customs inspection. We then cut open the Customs sealing strips of the new containers and ask porters to move the goods in them to the empty containers. Finally, the Yuan Hua group will arrange to send trailers to haul away these formerly empty containers which have already passed Customs inspection and are now loaded with smuggled goods.

The Minister's counsel then set out what Mr. Chen alleged happened next in the smuggling operation.¹⁷⁵

... someone called Liang Guo Guang who's from the Yuan Hua group, that he takes the same goods as named in the container's import declaration from the warehouse of the upper storage yard and puts these goods into the containers. Then after this is done, he uses the Customs sealing strips he brings with him to close and seal the containers, and then arranges to have trailers transport these containers out for the Customs inspection. After Customs makes its inspection, these containers will be transported back to the upper storage yard in order to be used for carrying smuggled goods next time...

¹⁷² Exhibit C9, tab 6 (unnumbered page 20). Statement dated 27 September 1999.

¹⁷³ Transcript, 13 July 2001, page 51, lines 20-22.

¹⁷⁴ Transcript, 13 July 2001, page 52, lines 1-9.

¹⁷⁵ Transcript, 13 July 2001, page 52, lines 11-19.

The Minister's counsel continued to read from Mr. Chen's statement. Mr. Chen is asked by his interrogators what goods are in the upper storage yard. He states that they are smuggled cigarettes and that Lai Chang Tu is in charge of the operation.

The quotation from Mr. Chen's statement ends with a comment that the Yuan Hua group directed him to destroy the records every month, which was done. This statement gives one explanation for the lack of business documents. He confirmed that the Yuan Hua group had been involved in smuggling in the Haixin storage yard since 1996.¹⁷⁶

The Minister's counsel stated that in his opinion, Mr. Chen had given a detailed description of what might have been going on at the Haixin storage yard. Mr. Lai denied that this was the case. He stated:¹⁷⁷

So I think it could happen that for, you know, the transfer of goods and the change of containers, yeah, that might happen. But there's one thing that I don't understand. But you say that there's a person that bring a Customs seal and to seal the containers. How could Yuan Hua have the Customs seal?

He opined that it could only have been customs staff who brought the seals, something that Yuan Hua staff could not do. When it was suggested to him that the customs staff must have been bribed, Mr. Lai stated that if that were the case, it would have been mentioned in the statement.

In response to this answer, the Minister's counsel set out some of the contents of the interrogation statement from Mr. Chen Zhao Zhong¹⁷⁸ the supervisor of the Customs Inspection team stationed at the Haixin storage yard. In the interrogation record, Mr. Chen states he was arrested for suspicion of accepting bribes totalling 1.27

¹⁷⁶ Transcript, 13 July 2001, page 53, lines 1-2.

¹⁷⁷ Transcript, 13 July 2001, page 53, lines 7-10.

¹⁷⁸ Exhibit C5, tab 8 (unnumbered page 30).

million RMB. He alleged he received the money from Mr. Lai's subordinates to show appreciation for the help he gave in the daily business operation of the imported containers. He states:¹⁷⁹

...I closed my eyes on Lai Cheong Sing's imported containers. I did not care if the containers had been opened or not. Lai Cheong Sing came to my office in Haixin storage. He told me that, 'You know what I wanted to say. I really appreciate your help on my goods.'

He goes on to say that:

Lai Cheong Sing's people would open containers after our Customs officers left at night. They would take the imported goods out and put in those goods which are reported on the import declaration form. It is for our Customs inspection next morning.

The Minister's counsel then noted that Mr. Chen had described a method by which Yuan Hua got the seals. When Mr. Lai was asked if he denied what Mr. Chen said, he gave the following answer:¹⁸⁰

So if Chen Zhao Zhong is in Canada, he probably would not say something like that. He was arrested by the 4-20. I saw Chen Zhao Zhong in that videotape. So this bit, one comment that I -- I was correct. I have been to Haixin container yard. So I met him -- met Chen Zhao Zhong at the dining hall, so that I said that, "I appreciate your help." I did not say that I appreciate the goods. So that's the Chinese way to say appreciation.

As for what Chen Zhao Zhong said, after they left that we replace goods, so there would be a number on that seal. So if you catch up that seal, there's no second number that will be identical to the original number. If Chen Zhao Zhong would be able to provide such a seal to the Yuan Hua group, so it must be included in his testimony. How could that, you know, disappear?

The next statement reviewed by the Minister's counsel was taken from Mr. Chen Tian De. He states he was a foreman at the Haixin Container Yard.¹⁸¹ Mr. Chen listed four companies, and stated that two of these did the most business at the Haixin

¹⁷⁹ Transcript, 13 July 2001, page 55, lines 3-15.

¹⁸⁰ Transcript, 13 July 2001, page 53, lines 28-39.

¹⁸¹ Exhibit C9, tab 7 (unnumbered page 30).

Container Yard. They are Dongfang [Dong Fang] Development Company Ltd. and Kaiyuan [Cai Yuan] Foreign Trade. He stated that although the owners of the goods in the bill of lading include these two companies, Yuanhua [Yuan Hua] Company was the real owner. Mr. Chen goes on to tell the investigators that many containers had their contents switched at night.

Mr. Chen was asked why containers were switched at night in the Haixin Container Yard. He replied:

In order to escape Customs inspection and evade Customs duties. In order to take out the goods originally in the containers and inconsistent with the Customs declaration, and substitute goods which are consistent with the Customs declaration.

He went on to note that more than 100 containers were switched each month.

After reading these sections to Mr. Lai, the Minister's counsel asked him if he confirmed or denied what he said. The following exchange then took place:¹⁸²

- A. So I would like to say that what he mentioned, that shipping stuff — exchange the stuff at container yard, yeah, it did happen. So exchanging containers is a typical practice at a container yard. So you pointed out that he said that he knew that he was smuggling. So if he was smuggling and he did not — could not make money, do you think that he would do it? Isn't it?
- Q Well, what he's saying is that he is changing goods from — one type of goods that are inconsistent with the Customs declarations for another type of goods, and that that's smuggling.
- A So because it involved import and export, of course the goods will be different. So after this document was forged by the 4-20, you will be — you know, the form like you mentioned.

The final interrogation reports referred to were those of Mr. Yang Qian Xian, former Director General of Xiamen customs.¹⁸³ Mr. Lai confirmed in his evidence that he spoke to Mr. Yang about setting up the appropriate computer system needed to

¹⁸² Transcript, 13 July 2001, page 58, lines 16-28.

¹⁸³ Exhibit C18, tab 5, (unnumbered page 2).

operate the customs office in the Haixin Container Yard.¹⁸⁴ Mr. Lai was asked why Mr. Yang was providing him with this particular equipment. Mr. Lai replied that this was just part of normal business dealings.

Mr. Yang was asked by the 4-20 Investigation:¹⁸⁵ “Did you know that Lai Cheong Sing and others were using Haixin storage for a large-scale smuggling operation?” He replied:

I assumed that Lai Cheong Sing is in the smuggling business when he first established Haixin storage, but the volume would not be large since he does not have an import/export licence. I learned the fact that Haixin storage was involved in large-scale smuggling.

Mr. Lai was again asked if he confirmed or denied the statements by Mr. Yang. He replied that as Mr. Yang gave the statement some time after he had been arrested, he must have had some sort of a deal with the 4-20 Investigation.¹⁸⁶ He did not answer the question.

Mr. Yang was quoted as stating that Mr. Lai gave him a car and a lover by the name of Zhou Bing in order to make Mr. Yang feel grateful to Mr. Lai. Mr. Lai made these arrangements so that Mr. Yang would be lenient with Mr. Lai and not investigate his activities. Mr. Lai responded that Mr. Yang and Ms. Zhou were indeed lovers, but that the 4-20 Investigation had delayed taking the interview and distorted the relationship Mr. Yang had with Ms. Zhou in order to make Mr. Lai appear complicit.¹⁸⁷

¹⁸⁴ Transcript, 13 July 2001, page 60, lines 11-13.

¹⁸⁵ Exhibit C18, tab 5, (unnumbered page 42).

¹⁸⁶ Transcript, 13 July 2001, page 62, lines 3-10.

¹⁸⁷ Transcript, 13 July 2001, page 63, lines 7-31.

Mr. Lai denied that he arranged for Ms. Zhou to become Mr. Yang's lover. He did agree that they stayed in a house he owned. He did not know if they stayed in the house overnight and thought they spent no more than a month in it in total.¹⁸⁸ He was asked about Mr. Yang being given the use of an automobile, but in this portion of the hearing he did not answer the question directly. In re-examination, he stated that he had a Lexus automobile and a driver by the name of Hong Guo Pan who was responsible for the car. Mr. Hong regularly drove the car for Mr. Yang. On short trips, Mr. Yang would sometimes drive himself. In his evidence, Mr. Lai stated that because he had handed the car over to Mr. Hong, he did not lend it out to others, but did not know how Mr. Hong used it at all times.

From the evidence, we conclude that while the vehicle was not given to Mr. Yang, it was, along with a driver, at his disposal.¹⁸⁹

Tampering with Customs Seals

Mr. Lai was questioned about the allegations in a two-page document from the government of China entitled "Facts of Smuggling Offences by Criminal Suspect Lai Changxing".¹⁹⁰ The passage reads as follows:

To prevent customs officers from discovering the true nature of the imported goods, the smuggling ring obtained, via Zhu Jianguo, a Xiamen customs officer who had been bribed, information concerning the numbers of the containers to be inspected, and transported the containers in question to the transit shed under the control of Xiamen Haixin Container Warehouse and Shipping Col Ltd.

Mr. Lai denied that he had done any such thing.

¹⁸⁸ Transcript, 18 July 2001, page 51, lines 6-21.

¹⁸⁹ Transcript, 23 July 2001, page 29, line 20 to page 34, line 11.

¹⁹⁰ Exhibit C5, tab 1.

Cigarette Import and Export Business and the British American Tobacco Company

Mr. Lai was questioned about his role in his cigarette import/export business and his dealings with the British American Tobacco Company (allegedly one of his main suppliers). His evidence was confused, inconsistent, and at odds with documentary evidence filed. Overall, it was not credible.

According to Mr. Lai, he went into the cigarette import and re-export business in 1997.¹⁹¹ Through contacts in a company called the Xiamen Cigarette Factory, he found out he could purchase cigarettes from a company called Ying Mei (in Chinese) or British American Tobacco Company (in English).¹⁹² He stated he took delivery of the cigarettes in Hong Kong and shipped them to Xiamen, where he in turn initially sold the cigarettes to a company called Hua Dong Industrial Company. It had a licence to import cigarettes, something Mr. Lai did not possess. Hua Dong Company in turn sold cigarettes it purchased from Mr. Lai to countries such as Singapore, South Korea and the Philippines. Confusingly, he also stated that British American shipped the cigarettes he purchased directly to his clients in Xiamen.¹⁹³

Additional testimony given by Mr. Lai was that British American Tobacco Company did not want the cigarettes sold to him to be sold outside of China at cut-rate prices. Despite this, Mr. Lai said he regularly sold cigarettes from British American Tobacco Company to Chinese companies that did just that. He was asked if he was not concerned that he was violating his contract with British American Tobacco regarding

¹⁹¹ Transcript, 9 July 2001, page 19, line 25.

¹⁹² Transcript, 9 July 2001, page 20, line 40.

¹⁹³ Transcript, 9 July 2001, page 71, lines 33-35.

sales to third countries. He replied that he was not as he did not violate the law and only sold to Chinese companies. He was of the opinion that the manager of the British American Tobacco Company China office might have known what was going on but did not inform the head office.¹⁹⁴ At another point in his evidence, Mr. Lai suggested that he heard about the policy, but that it was not incorporated into purchase contracts.

He was asked if the cigarettes were shifted from one container to another (re-containerised) once they arrived in Xiamen. He replied:¹⁹⁵

Yeah, because for the containers, you know, used by British-American for delivery have the numbers or codes on it. So if you use original container to ship the goods to Philippines, then they would be able to find out you ship to the product to the Philippines, which, you know, scrap their market. So once those cigarettes were put in the new container with the new number, so then the manager for British-American would not, you know, deal -- would not care about that and it would not be known by British-American companies.

When asked again about the transshipment of cigarettes through China to third countries, he replied that this was the concern of the companies he sold to.

I was not very clear about this, this part. So, as for the dealings with Customs, its all their responsibility.”¹⁹⁶

Mr. Lai was then referred to a “Cigarettes Delivery Report” dated March 1999 and filed in evidence.¹⁹⁷ His counsel asked him:

Q And were these brands that *you were buying and selling*?

A Yes.

[Emphasis added]

¹⁹⁴ Transcript, 13 July 2001, page 23, line 54 to page 26, line 11.

¹⁹⁵ Transcript, 9 July 2001, page 72, lines 16-24.

¹⁹⁶ Transcript, 9 July 2001, page 23, line 39-40.

¹⁹⁷ Exhibit C10, tab 3, unnumbered page 22.

Later in the evidence the following exchange took place:¹⁹⁸

Q Okay. Now, the -- so your involvement was just between British-American on one side and Dong Fang on the other; is that right?

A Yes, I got the cigarettes from the British-American, I sold it to Dong Fang.

He went on to say that while engaged in the cigarette business, he did not see the type of document in question, but knew the brands listed were the ones with which he dealt. The records of the transactions were kept in Hong Kong.

The same Cigarettes Delivery Report shows Mr. Lai's older brother Mr. Lai Shui Qiang and his nephew, Mr. Lai Wen Feng, as being consignees of some of the shipments. However, Mr. Lai stated he never had business with his brother and did not seem to know if he had business with his nephew.¹⁹⁹

As noted earlier, Mr. Lai Shi Qiang, was interviewed by Canadian Immigration officials in March 2001.²⁰⁰ In that interview, he gave extensive details of the Yuan Hua group smuggling operations from 1994 until 1999, and confirmed known involvement in those activities.

A record of an interview with Mr. Lai Shui Qiang conducted by the 4-20 Investigation team was entered as evidence.²⁰¹ The interview was conducted on November 14, 1999 at the Jinyan Hotel in Xiamen.

Mr. Lai Shui Qian was asked how Mr. Zeng Ming Yu, Ms. Tsang's brother, carried out the cigarette smuggling operation. Mr. Lai Shui Qian replied:

¹⁹⁸ Transcript, 9 July 2001, page 71, line 19-22.

¹⁹⁹ Transcript, 9 July 2001, line 30, to page 26, line 34.

²⁰⁰ Exhibit C14, tab 2.

²⁰¹ Exhibit C5, tab 7, unnumbered page 21 (16).

The Yuanhua Group's smuggling activities were of two types: one was to smuggle cigarettes for its own account; the other was to smuggle in cigarettes for a third party and to charge the latter a "premium".

Mr. Lai Shui Qian was then asked why one of the reports gave his name as owner of a shipment.²⁰² He replied that a friend had asked him to smuggle cigarettes for him, and was charged a premium for the service. Mr. Lai Shui Qian also stated that Mr. Zeng Ming Yu looked after the sale of cigarettes that Yuan Hua purchased once they arrived in China.

The claimant was asked why his brother made these statements. He replied that Mr. Lai Shui Qian was doing it to save his life. Mr. Lai then alleged that the evidence of those charged because of the 4-20 Investigation could not be trusted. Only those who had been executed would have been able to exonerate him. He added that his brother had nothing to do with any of his businesses until he left Hong Kong for Canada.

He repeated in his evidence that he did not have a licence to deal in cigarettes in China. What he did was use his money to buy cigarettes off-shore, then sell them to companies that were licensed to sell within China. He had to find a "partner" to do business in China. He had at least²⁰³ six such partners for the cigarette business.²⁰⁴

He stated that the persons who had the most knowledge about the cigarette import/export business were his brother Mr. Lai Chang Biao in Xiamen and his wife's brother Mr. Zeng Ming Yu in Hong Kong. He repeated several times in his evidence that his wife's brother Mr. Zeng Ming Yu was much more familiar with some of the details of the business than he was.

²⁰² Exhibit C10, tab 3, unnumbered page 22. "Goods Delivery Report (Cigarettes) in March 1999" list Mr. LAI Shui Qian as a consignee of a large number of cigarettes.

²⁰³ Transcript, 9 July 2001, page 58, line 23 - 41.

²⁰⁴ Exhibit A17, unnumbered page 1. The companies that are listed as doing business with Yuan Hua are Jiu Zhou, Dong Fang, Kai Yuen, Xin Da Di, Hua Dong and Xiong Hai.

The examination in chief of Mr. Lai ended with him denying any knowledge of cigarettes being brought into China that were originally intended for re-export.²⁰⁵

Under questioning by the Minister's counsel he repeated that he purchased cigarettes from the British American Tobacco Company and sold them to a company called Hua Dong Company. Hua Dong Company had operation rights to import cigarettes into China. He made about 300,000 RMB or \$60,000 CDN per container load, depending on the particular type of cigarette.²⁰⁶

He was asked why the Hua Dong Company would not go directly to British American Tobacco Company to purchase its cigarettes. He gave several reasons. He said that the Hua Dong Company was not familiar with the cigarette business. As well, a pre-signed contract with British American Tobacco Company was needed before cigarettes could be purchased, which he had or could get. Finally, he had the funds to take on business at the financial level required.²⁰⁷ His explanation as to why Hua Dong was agreeable to having him to participate in the business was because both he and Hua Dong Company were making money.²⁰⁸ He also stated that he had no idea where the British American Tobacco Company (China) office was located, but had only dealt with that division's manager.²⁰⁹

²⁰⁵ Transcript, 10 July 2001, page 18, lines 31-36.

²⁰⁶ Exhibit C10, tab 3, unnumbered page 22."Goods Delivery Report (Cigarettes) in March 1999" the number of containers is indicated to be "81+". Taking Mr. Lai's estimate of a value of \$60,000 Cdn per container load, the value could be as high as \$4,860,000 Cdn for this report of one month's delivery.

²⁰⁷ Transcript, 13 July 2001, page 11, line 1 to page 13, line 1.

²⁰⁸ Transcript, 13 July 2001, page 16, lines 20-25.

²⁰⁹ Transcript, 13 July 2001, page 14, lines 9-11.

Correspondence from BAT

Correspondence between British American Tobacco Company and the Minister's Counsel was filed in evidence.²¹⁰ In the correspondence, the Minister's counsel asked British American Tobacco Company (China) for information about its dealings with Mr. Lai, several of his companies and business acquaintances. The company's general counsel responded on July 31, 2001. After a search of the company records, no documentation or accounting entries could be found for any of the parties named by the Minister's counsel.²¹¹ The penultimate paragraph of the letter from British American Tobacco Company to Citizenship and Immigration Canada (CIC) states:

Our investigation, which involved comprehensive reviews by two separate departments, confirms that British-American Company (Hong Kong) Ltd. and B.A.T. China Ltd. have not had any previous dealings with any of the above-named individuals or companies covering the period from the years 1994 to June, 2001.

Mr. Lai was recalled by his counsel several weeks after the introduction of the letter from BAT to address the apparent discrepancies between its contents and his previous testimony. Mr. Lai stated that he had been in contact with Mr. Zeng Ming Yu – the person alleged to know the most about this particular enterprise – since the letter was filed. Mr. Lai alleged that Mr. Zeng told him the cigarette business was done by a company set up by Mr. Zeng and owned by Mr. Lai called Wan Fa. Two companies, Sheng Jun and Jin Bao Li, were also used by Mr. Zeng in the cigarette trade. Mr. Lai did not know who owned these latter two companies. He ended his responses to his counsel by stating that his involvement in the cigarette import/export trade consisted of meeting

²¹⁰ Exhibit C39, tab 1.

²¹¹ Exhibit C39, tab 1. British American Tobacco Company searched its records for transactions between 1994 and June 2001, and found no record of transactions with Mr. Lai Cheong Sing, Yuan Hua Import/Export Company, Hong Kong Yuan Hua International, Fairwell International Ltd., Matho Ltd., Mei Hua Co. Ltd., Wan Shiafo and Bi Rong Lu.

with the British American Tobacco Company representative, Mr. Huang He Xiong, and that after he decided to get into the business, he handed operations over to Mr. Zeng.²¹²

In cross-examination on the new evidence, Mr. Lai was asked about his apparent lack of knowledge concerning his very successful business. His answers were confusing and contradictory. At times he stated that he did not know which corporate entity conducted the business with British American Tobacco Company. At other times he stated he did know, but that the entity that dealt with British American Tobacco Company changed over time. He testified that his dealings with British American Tobacco Company staff were always done under the Yuan Hua name. He also said he had no idea which of his companies were signing contracts with British American Tobacco Company. He then said that eventually there were no contracts with British American Tobacco Company as a mature business relationship existed. He again repeated that the best person to speak to about the business was Mr. Zeng.²¹³ Mr. Lai testified that he had no idea how much money his cigarette business made or how the financial records of the enterprise were kept.²¹⁴ He said that one brand of cigarettes made a very small amount of money – several million dollars.

Under questioning by the Refugee Claims Officer, Mr. Lai stated that Yuan Hua did business directly and indirectly with British American Tobacco Company. He then said it was his Wan Fa Company which bought cigarettes from British American Tobacco Company (something he apparently was unaware of for an extended period of

²¹² Transcript, 25 September 2001, page 44 line 29 to page 46, line 6.

²¹³ Transcript, 25 September 2001, page 46 line 39, to page 53, line 5.

²¹⁴ Transcript, 25 September 2001, page 57 line 7-36.

time). Finally, he said that both his company and his lower-level company dealt with British American Tobacco Company.²¹⁵

In answer to the Presiding Members questions, Mr. Lai stated that over the years 1994, 1995 and 1996 his company did a large volume of business with British American Tobacco Company, and that as a result, contracts were no longer required. He then said he had no idea what records might have been maintained for non-contractual purchases from British American Tobacco Company.²¹⁶

Earlier on in his evidence, Mr. Lai was asked about a series of flow charts filed by the Minister's counsel alleged to show Mr. Lai's cigarette smuggling enterprise.²¹⁷ Mr. Lai stated that all the charts were fabrications made up by the 4-20 Investigation. Mr. Lai spoke of the third in the series which covers the time period between March and May of 1999. He stated that he knew it was fabricated by the 4-20 Investigation team, because it named two people on it who had not worked for Yuan Hua for several years.²¹⁸

He was then asked about statements taken by the 4-20 Investigation team from two men allegedly involved in the smuggling operation. A man known as "Atu" operated a small boat used to take false documentation to ships delivering goods to Xiamen. He stated he delivered documents to captain Zhou Ye Ling of the ship Su Da. Captain Zhou Ye Ling verified this operation in his own statement. Mr. Lai denied this occurred.

²¹⁵ Transcript, 25 September 2001, page 64, line 22, to page 68 line 12.

²¹⁶ Transcript, 25 September 2001, page 68 line 24, to page 69, line 2.

²¹⁷ Exhibit C15, tab 7, unnumbered page 5.

²¹⁸ Transcript, 13 July 2001, page 34, lines 36-54.

Mr. Lai's testimony about cigarette import/export business and his dealings with British American Tobacco Company was not credible. As noted, the evidence was often confused. It was also inconsistent, both within its own context and in comparison to information provided by outside sources.

Mr. Lai's explanation as to why he was able to act for years as a superfluous middleman – at great expense to his customers and to the detriment of his supplier – was not persuasive. His attempt to lay part of the blame for British American Tobacco Company's acquiescence to being undercut with its Hong Kong agent was speculative and not probative.

Mr. Lai did not directly challenge the contents of the letter from British American Tobacco Company. His evidence suggested that British American Tobacco Company had simply not been asked the right question about which part of his business empire it dealt with. Yet his own evidence indicates that he and some of the group of companies unknown to British American Tobacco Company allegedly had a long and mature relationship with the company.

While sometimes Mr. Lai was able to give details of the cigarette trade, he often stated that he knew very little about it and deferred to the unavailable Mr. Zeng. The exculpatory information alleged to be from Mr. Zeng was hearsay coming well after the letter from British American Tobacco Company was entered into evidence. As such, we accord his explanation very little weight.

The lack of records for Mr. Lai's long term relationship with the British American Tobacco Company is telling. As was the case with many of his other enterprises, Mr. Lai failed to present records generated in the normal course of business to the panel. He stated at the hearing that once a transaction was completed, he had no

reason to keep the paperwork as the company was privately held.²¹⁹ We find this explanation contradictory to other evidence and ultimately inadequate. It is implausible that there would be no records kept for a large financial operation.

To repeat, we find very little of his evidence about his dealings with the British American Tobacco Company in the cigarette import/export business credible.

Claimants Lack of Business Documents

Mr. Lai's counsel asked him if the records of his cigarette business were kept after a transaction was completed. He replied that he did not involve himself in this aspect of the business, at least in 1994 and 1995. To get information on this topic he would "...have to ask the financial person about it."²²⁰

It was suggested to Mr. Lai by the Member that he had ample notice of problems that he was confronting in China and knew that an investigation was underway. Mr. Lai was asked why he did not take with him the documents that could confirm that his financial dealings were legitimate.²²¹ He replied as follows:

Because at that time they said the investigation was about the business, so that I have been collaborating with them. But later on it turned out that not target on business. So they were trying to arrest the people that are trying to bribe officials. I did not anticipate that the situation would turn to be so serious by the 4-20 group. If I would have known that, I would have collected the evidence with me. So at that time I was told by 4-20 people that the investigation would last three months, and the maximum, six months, so that I did not bring anything with me.

²¹⁹ Transcript, 12 July 2001, page 73, line 43, to page 75 line 25.

²²⁰ Transcript, 20 July 2001, page 52, line 34-36.

²²¹ Transcript, 20 July 2001, page 19, lines 21-31.

His eldest sister in Hong Kong sent pictures, old business documents and awards to him after he arrived in Canada.²²² It is unclear why he was able to secure these materials and not others relating to his more recent business practices.

The panel made a ruling on an application by Minister's counsel for specific documents of Mr. Lai. Because it is of importance to the claim, the ruling is reproduced here in its entirety.²²³

The Minister's counsel is asking the panel to order that the claimant, Mr. Lai, file his personal income tax records from Hong Kong. Mr. Lai's counsel objects.

The Minister's position is that the records are relevant and would assist the panel in coming to a decision. Personal income tax documents would document, from an independent source, the nature of his assets and business activities, and would give an accurate picture of his business dealings. If Mr. Lai has been telling the truth, says the Minister's counsel, he has nothing to fear.

On the other hand, counsel for the claimant does not see the material as relevant.

The basis for the claimant's fear of persecution does not arise from the Hong Kong income tax documents or his income tax status. The exclusion issue does not concern any alleged breach of the income tax laws of Hong Kong.

Our understanding of the claimant's basic position is that he has been framed and cast unjustly as a criminal by the government of China. This has allegedly been done for political reasons.

Mr. Lai's counsel says that Mr. Lai was a legitimate businessman in Hong Kong and Mainland China, and did not engage in any illegal activity.

The Minister's position is that he was not an honest businessman and was involved in widespread crime.

It is clear from Mr. Lai's evidence that he made a great deal of money over the years in both Hong Kong and Mainland China. Any number of types of documents produced in the ordinary and normal course of business may be relevant to the claimant's position. The list could include his personal Hong Kong tax records. Be that as it may, however, this panel is not going to attempt to pick and choose which documents might be relevant to or definitive of either side's position. We are not going to order the production of Mr. Lai's personal income tax records from Hong Kong.

²²² Transcript, 20 July 2001, page 31, lines 29-48, and found in exhibit A4,

²²³ Transcript, 4 October 2001, page 2, line 44 to page 3, line 46. The interpreter's interjections have been edited from the transcript.

Having said that, however, once all the evidence is in, both oral and documentary, the panel will determine if the evidence presented is sufficient in the circumstances of the entire case to establish the claimant's allegations or those of the Minister, applying the appropriate evidentiary test. At the end of the day, it may be reasonable to expect that documentation corroborating either side's position would have been filed.

[Emphasis added]

In our view, the claimants have provided little of the documentation that would have been produced in the normal course of business to support their allegation that they were legitimate business people. The materials filed by Ms. Tsang with CIC for the Entrepreneur Class and Student Immigration Visa applications about their businesses were by her own evidence (reviewed later in these reasons) incorrect and are untrustworthy.

Both claimants failed to provide adequate reasons for not having presented reliable evidence of their legitimate business activities. We draw an adverse inference in regard to this aspect of their evidence.

Judgements and 4-20 Investigation Statements Implicating Mr. Lai Cheong Sing

A large number of judgements from Chinese courts were filed by the Minister's counsel. As well, a large number of statements were presented to the panel that were obtained by the 4-20 Investigation team. These materials concerned the alleged bribery and smuggling activities of Mr. Lai.

Several of the judgements find that Mr. Lai Cheong Sing paid large bribes to a number of individuals. For example, Cai Hai Peng, the Director of the Intelligence Division of the Investigation Bureau of Xiamen Customs was found guilty in November 2000 of accepting bribes totalling 450,000 RMB and \$40,000 HK from Mr. Lai.²²⁴ This

²²⁴ Exhibit C7.1 judgement no. 138.

is the same person Mr. Lai admitted “loaning” 150,000 RMB, but had no idea if the money had been paid back. Wang Ke Xiang, the Director of the International Liaison Division of the Xiamen City PSB was found guilty in November 2000 of accepting bribes amount to 900,000 RMB from Mr. Lai.²²⁵ Zhang Yong Ding, Chief of the Second Division of Marine Police of the Frontier Defense Department of the Armed Police in Fujian Province was found guilty in November 2000 of accepting bribes in the amount of 785,200 RMB from Mr. Lai.

As noted elsewhere, Mr. Li Zhi Zhou was found guilty of accepting bribes, included three amounts from Mr. Lai: 1 million RMB, \$500,000 US and \$30,000 HK.²²⁶

In these four cases, the Chinese courts have found that Mr. Lai has paid bribes totalling 3.1 million RMB, \$70,000 HK, and \$500,000 US. We find that decision of the Chinese courts add to the credible body of evidence indicating that there are serious reasons to consider Mr. Lai was involved in bribery on a very large scale.

Numerous interrogation reports compiled by the 4-20 Investigation were also filed by Minister’s counsel. They contain allegations that Mr. Lai Cheong Sing was involved in large scale smuggling for a number of years. Several of the statements have been referred to in the review of Mr. Lai’s evidence. Several of the statements that implicate Ms. Tsang in the smuggling operations (reviewed later in these reasons) also implicate Mr. Lai. In our view, these various statements are of probative value and are to be given weight. We find these materials add to the credible body of evidence that establishes serious reasons for considering that Mr. Lai was involved in large scale smuggling through the Yuan Hua group of companies.

²²⁵ Exhibit C7.4 Judgement no. 156.

²²⁶ Exhibit C56.

Taiwan Intelligence Work

The thrust of Mr. Lai's story changes dramatically at this point in his Personal Information Form. He begins a section on his contacts with a former head of Taiwanese intelligence in April of 1999. He states:²²⁷

In April 1999, the recently retired Yue Bing Nan (former head of Taiwanese military intelligence), visited me in Xiamen. He had written out five major pieces of secret military information and asked me to communicate this fact to Beijing with a request that they send someone of his rank to talk to him and an assurance that he would not be harmed. One of the pieces of information was that in 1996 March when PRC* was threatening to launch missiles against Taiwan, Taiwan was aware that Beijing had determined not to arm the missiles. This allowed the then Taiwanese President LI Teng Hui to posture in a very bold way in response to the threats.

* *A meeting was held in Beijing by the Central Military Commission at which no minutes nor taping of proceedings were allowed. [added at the start of the hearing]*

I relayed Yue's request to the National Security people in Beijing. They were very happy and were keen to meet with Yue. They told me to assure him they would do him no harm. National Security in Beijing sent a man named Deng to stay at my reception centre in Xiamen. After reading the five pieces of information provided to me by Yue, Deng had Yue arrested. This was on or about 10 April 1999.

Yue called me after his arrest. He was very upset. I went to the reception centre and argued with Deng, telling him he had reneged on his promise not harm Yue. Deng said it was his superior's decision and nothing to do with him. He told me I was best not to be involved. I went to Beijing intending to plead for Yue's release with the Deputy Minister of National Security. He refused however even to see me.

So far as I am aware, Yue is still under arrest and detained in PRC, facing the possibility of a death sentence. The PRC general and two subordinates who had leaked the information about the unarmed missiles to Taiwanese officials in the 1996 for USD \$500,000 were tried and executed about three months after Yue's arrest. Deng was promoted.

²²⁷ Exhibit A1.1 (a), question 37, lines 105-124.

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IN PUBLIC

The claimant was asked how the Chinese government showed its gratitude for the work he had done. He stated that they offered him armed guards, which he declined. Later, in late 1997 or early 1998, Chen Shi in the Ministry of National Security gave Mr. Lai a special pass or permit for his automobile. The plate allowed him special privileges for tolls, road access and parking fees in China. He would only display it in his car if he needed to use it. It could not be used to travel to and from Hong Kong. He claims he was also given a certificate, which allowed him to request that a person be searched by the Bureau of National Security. He was also given a uniform and an award or citation. He had these items for about two years. It is not credible that the Chinese government on the one hand would encourage his espionage activities and then would reward him for his espionage work with items that could easily disclose his activities to pro-Taiwanese groups and individuals.

After the section in the Personal Information Form on Mr. Yue, the claimant discusses his flight from Hong Kong. He states:

On or about 13 August 1999, the head of the investigation section for Hong Kong immigration, Jing Guang LIANG, a friend of mine, received a communication from Beijing ordering that I be arrested, on the pretext of having fake Hong Kong documents. LIANG told me about the communication and advised me to leave Hong Kong immediately. He suggested I not go to any south east Asian country and urged me to instead go to Canada from where, he said, perhaps I could work something out.

My family and I arrived in Canada on 14 August 1999. We came as visitors. I did not make a claim immediately for protection because I believed, as Liang had suggested, that I might be able to work something out with the PRC authorities.

Final Departure from Hong Kong

Mr. Lai Cheong Sing left Xiamen for Hong Kong on 11 August 1999, and left Hong Kong for Canada on 14 August 1999. In his examination by the Minister's counsel, Mr. Lai stated that two or three days before his departure from Hong Kong, he

received a call from an old friend, Mr. Zuang Ru Shun. Mr. Zuang was the Director of the Municipal PSB Fuzhou City and Deputy Director of the Provincial Department of Public Security. According to Mr. Lai, Mr. Zuang gave him “inside information”²³⁰ that Mr. Lai was to be arrested the next day. The Minister’s counsel asked Mr. Lai several times why Mr. Zuang would give him “inside information”. Mr. Lai replied that he had no idea.²³¹

The Minister’s counsel noted that media reports from China²³² state that Mr. Zhuang was charged with “...accepting 545,000 Yuan worth of bribes from Lai and others; informing Lai and telling him to flee abroad...”. The Minister’s counsel asked Mr. Lai if Mr. Zuang gave him the inside information because Mr. Zuang felt he owed him something as a result of the bribe. Mr. Lai responded that he never bribed Mr. Zuang.²³³

Mr. Lai stated that the decision to leave Hong Kong was not based on the call from Mr. Zuang, but a call from Mr. Liang Jun Guang of the Hong Kong Immigration office warning him that he was accused of forging documents.²³⁴

He stated in answer to questions by the Refugee Claims Officer²³⁵ that the Chinese government wanted him to return to China so that it could kill him in order to prevent people from finding out from him that the 4-20 Investigation was a set-up and a fraud. The claimant was asked why he did not think it important enough to mention this aspect of his claim in his Personal Information Form. He replied in a convoluted manner

²³⁰ Transcript, 17 July 2001, page 12, lines 50-51.

²³¹ Transcript, 17 July 2001, page 13, lines 30-41.

²³² Exhibit C4.1, tab 1, unnumbered page 5, 2nd paragraph.

²³³ Transcript, 17 July 2001, page 13, lines 38-41.

²³⁴ Transcript, 17 July 2001, page 15, lines 38-40.

²³⁵ Transcript, 19 July 2001, page 76, lines 42-48.

that he thought the whole story would be told in the hearing.²³⁶ We find his explanation for his failure to mention the core to his fear of persecution in his Personal Information Form not credible.

Application for Canadian Entrepreneur Class Visa

At one point in the narrative Mr. Lai notes that his wife wanted to leave Hong Kong because she was unhappy with their situation there while he wanted to stay. He states that an application was made for permanent residence in Canada by a consultant on his wife's behalf. She was shown in the application documents as the "guiding mind" of two Yuan Hua Co. subsidiaries. He states:²³⁷ "the documents were in English and my wife did not read them but simply signed them where she was advised to."

Some of the information requested in the form was incorrect or omitted, e.g., his source of income, his previous name, his language. His explanation was that someone else prepared the form and he signed it without verifying the contents.²³⁸ His counsel asked him if the form was ever interpreted to him. He replied that he could not remember.²³⁹

Meetings with Chinese Investigators in Canada

Three members of the 4-20 Investigation travelled to Canada in May 2000 to meet with Mr. Lai. His brother, Lai Shui Qiang came with them. They all posed as members of business delegations.

²³⁶ Transcript, 19 July 2001, page 78, lines 27-37.

²³⁷ Exhibit 1.1(a), Personal Information Form, question 37, lines 80-81.

²³⁸ Transcript, 20 July 2001, page 16 line 29 to page 17, line 51.

²³⁹ Transcript, 23 July 2001, page 5, lines 9-17.

Tricell (Canada) Inc. and Top Glory Invitations

Two witnesses were called by the claimants to give evidence on the circumstances of the visas the group of four obtained to enter Canada.

The first witness was Mr. Wu Gang (Victor Wu), an employee of Tricell (Canada) Inc. The second witness was Mr. Cao Yu, an employee of Top Glory. Both are based in Vancouver. Both were credible witnesses.

Tricell (Canada) Inc. is a wholly owned subsidiary of the China National Light Industry Import and Export Company. At the time relevant to the claim, the parent company was owned by the Chinese government in Beijing. It was part of the Chinese Ministry of Foreign Trade and Corporate Relations. Tricell (Canada) Inc. is involved in the pulp and paper industry. It regularly receives about a dozen trade delegations from China a year. They come to Canada to investigate the pulp market and production facilities. The delegations range from one to eight people.

Mr. Wu explained how the invitation process worked. Once a Chinese company decides and identifies potential visitors, that company will contact Tricell (Canada) Inc. and ask for a letter of invitation. Tricell (Canada) Inc. makes no independent investigation of the individuals in the delegation.

Mr. Wu was asked about a letter of invitation he sent²⁴⁰ dated 15 May 2000. The letter invites three individuals to visit Canada, including Mr. Lai Shui Qiang. Mr. Wu explained that the invitation came about when staff of the China Light Industry Import and Export Corporation called him and requested a letter of invitation for staff of a subsidiary company called China National Pulp and Paper Corporation. Mr. Wu was

²⁴⁰ Exhibit C18, tab 6, added page 17.

familiar with one of the three names on the list. Mr. Wu sent the letter as requested. No inquiries were made of Tricell (Canada) Inc. by Canada Immigration until the delegation arrived at the Vancouver airport. At that time Canada Immigration officers confirmed the invitation with Mr. Wu. The day after their arrival the delegation came to Mr. Wu's office and visited with him for under an hour. Only two of the persons invited by him came to Canada – Lai Shui Qiang and Chen Jian Xin. The one person Mr. Wu knew previously from the company did not come. During the visit Mr. Wu briefed the two men about his company and the local market. Mr. Wu stated at the hearing that he did not know that Mr. Lai's brother, who was posing as the deputy manager of the China National Pulp and Paper Corporation, "was in detention and brought over."²⁴¹ Nor did Mr. Wu know that Mr. Chen Jian Xin was part of the 4-20 Investigation team.

Top Glory is a fully-owned subsidiary of China National Cereals, Oils and Foodstuffs Import and Export Corporation which also has its headquarters in Beijing, China. It is a world-wide operation, having its Canadian office in Vancouver as well as offices in several other countries. The Vancouver office of Top Glory imports Canadian agricultural products into China.

Mr. Cao testified that the Vancouver office is small, having two employees. It receives visitors from China on a regular basis for the purpose of doing business in Canada in the area of grain purchases. The invitees are normally people employed by the parent company. Normally the practice is for the parent company to phone or fax the staff in Vancouver to let them know who is coming to Canada.

Mr. Cao was shown a letter of invitation from Top Glory.²⁴² He explained that his parent company called him and told him three people were coming for visit to

²⁴¹ Transcript, 20 July 2001, page 11, lines 19-20.

Canada, and asked him to send invitation. No reason was given for the visit beyond 'business purposes'. He heard nothing further about the visit until the invitees arrived in Canada. Canada Immigration called from Vancouver airport to advise him of the group's arrival. He was asked to provide verification for the three individuals, which he did.

The individual who had requested the invitation initially was the vice-president of the parent company. Two days after the delegation arrived in Canada, two of the three came to Mr. Cao's office. They stayed about 20 minutes and discussed events at company headquarters. Mr. Cao testified that he did not know that the delegation did not work for the parent company.

Evidence of Susan Gregson

Ms. Susan Gregson of Canada Immigration gave evidence at the hearing by telephone.²⁴³ At the time she gave her evidence, she was involved in the administration of the Canadian immigration program in Beijing and Mainland China.²⁴⁴

She was questioned by counsel for the claimants about visitor's visas issued by the Embassy for Lai Shui Quiang, Jian Xin Chen, Liu Liao Hui, Cai Huan Sheng, the four men who came to see Mr. Lai. She stated she saw the visa application documentation after the four men returned to China.²⁴⁵ Some of the documentation indicates that Lai Shui Quiang was the head of a three-person business delegation.

She noted that the commercial section of the Embassy had received a message of support from the Chinese Ministry of Foreign Trade and Economic Co-

²⁴² Exhibit C18, Tab 6, page 14/15.

²⁴³ Evidence given by telephone on 11 July 2001 from the Canadian Embassy in Beijing, China.

²⁴⁴ Transcript of Evidence of Susan Gregson, 11 July 2001, page 2, line 1-4.

²⁴⁵ Transcript of Evidence of Susan Gregson, 11 July 2001, page 4, lines 45-51.

operation (MOFTEC).²⁴⁶ This was a routine process by which the commercial section could indicate support for a visa application.

Mr. Lai's Evidence on Meeting with 4-20 Investigators in Canada

Mr. Lai sets out the circumstances of his meeting with the 4-20 Investigation team members and his brother Lai Shui Qiang in his Personal Information Form narrative. He states:²⁴⁷

My brother Sui Qiang LAI, his two sons and a son-in-law were arrested in about October 1999. After several months in jail, Sui was released to come to Canada with three members – Xiao Hui LIUI, Mr. Chen and Mr. CAI – of the team investigating me, also known as the 4.20 investigative group.

Sui and the three team members arrived in late May 2000. I met with them on 1 June 2000 at the Delta hotel in Vancouver. The team members told me they were here to do six things: to see me, to tell me what the PRC government wants of me, to advise me to return to PRC, to provide information on certain PRC government officials, to offer my relatives use of their identity documents again if I return but to assert that they are false if I do not and to allow me to keep a portion of my assets if I agree to return.

I did not believe anything they said. I recall well the promises the authorities made to Yue and to my brother Chang Tu. I realized that I was not going to be able to work anything out and accordingly with my family members I commenced a refugee claim on 8 June 2000.

The claimant noted late in his evidence that he had lengthy telephone discussion with the investigators before they came to Canada. The purpose of the calls was to negotiate the terms of the meeting with him in Vancouver.²⁴⁸

²⁴⁶ Transcript of Proceedings (Evidence of S. Gregson), 11 July 2002, page 8, lines 14-15.

²⁴⁷ Exhibit A1.1 (a), question 37, lines 158-168.

²⁴⁸ Transcript, 20 July 2001, page 42, line 41, to page 43, line 11. The evidence is somewhat ambiguous as to the exact timing of the contact.

The claimant was asked²⁴⁹ why he stated in his oral evidence that there were three meetings with the 4-20 investigators in Vancouver, not just one as mentioned in the Personal Information Form. He replied that the reference to one meeting was his error. He did not meet with the investigators on 1 June 2000 as stated in his Personal Information Form, but his associates did. He said there had in fact been three meetings over 3 days – 2, 3, and 4 June 2000.

During the series of meetings, one of the investigators, Mr. Liu Xiao Hui, allegedly told Mr. Lai that “big politics” had settled on him. It is unclear to what the phrase is referring. Mr. Liu asked Mr. Lai if he had financial dealings with government officials. Mr. Liu then said that three people wanted to talk to Mr. Lai: He Yong, Mu Xian Sheng and Mr. Gan.

At the meetings, the investigators gave Mr. Lai a document which promised certain things to him should he return to China and assist in the 4-20 Investigation.²⁵⁰

They were:

- I. [he] can be dealt with leniently and not given the death penalty; (he can be processed leniently, that he will not be sentenced to the death penalty)
- II. if there are significant contributions, [he] will be dealt with extra leniently according to the law; (should he perform major meritorious services, he will be administered particularly lenient according to the law.)
- III. will not arrest LAI Chan Xing’s wife, ZENG Ming Na (will not arrest Zeng, Ming Na, Lai, Chang Xing’s wife.)
- IV. will not send back ZENG Ming Na, Cai Ling Ling, as well as their respective children; (will not repatriate Zeng, Ming Ma, Cai, Ling Ling and their children)
- V. will permit the above-mentioned relative of LAI Chang Xing to freely enter and leave the PRC as well as to study and work in PRC; (will allow Lai, Chang Xing’s above mentioned relatives to enter and exit Mainland China, to study and work in China.)

²⁴⁹ Transcript, 20 July 2001, page 21, line 7 to page 23, line 19.

²⁵⁰ Identified as claimants’ Exhibit A11, tab 5 and Minister’s Exhibit C28, tab 2. Both translations are set out. The Minister’s translation is in parenthesis.

VI. from among the assets of LAI Chang Xing and ZENG Ming Na that should have been confiscated and recovered according to the law, put aside in advance a certain amount of money to pay for the upbringing and education of their children; (among the assets of Lai, Chang Xing and Zeng, Ming Na that were supposed to be seized and recovered according to the law, a certain amount of it can be reserved for his children's daily expenses and education.)

He was given these promises on condition that he return to China and cooperate. Mr. Lai added at the hearing that the investigators also promised him some things not included in the document if he returned, e.g. he could go in and out of the trial court freely and would not be under escort. The investigators were not promising him his freedom.

Mr. Lai said the investigators told him they wanted him to confirm that he had made payments for business favours to a number of government officials allegedly named in the Zhu Niu Niu report.²⁵¹ When Mr. Lai and Mr. Liu argued about some of the allegations, Mr. Liu told him that if he did not return, an arrest warrant [subsequent to the October 1999 warrant] would be issued immediately. Mr. Lai alleges he knew that he would have to fabricate something in order to gain "merit". He was worried about the treatment his wife would receive, and had concerns about his exit and entrance rights should he go back.

Mr. Lai was asked at the hearing why the 4-20 Investigation would want to frame people. He first suggested that there was a power struggle going on. He then seemed to suggest that because someone wanted to get a promotion through the investigation, he would be forced to fabricate evidence. He also stated that he thought he would have to turn in his wife to "get merit".²⁵²

²⁵¹ Transcript, 11 July 2001, page 49, line 26-27.

²⁵² Transcript, 11 July 2001, page 52, lines 11-38.

After the investigators returned home, he had several telephone conversations with them. He was asked why he did not mention this in his Personal Information Form. He replied that he had not thought about it. The following exchange took place between the Member and Mr. Lai:²⁵³

Q You didn't think it was important to mention that the people that you thought were framing you were still in conversations with you after they returned to China?

A Okay. At that time, I mentioned that these officials in China that helped me in some extent -- to some extent in my business. Then I said, really, you know, it never happened. So they asked me if I wanted to go back or not. If not, they would issue a red-coloured warrant and get me back. So they even asked me if I noticed that the RCMP started following me. I said, "No."

Mr. Lai did not answer the question put to him.

One of the documents filed by Minister's Counsel is an affidavit of Mr. Jiang Kai Yuan, a member of the Investigation Division of the Anti-Smuggling Criminal Investigation Bureau of the General Administration of Customs of the PRC.²⁵⁴ Mr. Jiang states that he drafted the six-point promise to Mr. Lai after discussions with Mr. Lai's older brother, Lai Shui Qiang and Mr. Lai himself. The first contact Mr. Jiang had with the claimant was in January 2000. At the end of June or early July 2000, after the group's return to China, Mr. Lai contacted Mr. Jiang to say he did not trust the promises made.

Mr. Lai's dealings with the 4-20 Investigation team in Canada contains several unusual elements. He was in contact with the investigators long before they arrived in Canada. While they were here, he conducted himself more as a host than a victim. The group changed hotels after the first day because Mr. Lai was able to get them

²⁵³ Transcript, 20 July 2001, page 23, lines 20-27.

²⁵⁴ Exhibit C28, tab 2.

accommodation at a more reasonable rate. He stayed in the same hotel with the investigators and his brother for some of the time the group was in Canada. Mr. Lai provided Mr. Liu with a cell phone to use during his stay.²⁵⁵ The hotel account for the investigators was paid through Mr. Lai. Mr. Lai noted that Mr. Liu Xiao Hui gave each of his children \$200 Canadian.²⁵⁶ In re-examination, he stated that they gave the children money because the investigators cared about them.²⁵⁷

In sum, it would appear that Mr. Lai actively participated in the arrangements to meet with the 4-20 Investigation team and well knew that the conditions for his return were going to be discussed. He assisted the group in their stay, and met with them extensively. Clearly he was willing to negotiate with them, the very people he alleges had fabricated everything being alleged against him.

He stated that it was only after the meetings with the members of the 4-20 Investigation team that he sensed that something was not right. He said he realized they were trying to trick him and provide false evidence.²⁵⁸ It was then that he decided to make a refugee claim.²⁵⁹ Yet, he continued to communicate with them even after he made his claim.

Mr. Lai's initial recollection of the details around the June meeting was at odds with the details he later recounted. However, we have no doubt that the meeting took place. It is clear that Mr. Lai was attempting, over an extended period of time, to negotiate the best possible terms for his and his family's return to China. His willingness

²⁵⁵ Transcript, 23 July 2001, page 54, lines 38-42.

²⁵⁶ Transcript, 23 July 2001, page 49, lines 25-27.

²⁵⁷ Transcript, 23 July 2001, page 49, line 29-31.

²⁵⁸ Transcript, 11 July 2001, page 51, lines 37-38.

²⁵⁹ Transcript, 23 July 2001, page 54, line 38-39.

to enter into these discussions with the 4-20 team suggests recognition on his part that the authorities had substantial reasons to pursue him. If what they were alleging was a 'complete fabrication', why would he enter into such protracted negotiations with them at all? Only when he determined that what was being offered was not up to the mark did he decide to make a refugee claim, not before. He did not give an adequate explanation for not stating in his Personal Information Form that he had continued contact with the Chinese investigators.

Delay in Claiming Refugee Status

Mr. Lai Cheong Sing left Hong Kong for Canada on August 14, 1999. Taking his story at face value, he knew why the authorities wanted to arrest him - he was a pawn in a power struggle within a government bureaucracy. Despite the supposedly clear political implications of what was going on, Mr. Lai and his family did not claim refugee status until 8 June 2000, some ten months after their arrival in this country. In re-examination, Mr. Lai stated that after the three meetings with the members of the 4-20 Investigation, he sensed that something was not right and then decided to make a refugee claim.²⁶⁰

At his hearing, his counsel asked him about the delay in making his claim to refugee status.²⁶¹ Mr. Lai replied that he had heard the investigation had to be completed in three months time. He got his information from Mr. Zhang Guo Sheng, a member of the 4-20 Investigation group and director of the Investigation Bureau of the General Administration of Customs. Mr. Zhang gave this information to a Mr. Qian Ri Chang who in turn told Mr. Lai between May and June of 1999 that it would continue

²⁶⁰ Transcript, 23 July 2001, page 54, line 38-39.

²⁶¹ Questioning begins in transcript, 11 July 2001, page 40, line 52.

until August 1999. Confusingly, Mr. Lai then said that the investigation was to start in August. That is when Zhuang Ru Shun and Yang Qian Xian were arrested. He then said that the information he had was that the investigation was to last three to six months.

Mr. Lai was then asked what the connection was between this information and not making a claim. His answer was not intelligible. He stated:²⁶²

Yeah. Because this -- the investigation of this case will only cause the damage to the reputation of the company. I just let them do the investigation. So whether I have done something or not, so investigation will have conclusion. So the report written by Zhu Niu Niu was about smuggling of Yuan Hua Company.

The following exchange took place when Mr. Lai's counsel repeated the essential question in an effort to clarify the previous response.²⁶³

Q Why not make a refugee claim when you arrived?

A Because I feel that the investigation would have nothing to do with me, so we just let the 4-20 group to do it.

Q But you had been told there was a warrant for your arrest.

A Yes. This warrant was issued on October 22nd, 1999, by Lu Yuan Zheng.

Q ... So why would you say the investigation had nothing to do with you?

A I don't understand your question.

Q I mean, what I heard you say was the investigation had nothing to do with you.

A So what I meant was that the investigation was about smuggling, because I was not involved in smuggling, so that I did not have a concern.

...

Q Then why leave Hong Kong at all?

A Because I knew too much inside information. I knew how they operate things. Therefore, I left first so -- so the first place after leaving Xiamen was to go to Hong Kong. After Yang Qian Xian and Zhuang Ru Shun were arrested ... I had no intention leaving Hong

²⁶² Transcript, 11 July 2001, page 42, lines 25-28.

²⁶³ Transcript, 11 July 2001, page 42, line 40 to page 44, line 41.

Kong. Then it was Liang Jin Guang who told me that Beijing authorities was trying to arrest me.

A Liang Jin Guang said he saw a piece of paper in his office that shows my name and my wife's name.

Q ...But what I'm trying to find out now is why what prompted you to leave Hong Kong didn't also prompt you to make a refugee claim.

...

A So because I believed that the investigation will have a clear result. Then later on, I found it's not the case. So one of the persons mentioned in the *in camera* hearing this morning told me some information. Then 4-20 came. Then on May 31st, 2000, in Vancouver, 4-20 people came to talk to me.

...

Q All right. So -- but let's -- I will come to that in a second, believe me. But you thought the investigation would have a clear result. What result?

A Because the Yuan Hua Company could not do the import and export business. So if they conduct investigation, they will find out about that.

We find the answer given by Mr. Lai as to why he did not claim refugee status early on convoluted and contradictory. In the end, he states he thought the investigation would exonerate him because his business could not conduct import and export activities. Yet he alleged that the investigation was initiated as part of a politically driven plot, not one rooted in reality. Even when he knew a warrant had been issued for his arrest, he continued to put off making a refugee claim for 8 months. In any event, Mr. Lai actively negotiated with the 4-20 Investigation team that eventually came to Canada, before, during and after their visit.

We find that Mr. Lai has not provided an adequate reason for not claiming refugee status at the earliest possible opportunity. This is one factor of many going to the lack of Mr. Lai's subjective fear of persecution.

A section of the Personal Information Form deals with the arrest of members of the Mr. Lai and Ms. Tsang's families.²⁶⁴

After I left Hong Kong, Liang arrested my wife's sister, Su Lan Tsang, and her two children. They were taken initially to Guang Zhou where my wife's sister was jailed, ostensibly for having fake documents. The children were not detained. My wife's sister was released after about a month. She went then to Xiamen where she complained about the treatment she had received in Guang Zhou. She was then arrested and detained in Xiamen for about another five months. The authorities also seek to arrest her husband, who is in hiding. She was questioned about me.

My wife's father was also arrested, detained, beaten and later released. My wife's brother Ming Tie Tsang was arrested and remains in prison in Fujian though he was in no way connected to me or Yuan Hua. My wife's other brother, Ming Yu Tsang, was also sought by the authorities but fled and is in hiding.

I called Liang and asked him why he had arrested by wife's sister and her two children. He said Beijing had demanded it and there was nothing he could do. I asked him when I could return. He said I could go back any time but I would not be able to ever leave again. Liang, incidentally, was killed in a fire at the Hong Kong immigration building in about August 2000.

My parents are deceased. The situation of my siblings since I left Hong Kong is as follows:

My sister Qiu Ju LAI is in hiding. She is wanted by the PRC.

My sister Hao Lai's two sons were arrested and remain in jail in Xiamen. I understand they were beaten, starved of sleep, questioned about me and coerced into confessions for which they are now on trial.

My sister Lian Zhi LAI's son was arrested and remains in jail in Ziamen. I understand he was also beaten, starved of sleep, questioned about me and coerced into a confession for which he is now on trial.

My brother Chang Biao LAI has mental problems. He has been hospitalized in Beijing for about the last two years. Nevertheless he is kept under surveillance by PRC authorities.

My brother Chang Tu LAI fled to Australia. He was enticed back to PRC on promises of leniency if he cooperated with the PRC authorities. According to media reports, he is now facing the death penalty. (and since has been sentenced to 15 year imprisonment).

It would appear that at least some of these events took place shortly after he arrived in Canada. However, the arrests did not spur him on to make a refugee claim.

²⁶⁴ Exhibit A1.1 (a), question 37, lines 133-157.

The claimant ends his Personal Information Form with a summary of why he is claiming refugee status in Canada. He states:²⁶⁵

In summary, I claim to be Convention refugee owing to political opinion.

The PRC government wanted me to participate in a fit-up of LI for political purposes. I refused. Consequently, the PRC government, which previously had lauded my business enterprises and which pressed me into service for its National Security department, came after me.

If I return to PRC, I believe I will, for political reasons, be arrested, detained, subjected to an unfair and secret trial probably without legal representation, convicted on whatever charges the PRC government chooses to assert against me and executed. My experience of the PRC government, the treatment of Yue and the treatment to date of my family members bears this out.

Summary of Credibility Findings

Overall, Mr. Lai Cheong Sing was not a credible or trustworthy witness. He often failed to answer questions put to him. Many times his answers were convoluted and confusing. He failed to mention a significant number of major incidents in his Personal Information Form that were central to his claim and did not provide adequate reasons for the omissions. On the other hand, he provided extensive information in his Personal Information Form and at his hearing on issues that were at best peripheral to his claim. He did not claim refugee status in Canada early on, but waited for many months to seek the protection of Canada. His explanation for the delay is not credible or reasonable.

There are issues of credibility that are of particular note. We find it implausible that Mr. Lai would be asked to perform espionage work in Hong Kong by the Xiamen Deputy of Public Security without that person knowing the reasons why Mr. Lai wanted to leave the area. We do not find his evidence on his change of name credible. We do not find it credible that he was asked to spy on persons involved in the 1989

²⁶⁵ Exhibit A1.1 (a), question 37, lines 169-176.

Tiananmen Square demonstrations. We do not find the evidence of a clandestine transfer of a list of names of Hong Kong bureaucrats to the Chinese government credible.

We do not find it credible that Mr. Lai has almost no recollection of his multi-million dollar real estate holdings in Hong Kong. We note there were no documents provided as to any of these holdings.

As to the key allegations in his claim, there has been no cogent explanation given as to why officials in the government of China would need to instigate an elaborate, costly, and far-reaching investigation to remove one official from a position. The claimant would have the panel believe that the government of China can do anything it wants to get at him, but on the other hand is incapable of replacing one bureaucrat.

The claimant failed to adequately explain why he failed to mention two substantial loans to Mr. Li Ji Zhou in the first version of his Personal Information Form. His evidence as to his role in the investigations surrounding Mr. Li is not credible.

The amount of money given out by Mr. Lai to Mr. Li Ji Zhou and others amounted to many million RMB. Some of the money was described as loans. Yet no records were kept, nor was Mr. Lai even aware if some of the funds were repaid. Many of the people who benefited from his largesse have been convicted for obtaining bribes. Many of those were involved in customs enforcement in China. Mr. Lai's explanation that these amounts were nothing more than simple gifts or business loans is not credible.

Mr. Li Ji Zhou, a senior bureaucrat, confirmed in his evidence that he understood himself to be receiving bribes from Mr. Lai. Mr. Lai received consideration from Mr. Li for the money in two known incidents.

Mr. Lai never adequately explained why one of the most important episodes in his claim was never mentioned in his Personal Information Form, the attempt

by Zhu Niu Niu to blackmail him. The story of the blackmail attempt itself is problematical and not credible. The information allegedly used in the attempt to blackmail Mr. Lai implicated the blackmailer. We do not find this aspect of the evidence credible.

Mr. Lai described in some detail the operations of the Red Mansion. We do not find his evidence as to a PSB presence or operations in the Red Mansion credible.

We do not find it credible that he did not keep any business records. It is not credible that he and his staff could rely on his memory for such a large number of business transactions. He could even not remember if a number of 'loans' he made had been repaid.

Mr. Lai's evidence as to the Haixin Container Yard and the Customs office at the cite was confused and not credible. His evidence about his cigarette business was at times evasive. His evidence as to his dealings with the British American Tobacco Company was confused and not at all credible.

We draw an adverse inference as to the absence of business documentation that would go to establish his allegation that he and his wife were running legitimate businesses. While corroboration of sworn testimony is not strictly necessary, it is reasonable to expect in these circumstances that there be documentation to support their protestations that they were running legitimate businesses. Several employees of the Yuan Hua Group and lower level customs bureaucrats gave detailed accounts as to how the smuggling operations were carried out.

Mr. Lai alleged at his hearing that the government of China wanted him to return so that it could kill him. It wants to kill him so that people don't find out that the 4-20 Investigation was a set-up and a fraud. It is not all clear why he must be silenced now, given what he has already said. When asked why he did not mention this key issue

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IN PUBLIC

Ms. Zang went on to describe the contents of her book. It became clear that the primary source of the information in it was the claimant Mr. Lai Cheong Sing. Ms. Zang appears to have been uncritical of what he told her. Other information she relates in

²⁶⁶ XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
²⁶⁷ XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

her book was gleaned from newspaper reports and contacts who spoke to people generally in Xiamen. One source referred to in her evidence was a taxi driver who spoke to her researcher.

She also gave vague testimony about persons that she had heard were tortured by the 4-20 Investigation team. Her sources were all second hand. In some instances, she did not give the name of the person allegedly tortured, but only that of their spouse.²⁶⁸ Another unattributed source reported to her that the accused in some of the Xiamen smuggling cases were not allowed to hire lawyers once they were arrested and were not allowed to confer with their lawyers in private. In her words, “The lawyers could not argue for their clients for anything.”²⁶⁹

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In answer to questions by the Minister’s counsel, she confirmed that the name she gave at the start of her evidence, Sheng Xue, was not her real name, but a name she used as a journalist. On the second day of her testimony, the start of the hearing was delayed briefly. Ms. Zang was late in arriving from a radio interview about her book. To say the least, her manner before the panel was most offhand.

She noted in her evidence that she had a theory that Chinese entrepreneurs were regularly victimized by the Chinese government. She felt Mr. Lai Cheong Sing fell

²⁶⁸ Transcript, 12 October 2001, page 19, lines 14-44.
²⁶⁹ Transcript, 12 October 2001, page 20, lines 30-31.

into this category of persons. Ms. Zang appeared as a guest on a television program on 27 July 2001 called “Straits Today”, on Talentvision TV. A transcript of Ms. Zang’s comments was entered into evidence by the Minister’s counsel.²⁷⁰ She states in the program:

Sometimes people asked me if Changxing LAI (sic) manipulated me. I could say that it was I who manipulated what had happened to him to express what I wanted to say for years.

Ms. Zang also states several times in the interview that she is not able to conclude whether Mr. Lai was a smuggler. She says the matter is too complicated. She maintained this position at the hearing.²⁷¹

After the close of the hearing, an excerpt from the Singtao Daily newspaper of 25 November 2001 was filed.²⁷² The article states that the books “Unveiling the Yuan Hua Case” and “Tianamen Papers” have been banned in China. They are described as being based on fabrications and distortions.

This witness was presented as a fact witness. Most of the information she proffered was given to her by Mr. Lai Cheong Sing and, to a much lesser degree, by a series of ‘sources’ within China and Hong Kong whose investigatory expertise remains unknown. She appears to have been an uncritical journalist.

Her motivation in writing her book suggests that she was pursuing a long held hypothesis rather than confirming the information she received and following it where ever it might lead. Even after writing an extensive book on the alleged frame-up

²⁷⁰ Exhibit C42, tab 7, page 12-21.

²⁷¹ Transcript, 12 October 2001, page 29, lines 35-41.

²⁷² Exhibit XA10.

of Mr. Lai by the Chinese government, she was unwilling to state publicly whether she believed he was guilty or innocent of smuggling.

This witness' testimony does not add to the overall body of probative evidence available to the panel on the facts of the case. We give it little weight.

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6. EVIDENCE CONCERNING TSANG MING NA

Ms. Tsang Ming Na's Background

Ms. Tsang Ming Na gave evidence at the hearing.²⁷⁹ She identified her Personal Information Form²⁸⁰ and confirmed that its contents were truthful. She noted that it had recently been translated to her. The narrative section of the form is brief, and is set out in its entirety.

I claim to be a Convention refugee. I am a citizen of the People's Republic of China (PRC). I am outside that country. I am unwilling and unable to avail myself of the protection of that country because of a well-founded fear of persecution by reason of political opinion and membership in a particular social group. Without limiting the generality of the foregoing, I base my claim on a number of facts, including, but not necessarily limited to the following general matters:

I was born on 30 November 1964 in Fujian, PRC. ON [sic] 25 October 1981, I married Cheong Sing LAI, with whom I have three children.

I base my claim to be a Convention refugee upon substantially the same facts and matters related in my husband's Personal Information Form question 37 statement.

Like my husband, I fear persecution based on political opinion and, in addition, membership in a particular social group, that group being the family members of Cheong Sing LAI. The PRC government has demonstrated its willingness to arrest and detain persons connected to Cheong Sing LAI, *including: measures taken against my family: (the*

²⁷⁹ Because of the time demands of other witnesses, her evidence was heard over 5 days. Evidence was heard in July, September and October, 2001. Her evidence begins in the transcript on 23 July 2001, page 56, line 31.

²⁸⁰ Exhibit 1.2(a).

Tsang Family): Chuan Zhang TSANG, Father – being monitored, arrested and jailed 3 times by 420 team; Xiu Meng CAI, Mother – was subjected to beating, arrest and jailed since December 2000 (about 1 month after my arrest in Canada) by 420 team; Sulan TSANG – Sister – jailed 3 times, being monitored, Sulan’s 2 children were also taken back by PRC authorities to China from HK; Ming Yu TSANG, Brother – in hiding; ZHUANG, Brother’s Girlfriend, - arrested and jailed; Ming Tie TSANG, Brother – jailed, sentenced to 10 years. My and my children’s remaining with Cheong Sing LAI abroad in defiance of the PRC government’s desire for him to return and my nominal directorships in Yuan Hua companies provide I believe sufficient pretexts to the PRC government for me and my children to be persecuted if returned to PRC.

This here is a general summary of facts to the best of my recollection, knowledge and belief. I will provide further details upon giving testimony as required. There may be further facts which may be recalled later on or which I may become aware of later on.

[Portions in Italics are additions sworn to on 22 July 2001]

The claimant appeared to be fatigued and somewhat distracted at the beginning of the hearing, at which time she was in custody pursuant to an order of the Adjudication Division of the Immigration and Refugee Board. She stated when she began her evidence on 23 July 2001 that she was taking medication daily “...to get by...” but did not indicate what type of medication. In any event, she was lucid and appropriately responsive to the questions asked. She was released from custody, on or about 2 August 2001. Once released from custody, her demeanour improved.

Ms. Tsang is 37 years old. Her parents are in Fujian. She has two younger sisters and two younger brothers. Her sisters are also in Fujian. One of her brother’s whereabouts are unknown. One is in jail, as is her mother.

The claimant has about four years of education. Although she stated she reads books with difficulty and she could not write beyond signing her name, the panel noted that during the hearing she regularly browsed through newspapers.

Her Personal Information Form indicates she worked on the family farm from 1977 until 1981. She married Mr. Lai in 1981. She stated that thereafter she did not work, but looked after her children.

Ms. Tsang's Business Activities

In direct answer to her counsel's question, she said she never did anything for any of her husband's businesses.²⁸¹ However, she then went on to explain that she did have an office in Hong Kong, although she seldom used it. She gave a somewhat surreal description of her office and what she did there. She said her office had a desk and chair, a shelf with nothing on it, and little else. As far as spending time in the office she said she "...just went in and sit there for a little while."²⁸² She alleged she had no secretary, but if she needed to sign something, an employee would be sent to her with the documents. She alleges she had no idea as to the content of the documents.

In answer to questions by the Minister's Counsel, Ms. Tsang stated that she went into her Hong Kong office once or twice a week. She would sometimes sign documents brought to her there. Different staff would bring the documents to her, sometimes a clerk or telephone receptionist.²⁸³

In answer to questions from the Minister's counsel, Ms. Tsang stated that she signed whatever documents were given to her to sign. She had no knowledge of their content. She also claimed that she had no idea what products were being traded or if the companies were profitable. In short, she alleges she knows nothing about her and her husband's business interests.²⁸⁴

The claimant confirmed in cross-examination that the Yuan Hua group owned three buildings close to the Red Mansion in Xiamen, including an office building where Ms. Tao Mi worked. Ms. Tsang stated that she did not have an office herself at

²⁸¹ Transcript, 23 July 2001, page 58, line 52 to page 59, line 1.

²⁸² Transcript, 23 July 2001, page 60, lines 7-8.

²⁸³ Transcript, 14 September, page 33, line 25-27.

²⁸⁴ Transcript, 26 July 2001, pages 29-34.

that location but did see Ms. Tao there from time to time. Ms. Tsang believed Ms. Tao was working in the cigarette business run by the Yuan Hua group.

Activities of Ms. Tsang Ming Na in the Businesses of Mr. Lai Cheong Sing

Mr. Lai Cheong Sing was questioned about his wife's activities in his business interests. The following exchanges set out his view of the situation.²⁸⁵

Q Okay. You came -- oh, the other thing I wanted to ask you about is what was the involvement of your wife in your business?

A Tsang Ming Na is my wife, so all the properties were owned under the name of both of us. So every time when we went to applied for the business licences, so we always have my wife's name in it. So that's part of it.

Q Okay. And what's the rest of it?

A That's about it actually. She did not participate in the companies' business. But when we were in Hong Kong, when I was away and for the matters like the payroll and some office management, so I would phone my wife and instructing her to issue the payment of the money. Usually she just stay home looking after two children.

Q Okay. And when you say "issue the payment of the money", what did she actually have to do to issue payment of the money?

A So the company needs money, so only there were three people in the company who can sign to the payment of the money. One is Zeng Ming Yu, one is my wife. Okay. My wife can only sign it if she has my instruction.

...

Q All right. Did she ever come to work when you were there?

A Yes. Sometimes she might come to office and have a look.

Q And if she was there when you were there, what was she actually doing?

A Not much. Just, you know, have a look.

Q And what about in Xiamen. Did she ever do any business for you in Xiamen?

A No.

²⁸⁵ Transcript, July 11, Page 40, lines 13-50.

Ms. Tsang on the Statements of Ms. Tao and Ms. Cai

Ms. Tsang was questioned about statements taken by the 4-20 Investigation from Ms. Tao Mi, a former employee of Yuan Hua.²⁸⁶ Contrary to Ms. Tao's statement, Ms. Tsang denied that Ms. Tao was ever her secretary.²⁸⁷ Ms. Tsang also denied the allegation that she was in charge of smuggling operations for the company. She denied taking over the smuggling business in Xiamen in 1999. She stated she spent more time in Xiamen starting in that year because her husband asked her to do so as a result of his brother's medical condition. She denied having seen documents called "Goods Delivery Reports, Cigarette."²⁸⁸ She denied having such documents on her desk in Xiamen as alleged by Ms. Tao, stating that she had no office in Xiamen.

Counsel for the claimant reviewed a statement by a Hong Kong business woman, Ms. Cai Shuang Min, to the 4-20 Investigation.²⁸⁹ In the statement, Ms. Cai describes meeting Mr. Lai in Hong Kong in about December 1998. She subsequently met with Ms. Tsang in 1999 to discuss the transport of goods into China. Ms. Cai states Ms. Tsang gave her a business card. In answer to her counsel, Ms. Tsang said she could not remember doing so.²⁹⁰ Ms. Cai alleges that Ms. Tsang arranged for the transport of goods to China through the Yuan Hua Group. Ms. Cai paid Ms. Tsang between 50,000 and 60,000 RMB per container load, shipping between 50 and 60 containers.

²⁸⁶ Exhibit C5, tab 10, page 35.

²⁸⁷ Transcript, 23 July 2001, page 62, lines 44 - 47.

²⁸⁸ Exhibit C10, unnumbered page 8.

²⁸⁹ Exhibit C5, tab 6 unnumbered page 24.

²⁹⁰ Transcript, 23 July 2001, page 65, lines 17-20.

Ms. Tsang stated in her evidence that she was never asked by Ms. Cai to ship containers. However, she went on to say: “So if that’s a thing between two companies, I have no idea. That’s my husband’s business.”²⁹¹

The translation of Ms. Cai’s statement indicates that she paid Ms. Tsang by wiring “...250 Hong Kong dollars”²⁹² to Ms. Tsang’s personal account. In answer to her counsel’s questions on the possible wiring of money, Ms. Tsang stated:

Yeah, whether she wired money or not, I have no idea because there were many, you know, money transactions in and out of account. That could be, you know, under my husband’s instructions, but I have no idea.

When Ms. Cai was asked what kind of customs clearance procedures were followed by Ms. Tsang, she replied as follows:²⁹³

I knew Zeng, Ming Na would not use the normal or legal way to clear Customs in China. Therefore, I did not ask her to clear Customs; however, there would be legal documents if they cleared Customs through the normal ways. Zeng, Ming Na did not go through those procedures.

...

The truth was my goods were smuggled into China, and I retrieved my goods in China to deliver them to my clients.

Ms. Tsang’s answers to the questions about dealing with Ms. Cai were at times noticeably ambivalent. She seemed to be saying that some business dealings might have been going on between Ms. Cai and her husband, but she was unaware of what they might have been.

²⁹¹ Transcript, 23 July 2001, page 66, lines 38-39.

²⁹² Exhibit C5, tab 6 unnumbered page 25. It is unclear to what “250 Hong Kong dollars” refers. 50 containers at 50,000 RMB equals 2,500,000 RMB

²⁹³ Exhibit C5, tab 6 unnumbered page 26.

Ms. Tsang's Entrepreneur Class Visa Application

Ms. Tang was asked about the form prepared on her behalf and in her name as principal applicant for emigration to Canada. She could not recall if the contents of the "Immigrant Application Form – Business"²⁹⁴ had ever been translated to her. It appears to bear the same signature²⁹⁵ as her Personal Information Form. Under cross-examination by the Minister's counsel, the claimant confirmed that she did not know the contents of any of the declarations in the form concerning her business interests. She alleged the immigration consultant had written everything in the form and she did not know what was said. She also stated that she had no knowledge of any of the attachments to the form. Yuan Hua employees had completed the documents for her. When questioned again on this point several days later, she again denied having any knowledge of the contents of the form. She testified that her company staff and the immigration consulting company had drafted everything in it.²⁹⁶

When asked about business records attached to the CIC form that indicated she attended board meetings, she stated that there were no such meetings. When asked if the document was made up, she replied that "They wrote it out", "they" presumably being her staff.²⁹⁷ She went on to say she had no idea when the particular document was signed. She said:²⁹⁸

... So if it's necessary for me to sign, Ms. Cai²⁹⁹ from the company will provide them to me to sign. Because I was not in charge of anything, therefore, even if she does need -- did need me to sign anything, she would not bother to explain what it was in the content for me to sign it, just ask me to sign it.

²⁹⁴ Exhibit C12, page 2.

²⁹⁵ Exhibit C12, page 13 of the Exhibit, page 9 of the document.

²⁹⁶ Transcript, 14 September 2001, page 7, lines 16-20.

²⁹⁷ Transcript, 14 September 2001, page 9, lines 10-47.

²⁹⁸ Transcript, 14 September 2001, page 10, lines 33-37.

²⁹⁹ This is not a reference to Ms. Cai Shuang Min.

Overall, she repeatedly denied having any knowledge of any of the numerous documents she signed on behalf of a number of companies. The materials submitted in support of her business immigration application run to just under 200 pages. Her signature appears approximately 25 times in those materials alone. She alleged she signed what she was told to sign by her husband or her employees. She claims to have no knowledge of the contents of the documents submitted on her behalf to emigrate to Canada.

Later in the hearing, she was asked:³⁰⁰

Q I'm wondering why documents that everyone knows you can't read are routinely given to you for signature. Do you have any idea?

A Well, usually if my husband is absent, there is a company document need to be signed, he will tell me. I would also trust him and trust the company staff who prepared it.

On the issue of her involvement in various business enterprises, she is at best reckless in how she conducted herself. If her evidence is taken at face value, she was indifferent when applying to immigrate as to whether she was misleading Canada Immigration. According to her, she never read any of the documents put before her, so she could have no idea what anything said.

When asked about a tax form she signed that was included in the CIC application, she stated that there may have been two Mei Hao companies in Hong Kong. One was a limited company and one was not. This explained why both she and her husband had stated at different times that they each were owners of Mei Hao.

³⁰⁰ Transcript, 24 September 2001, page 64, lines 26-32.

Ms. Tsang's Relatives in China

Ms. Tsang was asked about the arrest of her relatives in China. She stated that the authorities took in five of her relatives. Of that group her father, younger sister, and sister-in-law were released. At the time she gave her evidence her mother and another sister in law were still in detention. Her brother Tsang Ming Tie has also been arrested.

She stated that her younger sister Zeng Shu Lan was arrested three times in succession.³⁰¹ The first time she was in custody for about two months, the second time about five months and the third for an unknown period of time while the claimant was in custody in Vancouver. The husband of Zeng Shu Lan, Zhuang Jian Qun, left China in August or September 1999.

Ms. Tsang then spoke about the treatment of her father, Tsang Chuan Zhang. She stated that he was arrested two or three times, and was tortured and beaten while in custody. She stated her father is still in fear as a result of his treatment in custody. According to Ms. Tsang, her father never worked for the Yuan Hua Group. He was arrested because of her. Her mother is still in jail, and has been arrested two or three times. She stated that after her father was released from custody in December 2000, he lived in Jinjiang. He never lived in Xiamen.³⁰²

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³⁰¹ In her evidence she notes that the children of Zeng Shu Lan were also arrested but released to the family.

³⁰² Transcript, 24 September 2001, page 57, lines 12-18.

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Minister’s Counsel referred to a document filed by the claimants³⁰⁶ indicating that Ms. Tsang’s mother, Ms. Cai Xin Meng, was suspected of “the crime of harbouring” as of 31 March 2001. Another document indicated that Ms. Zhuang Shao Cheng, the girlfriend of the claimant’s brother, Tsang Ming Yu, was also suspected of “the crime of harbouring” as of 23 March 2001. Both Ms. Cai and Ms. Zhuang were in custody as of the dates of the documents. It was suggested to Ms. Tsang Ming Na that her mother and her brother’s girlfriend were accused of harbouring Mr. Tsang Ming Yu.

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³⁰⁶ Exhibit A14, tab 3.

He is not in custody but is wanted by the authorities. Ms. Tsang Ming Na denied any knowledge of the reasons for the charges.³⁰⁷

After the close of the hearing, counsel for the claimants filed a document described as the “Judgement by Fujian Province JinJiang City People’s Court Re Zhuang Shao Cheng and Cai Xiu Meng” dated 8 February, 2002.³⁰⁸ That document states that the two accused were found guilty of harboring the fugitives Lai Cheong Sing and Tsang Ming Na by arranging for funds to be forwarded to them in Canada. This was done after they received several calls from the son of Mr. Lai and Ms. Tsang, Lai Jun (sic) Wai. Both were sentenced to one year and six months imprisonment for harboring. Both received credit for time served in detention prior to sentencing. There was no suggestion in the judgement, nor has it been suggested by the parties, that Lai Chun Wai is at any risk because of his role in securing funds for his parents.

Counsel for the claimants argues in written submissions filed with the materials³⁰⁹ that these convictions establish that family members of Mr. Lai and Ms. Tsang are being persecuted in China and that the convictions assume the guilt of Mr. Lai and Ms. Tsang. Therefore, the result of any trial should they return is a foregone conclusion.

In reply,³¹⁰ counsel for the Minister argues that the section used to charge Ms. Zhuang and Cai is one of general application, found in section 310 of the Criminal Law of China. That article is as follows:³¹¹

³⁰⁷ Transcript, 14 September 2001, page 25, lines 34-44 and page 28, lines 1-5.

³⁰⁸ Exhibit XA13.

³⁰⁹ Written submissions dated 4 April 2002.

³¹⁰ Written reply dated 9 April 2002.

³¹¹ Exhibit C22, Criminal Law of China, page 261, Article 310.

Whoever knowingly provides a hiding place, money or property to a criminal, or helps the criminal escape or gives false testimony to protect the criminal shall be sentenced to fixed term imprisonment of not more than three years, criminal detention or public surveillance; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.

Counsel for the Minister further submits that Ms. Zhang and Ms. Cai were prosecuted, pleaded guilty, and were sentenced for a crime clearly set out in Chinese law.

Counsel for the claimants responds³¹² that in essence Chinese criminal law, as found in article 310, allows for persecution. He repeats his argument that the characterization of Mr. Lai and Ms. Tsang as criminals indicates their conviction upon return is assured.

Article 310 of the Chinese Criminal Law appears to be similar in effect to sections 23(1) and 592 of the Canadian *Criminal Code*. Section 23(1) states:

Accessory After the Fact

An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.

Section 592 states:

Accessories After the Fact

Anyone who is charged with being an accessory after the fact to any offence may be indicted, whether or not the principal or any other party to the offence has been indicted, *whether or not the principal or any other party to the offence has been indicted or convicted or is or is not amenable to justice.*

[Emphasis added]

Canadian criminal law allows for the indictment of an accessory without an indictment or conviction of the principal, a situation similar to Chinese Law.

³¹² Written response dated 14 April 2002.

In our view, Article 310 of the Chinese Criminal Law is a law of general application. The Federal Court of Appeal in *Zolfagharkhani*³¹³ sets out the general propositions relating to the status of an ordinary law of general application when considering the issue of persecution. The propositions are set out as follows:

(1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.

(2) But the neutrality of an ordinary law of general application, vis-à-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.

(3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.

(4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

We do not find Article 310 to be inherently or for other reasons persecutorial. It is a law of general application addressing a type of offence recognized in Canadian law.

Ms. Tsang's youngest brother, Mr. Tsang Ming Tie, has been sentenced to a 10-year jail term for smuggling cars. According to the court documents, the fact that he voluntarily surrendered and co-operated in the investigation served to reduce his sentence. Other persons received higher sentences, in part because their role in the car smuggling operation was more extensive.³¹⁴

Ms. Tsang stated her brother Tsang Ming Tie did not work for the Yuan Hua Group and she did not know what he had been sentenced for. In her evidence, she

³¹³ *Zolfagharkhani v. Minister of Employment and Immigration*, [1993] 3 F.C. 540 (F.C.A.), at page 552.

³¹⁴ Exhibit C7.2 contains the court documents for the sentencing of Mr. Tsang Ming Tie.

stated that her brother Tsang Ming Tie was arrested and then subsequently released. Members of the family saw him and it appeared he had been mistreated while in custody.³¹⁵ According to the court documents, he was “bailed out pending trial on March 29, 2000” and was arrested on 12 July 2000 because of the pending trial.³¹⁶

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³¹⁵ Transcript, 24 September 2001, page 56, lines 19 - 24.

³¹⁶ Exhibit C7.2, page 2 of decision.

³¹⁷ Exhibit A15.4, dated 26 May 2001.

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Ms. Tsang’s Student Visa Applications for her Children

Ms. Tsang was also questioned about an application she filed with Canada Immigration to obtain student visas for her three children.³²⁰ As with other documents bearing her signature, she said she did not know the contents of the paperwork because it had never been translated for her.

The materials submitted in support of the student visa applications run to just under 50 pages. Her signature appears approximately 12 times. Included in the package of documents are two statutory declarations signed by Ms. Tsang. Her evidence was that they were never translated to her. The declarations are dated 14 September 1999 and 25 January 2000.

She testified that the lawyer who prepared the declarations spoke Mandarin, not Fujianese.³²¹ According to Ms. Tsang “... he just told me how much does a student visa cost for each child, and he asked me to provide some document, and also he said at least we have to deposit \$10,000 in each of their accounts.”³²² She was asked why she would sign documents if she had no clear understanding of what they said. She replied that the lawyer told her the documents were necessary to get the student visas for her children. She was asked how she could be sure the information in the forms was correct. She answered:

³²⁰ Contained in Exhibit C13, tab 7. The materials consist of 48 pages.
³²¹ Transcript, 24 September 2001, page 62, line 51 to page 63, line 7.
³²² Transcript, 24 September 2001, page 63, lines 15-17.

Perhaps that was my fault. I didn't know exactly what it was.³²³

Elsewhere in the evidence, Mr. Lai stated that in September 1999, after he and his wife arrived in Canada, his wife's English speaking secretary, Ms. Chen Tong, was always with Ms. Tsang on her business because Ms. Tsang did not speak English. He stated:³²⁴

Because all the things left behind about household there, even about my children, were not done properly because my wife did not speak English. Because everything was accompanied by Chen Tong with my wife to have those things done. That's why I said she was my wife's secretary. That was the reason.

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³²³ Transcript, 24 September 2001, page 63, line 27.

³²⁴ Transcript, 17 October 2001, page 57, lines 3 - 6.

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At the end of her examination by her counsel, Ms. Tsang Ming Na stated that it was her view that if she was returned to China, her fate would be death.

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Interrogation Statements of Cai Shuang Min

The panel was provided with two translated interrogation statements taken by the 4-20 Investigation concerning Ms. Cai Shuang Min, a Hong Kong business woman.³³⁰ Ms. Cai described in her statements how she met Mr. Lai Cheong Sing and Ms. Tsang Ming Na. She sets out in detail how she made arrangements through Ms. Tsang to ship goods into China to avoid customs duty from March 1999 to July 1999. She also sets out the amount of money paid to Ms. Tsang Ming Na by her and her clients for this service. It was in excess of \$13 million HK.

The statements were taken on 12 August and 15 September 2000 at the Quan Zhou City Detention Center, Fujian Province. The first statement does not note the time of day when the interview ended. We do not find this omission to be evidence of coercion or torture. The second note indicates the interview lasted about 2 hours and 40 minutes. There was no evidence presented specific to this statement that it was obtained by torture or coercion.

Evidence of Tao Mi

4-20 Investigation Records

On 5 August 2000, Ms. Tao Mi was interrogated by Inspector Wu Jiang Ping and other 4-20 Investigation members.³³¹ The record shows a start time for the interview of 21:05 but does not show an end time. This omission is of a technical nature and does not preclude the statement from being considered by this panel. There is

³³⁰ Exhibits C5, tab 6 and C10, tab 8, Exhibits “D” and “E”.

³³¹ The interrogation record is contained in Exhibit C10, at tab 1, p. 35 and Exhibit C5, tab 10, page 35.

nothing beyond speculation to suggest the interview took place over an inordinate or unlawful period of time.

Inspector Wu was presented as a witness by Minister's counsel. His evidence is reviewed in detail elsewhere. He stated that he never mistreated any of the individuals he questioned during his 4-20 Investigation assignment. That evidence was not seriously challenged or called into question. The panel had an opportunity to assess Inspector Wu as a witness over several days. We have no basis on which to reject his evidence in this area.

In Ms. Tao's statement, she says she was employed by Tsang Ming Na to work for the Xiamen Yuan Hua Group Co. Ltd. as Ms. Tsang's secretary. She was hired on 7 July 1998. When the company was closed down in August of 1999, Ms. Tao lost her job and was questioned by the 4-20 Investigation team. Ms. Tao denied any direct knowledge of the alleged smuggling activities of the principal claimants, saying she only worked in the real estate investment wing of the company.

She stated that the financial department of the company was divided into three sections, one of which was the capital controlled by Mr. Lai Cheong Sing and which was mainly used for bribing the government officials of different organizations and levels. Ms. Tao was not questioned as to the basis for this statement.

She stated that Ms. Tsang came to Xiamen permanently in February 1999. She told Ms. Tao that she had come to Xiamen to control the business, mainly the money gained from smuggling.

Ms. Tao was shown a "Cigarette Delivery Reports" by her questioners and asked if she had ever seen it before. She replied that she had seen documents like it. The one shown to her was made in Hong Kong. Ms. Tao sometimes passed yellow envelopes from Hong Kong to Ms. Tsang Ming Na. She once saw some similar materials on Tsang

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Tao Mi Interview with Colin Walker

On 31 December 2001, a person identified as Ms. Tao Mi was interviewed by Colin Walker, a RCMP officer, at the Canadian Consulate in Shanghai, China. The person in this second video recording is the same person as in the previously noted video recording.³³⁸ Besides Mr. Walker, an interpreter and a PSB officer were in the room. In addition to a transcript of the interview with Colin Walker, Minister’s counsel filed an affidavit from Ms. Tao dated the 31 December 2001.³³⁹ It states that her statement to Mr. Walker concerning her knowledge of Lai Cheng Xing, Tsang Ming Na and the Yuan Hua Group as set out in the video tape is true.

Counsel for the claimants argued, in extensive submissions, that the video recording of Ms. Tao Mi and accompanying materials ought not to be admitted.³⁴⁰ Counsel’s submissions have been reviewed in detail, as have the submissions of the Minister’s counsel. Counsel for the claimants argues, among several other issues, that the failure of the Minister to pursue the issue of a potential breach of solicitor client privilege in a timely manner amounts to a material misrepresentation that severely prejudices the claimants. He argues that before the Minister contacted Ms. Tao Mi, a detailed set of conditions should have been set out by the panel to increase the credibility and

³³⁸ Exhibit C23.4.

³³⁹ Designated Exhibit XC6.

³⁴⁰ Submission filed 8 March 2002.

trustworthiness of the evidence. He further argues that admitting the evidence now would tarnish the integrity of the CRDD.³⁴¹

With respect, the panel cannot agree with the arguments made. The materials counsel for the claimants submitted after the close of the hearing have been admitted into evidence. The Minister's counsel has a right to respond to that evidence. There is no property in Ms. Tao Mi as a witness. The manner in which all the evidence was collected by both parties and the opportunity for each party to test that evidence are matters for the panel to consider when ascribing weight to the various pieces of evidence.

We are of the view that the evidence of Ms. Tao's video recorded interview with Mr. Walker and supporting material are admissible.

As in the previous video recording of Tao Mi, she is well dressed and appears to be in good health. She is reserved in manner, but does not appear to be hesitant in answering the questions she is asked.

In the interview with Mr. Walker, she reviews her statement to Inspector Wu on 5 August 2000³⁴² and confirms that the contents are true. She states she started her employment with Yuan Hua Company in July 1998 and was paid until July 1999.³⁴³ Her main responsibilities were in real estate, Yuan Hua cigarette sales in China, and assisting Ms. Tsang Ming Na. Ms. Tao also worked for two other persons in the company besides Ms. Tsang.

³⁴¹ Submission filed 8 March 2002, page 28, paragraph 90.

³⁴² Exhibit C10, tab 1, page 35.

³⁴³ Exhibit XC8, page 11, lines 9-21.

Ms. Tao Mi explained to Mr. Walker that her status in the Yuan Hua investigation was one of witness. She was not subject to compulsory measure and so far was not a criminal suspect.³⁴⁹

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We prefer the materials provided by the Minister's counsel to those provided by counsel for the claimants in regard to what Tao Mi stated about the Yuan

³⁴⁹ Exhibit XC8, page 56, line 7-9.

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³⁵¹ Exhibit XC8, page 59, lines 22-25.

Hua group and the conditions under which she was interrogated. We find on the balance of probabilities that she was not tortured or abused while in custody of the 4-20 Investigators when she gave the initial two statements. On a balance of probabilities, we conclude that what she said to Mr. Walker was not said under duress. We find that what she had to say about the activities of Mr. Lai Cheong Sing and Ms. Tsang relatively innocuous. Had she been coerced into saying whatever the Chinese authorities wanted her to say, the panel would have expected her statements to Mr. Walker to be far more damning of the claimants.

4-20 Investigation Statements and Documents Implicating Ms. Tsang Ming Na

A number of interrogation statements were presented to the panel which were obtained by the 4-20 Investigation team that related to Ms. Tsang's alleged business activities. Some of the statements concerned the use of a form referred to as the 'Goods Delivery Report'. A few examples of this type of document were allegedly found in the Red Mansion by the 4-20 Investigation team headed by Inspector Wu Jiang Ping. As well, some of the statements referred to the alleged responsibilities of Tsang Ming Na in the Yuan Hua Group.

Before reviewing the statements about the Goods Delivery Reports, it is useful to review the evidence of the three experts recognized by the panel in the area of police and prosecution processes in China. Dr. Jerome Cohen stated that the Chinese do not fabricate evidence.³⁵² Dr. Charles Burton also testified that the Chinese do not fabricate evidence in criminal trials.³⁵³ Dr. James Feinerman stated that he had no reason

³⁵² Transcript, 26 July 2001, page 16, line 43 to page 17, line 16 and page 22, lines 19-33.

³⁵³ Transcript, 27 July 2001, page 39, lines 6-14.

to believe the Chinese would fabricate evidence in this case, although it was not beyond the realm of possibility.³⁵⁴

Four statements from Yuan Hua employees that mention Ms. Tsang's role in the companies operations are reviewed here.

Zhang Wei Qun³⁵⁵, a member of the staff at the Yuan Hua Company, was shown "Goods Delivery Reports", including the one dated April 1999. She states at page three of her interrogation that she recognized the report, that she would write detailed reports on the contents, and that the reports would be sent to Tsang Ming Na.

Lai Chang Tu, the younger brother of Lai Cheong Sing, was also shown the April 1999 Goods Delivery Report during his interrogation by the 4-20 Investigation team. In one of his statements,³⁵⁶ he states that the report specifies the goods that were being smuggled into China, and that they were given to Tsang Ming Na for collection of the 'premium'. She needed to know if the 'premium' had been collected in full and how things stood. She was, according to him, the number two person in the Yuan Hua Group.

Lai Shui Qiang is the older brother of Lai Cheong Sing. In his statement³⁵⁷ he is reported as saying that the Goods Delivery Reports were the responsibility of Tsang Ming Na and Tsang Ming Yu, her brother. He also stated³⁵⁸ that Tsang Ming Na and her brother were in charge of organizing smuggled containers from Hong Kong and "organizing funds".

³⁵⁴ Transcript, 18 October 2001, page 77, lines 14-18.

³⁵⁵ Statement contained in Exhibit C5, tab 9, Exhibit "B" to Liu affidavit.

³⁵⁶ Statement contained in Exhibit C42, tab 4, Exhibit "A".

³⁵⁷ Statement contained in Exhibit C5, tab 7, Exhibit "B" to Liu affidavit.

³⁵⁸ Statement contained in Exhibit C10, tab 2.

Huang Ke Zhen, Mr. Lai’s chauffeur, described some of the details of the smuggling operations of the Yuan Hua Group.³⁵⁹ He stated in his report that Tsang Ming Na controlled the money in the smuggling operations, and needed to know who had to pay what to the Yuan Hua Group.

A particularly contentious group of documents were those allegedly found in the Red Mansion by Investigator Wu’s team. Many hours of testimony were taken up in trying to pinpoint their location when found and their content. As mentioned elsewhere, Inspector Wu was at times painfully honest about the shortcomings of his team’s work when they located the document. At the end of the day, there was conflicting evidence on exactly where in the Red Mansion the documents were found.

The position of counsel for the claimants was that because the Chinese procedure for securing evidence was not complied with, the materials should be given no weight.³⁶⁰

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³⁵⁹ Statement, contained in Exhibit C9, tab 7.

³⁶⁰ Submissions of Counsel for the claimants, page 161, paragraph 13.

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Conclusions on the Credibility of Ms. Tsang Ming Na

Ms. Tsang was not a credible witness. She denied any knowledge of her husband's business enterprises. She claims she knew nothing but would sign anything. Everything done in her name was someone else's responsibility. Yet given her apparent helplessness and ignorance, she was trusted as a signing authority in a multimillion-dollar organisation. We do not find it plausible she would be trusted to blindly sign documentation concerning large amounts of money and company operations without any verification. Her dealings with Canada Immigration through her business immigration application and visa applications for her children showed a clear disregard and indifference to accuracy. Her evidence about her dealings with Ms. Cai Shuang Min was questionable.

While we agree that the weight of the evidence found in the Red Mansion is diminished by the shortcomings in the manner it was located, given the statements of Drs. Cohen, Feinerman and Burton, that the Chinese authorities do not fabricate documentary evidence, it has probative value. When these opinions are considered together with the persons in China who gave statements about these and similar documents, we find that the Cargo Delivery Reports found in the Red Mansion and the various statements add to the credible body of evidence.

After reviewing all the evidence concerning Ms. Tsang Ming Na, including the various statements provided by the 4-20 Investigation and taken by Canadian officials in China, we are of the view that there are serious reasons for considering that she was involved in the smuggling activities on a major scale along with her husband, Lai Cheong Sing.

7. EVIDENCE CONCERNING THE CHILDREN

Evidence of Lai Chun Wai

Lai Chun Wai, also known as Kenny Lai, gave evidence at the hearing. He is eighteen years old and is the eldest son of Mr. Lai Cheong Sing and Ms. Tsang Ming Na. After amending his Personal Information Form he swore to the truth of its contents.³⁶⁷ The grounds for his claim to refugee status are political opinion and membership in a particular social group, “family member”.

He stated that he was ten years old when he moved from Fujian to Hong Kong, and seventeen years old when he left Hong Kong for Canada. While living in Hong Kong he often visited Xiamen. He stayed at the family home in Xiamen until the Red Mansion was built. Thereafter he always stayed in room 503 on the 5th floor of the Red Mansion. His recollection was that when he was at the Red Mansion his parents stayed in room 502.

When asked if he was concerned about his parents returning to China, he said he was afraid they would be put in prison and “...accused of something.”³⁶⁸ The claimant was asked about his parent’s working habits and whether they discussed business when the family was together. He said that sometimes in Hong Kong, employees of his father’s company would bring documents to the family home for his mother to sign. He did not know the names of some of the employees. He also noted that Ms. Chan Tung came with the family to Canada because she spoke English. At the time, no one in his family did.

³⁶⁷ Exhibit 1.3(a), Personal Information Form of Lai Chin Wai.

³⁶⁸ Transcript, 25 September 2001, page 11, lines 51 and 52.

Lai Ming Ming and Lai Chun Chun

Lai Ming Ming, age seventeen, and Lai Chun Chun, age fifteen, the minor children of Mr. Lai Cheong Sing and Ms. Tsang Ming Na, did not give evidence at the hearing. Ms. Tsang Ming Na was their designated representative.

There was no suggestion in any of the evidence that the three children had any past involvement in the family businesses or were of any direct interest to the Chinese government.

Evidence of Mr. Lai Cheong Sing about the Children

Mr. Lai was questioned about his concerns for his children during the course of the hearing. The following exchange took place between the RCO and Mr. Lai.³⁶⁹ His answer was surprising, given his alleged fear of persecution for his children.

Q Sir, what do you think would happen to your children if you went back to China?

A In any case, I -- I never thought about a situation for my children.

Q Okay. Are they --

A Never thought about it.

He stated that they are permanent residents of Hong Kong and that he has a sister living in that city. When asked what he thought would happen to his children if they returned to Hong Kong, he stated again that he had never thought about it. When asked if there was anything he wanted to say to the panel about his children, he replied: "Probably the strike on the kids will be very hard."³⁷⁰

³⁶⁹ Transcript, 19 July 2001, page 80, lines 42-48.

³⁷⁰ Transcript, 19 July 2001, page 81, line 37.

The following exchange took place between the presiding member and Mr.

Lai.³⁷¹

Q By the laws of Canada, or at least the immigration laws of Canada, your son is considered an adult, and I am referring to Chun Wai, who has been here throughout the hearing. If he were to return along with your two younger children, do you have any reason to believe he would be treated any differently than your younger children?

A I believe that in my opinion that because my children were quite young, I believe, I think that government would treat them the same. I don't think the government would do much harm to them, because they were not charged or alleged. But one thing which was -- but there is one thing that is very dangerous. There were several hundred people who were arrested, and those people were arrested by the Chinese authority, and they had -- those people who were arrested had some business deal, contact with me. Those ones who were executed, the number has reached eight of them, seven first and one more later, so they were all eight of them. And those who were sentenced with -- those who were sentenced to death but not executed yet, reached a number to 18 of them. Among those people, one of the family members were trying to bomb our house or residence. This is a fact.

He went on to note that the PSB had subsequently placed a guard at the house.

Mr. Lai was asked in re-examination³⁷² what the fate of his children would be should they return to China. He thought they might have trouble getting an education and jobs and might face retaliation from the families of those executed as a result of the Yuan Hua investigation.

³⁷¹ Transcript, 20 July 2001, page 40, line 29 to page 81, line 36.

³⁷² Transcript, 23 July 2001, page 42, line 10 to page 45, line 15.

Evidence of Ms. Tsang Ming Na about the Children

Ms. Tsang was asked what she thought would be her children's fate if they were to return to China. She replied: "So I would not even think about or imagine what their future would be."³⁷³

*Evidence of Other Witnesses on the Children*³⁷⁴

Dr. Charles Burton

Dr. Burton, a witness called by the Minister's counsel, was of the view that were it an earlier period, prior to 1978, children could suffer if their parents had been convicted of criminal activities. At present, however, he anticipated that innocent children of people who have engaged in criminal activities would not be subject to discrimination in education or employment.³⁷⁵ They would not be seen as pariahs in their communities.³⁷⁶

Dr. Jerome Cohen

Dr. Cohen, also a witness called by the Minister's counsel, testified that in the pre-1979 era, the children of politically disfavored people were discriminated against, but not always nor for all purposes. In the last 20 years, he has seen little evidence of this type of treatment. If the children did stay in Fujian province, they may have some notoriety which they might want to avoid. He felt there was not a high likelihood the children will be discriminated against.³⁷⁷

³⁷³ Transcript, 23 July 2001, page 73, line 28.

³⁷⁴ The four witnesses referred to were presented as experts. The discussion on their relative expertise is dealt with separately in these reason. Mr. Wei was not found to be an expert.

³⁷⁵ Transcript, 27 July, page 42, lines 7-15.

³⁷⁶ Transcript, 27 July, page 91, line 50 to page 92, line 8.

³⁷⁷ Transcript, 26 July, page 20, line 34, to page 21, line 13.

Dr. James Feinerman

Dr. Feinerman, a witness called by counsel for the claimants, was of the view that the parent's situation would likely visit some discrimination on the children should they return to China. He was not prepared to say how far that might extend.³⁷⁸

Wei Jing Sheng

Mr. Wei, also called by counsel for the claimants, was of the view that the family members of Mr. Lai Cheong Sing and Tsang Ming Na would be imprisoned due to what they might know.³⁷⁹ He was also of the view that if experts who testified at the hearing said that there was no such thing as children being persecuted because of their family relationships, the experts must be lying.³⁸⁰ As an example of persecution, he stated that his niece was not allowed to attend higher-level education because she was the relative of the anti-revolutionary element.³⁸¹ She was not imprisoned, as he suggested the three children of Mr. Lai and Ms. Tsang would be.

His evidence about the treatment of the children was not supported by any other witnesses at the hearing, including Mr. Lai. The evidence was largely anecdotal and was at times inconsistent. We give it little weight.

8. REVIEW OF WITNESSES PRESENTED AS EXPERTS

Several witness were put forward by the parties as experts. The panel indicated it would assess their expertise after hearing their evidence. The evidence of the

³⁷⁸ Transcript, 18 October 2001, page 78, lines 23-33.

³⁷⁹ Transcript, 5 October 2001, page 20, lines 22-29.

³⁸⁰ Transcript, 5 October, page 46, line 22-28.

³⁸¹ Transcript, 5 October, page 47, line 36-47.

Ruan Ming

Although this person was presented as a proposed expert witness by claimants' counsel, no expert report was presented in advance of his testimony as required by the CRDD Rules. His qualifications were spotty, to say the least, in the areas in which it was proposed that he was to testify. He left the People's Republic of China (PRC) in 1988 and has not returned there since then. Prior to 1983, he was the Deputy Director of the Research Office of the Chinese Communist Party's Central Party School in Beijing. According to him, he has since written articles on democracy in China, which have been included in weekly journals in Hong Kong and Taiwan, and in English-language newspapers in Taiwan and Hong Kong. He has a degree in mechanical engineering from 1952 but no advanced degrees of any kind. From his brief c.v.,³⁸⁹ he had not published any academic articles. Since 1997, he has been a visiting researcher at the Mainland China Research Institute at DanGang University in Taiwan.

He was a difficult witness for a number of reasons. He appeared to be primarily an advocate for the establishment of democracy in China. He testified that his intent was to inform people all over the world about the lack of freedom and human rights in the PRC. He had been given a copy of a manuscript of a book about Mr. Lai to read and he had then written a preface³⁹⁰ to it. The book itself was never entered as an exhibit in these proceedings. This witness did not appear to have any reliable independent evidence about the basis of these claims. He made some vague allegations that he had spoken to other individuals who had such independent information, and who had investigated the situation in Xiamen. However, when he stated that he did not want to give any of that information in a public session, he then refused to provide any details

³⁸⁹ Exhibits A23 and A23.1.

³⁹⁰ Exhibit A32.

about those individuals or their evidence, even when he was given the opportunity to do so *in camera*. It would appear that the extent of most of his knowledge about these claims was acquired as a result of what he read in that manuscript, which he then combined with his pre-existing negative views about the leadership of present-day China.

In the opinion of this witness, Mr. Lai is a classic case of a former peasant who became an entrepreneur and helped to economically develop a particular rural area. The local authorities in that area then became involved in a power struggle, led by Prime Minister Zhu Rong Ji, to centralise power in Beijing. He characterised that power struggle as an attempt to end the one-party system in China and achieve democracy. Local entrepreneurs such as Mr. Lai then became scapegoats in that power struggle. To this witness, the evidence and any criminal charges against the Lai's was suspect, because it all arose solely as a result of that struggle to centralize power in Beijing.

In the panel's view, this witness was merely an animated polemicist who saw the opportunity to testify as a forum to propound his own political views. His lack of objectivity was an obvious and overriding consideration. During his testimony, he was repeatedly unresponsive to questions. Indeed, it was noted that he appeared to have a set response that he wished to make, regardless of the question that had been presented to answer. It was apparent that his overriding goal was to expose what he saw as wrongdoings by the Chinese leadership. He did admit that crimes such as smuggling were commonly occurring there. However, in his view, Zhu Rong Ji only wanted to crack down on smuggling because he felt local governments had too much power and his goal was retain centralised power. The witness saw Mr. Lai as a scapegoat in that power struggle between the central government and the local authorities.

His lack of objectivity was particularly significant when he was asked about the diplomatic note and Dr. Cohen's earlier opinion that it was a meaningful

document. Asked if he had ever seen one before, he admitted that he had "... never done any diplomatic work, and I'm never interested in diplomatic matters."³⁹¹ However, he had no hesitation to then proceed to completely disparage the document's promise that the Lai's would not be subjected to the death penalty. He also proceeded to state that Dr. Cohen had "no knowledge about Chinese situations at all".³⁹² Shortly after that comment, he then had to admit that he did not know about either Dr. Cohen or his knowledge of China. Again, his eagerness to proffer such an answer about the note and about Dr. Cohen indicated that his personal political agenda was his overriding focus. Facts were, in effect, irrelevant to that agenda.

Overall, the panel found little if anything in this witness' evidence to be reliable or trustworthy and gave it no weight.

Wei Jing Sheng

Wei Jing Sheng was presented by the claimants' counsel as an expert witness. He lacked any formal academic qualifications and no expert report was provided in advance, as required by the CRDD Rules. Mr. Wei now lives in Washington, DC. He is a well-known political dissident and democracy advocate in the Chinese exile community.

He testified that he was the focus of two political trials in China, the first some twenty years ago and the second in 1994. Both trials arose from his political activities to effect political change in China. He was a prisoner in various Chinese jails for most of the intervening years until he was released and left China in 1997. Since he left China, he has been involved in further activities to support political change there.

³⁹¹ Transcript, 26 July 2001, page 74, lines 17 – 18.

³⁹² Transcript, 26 July 2001, page 74, lines 45 – 46.

His current knowledge about the situation in China is acquired largely from the news media and information from other former prisoners and their relatives. He testified that he had spoken to other prisoners himself while he was in jail, both political and criminal prisoners. It would appear that he had little opportunity to observe firsthand the changes that have occurred in all aspects of life in China over the past decades as he was mainly in prison or in exile during that time.

Mr. Wei gave evidence about his own personal experiences during his own two trials and his subsequent life as a political prisoner. However, on other areas of direct interest in these claims, he was much less able to satisfy the panel that he had any real evidence that was authoritative and of any weight.

He admitted that he knew little about the Yuan Hua cases as he had no real independent evidence about these claimants and their particular situation in China. However, in spite of that, he did make this surprising and damaging comment about Mr. Lai:

A person like Mr. Lai Cheong Sing, without any official--without any background of an official relatives or something like that, you must spend money to bribe.³⁹³

It was his opinion that the basis of these claims was an internal power struggle to attempt to change the Chinese government by way of a military coup. According to him, the case against Mr. Lai and Ms. Tsang was politically motivated because it was utilised as a way to liquidate the persons in the Chinese military who were allegedly behind this attempted coup. He based this opinion upon some unnamed personal sources that he had consulted.

³⁹³ Transcript 5 October 2001, page 37, lines 1-3.

No other witness supported his theory of this particular political-military struggle and attempted coup, not even the claimants themselves. Asked why there was a lack of independent documentary evidence to support his theory about such a coup attempt, his only response was to blame a supposed conspiracy among the world's reputable news media both inside and outside of China. He also opined that the media's goal in such a conspiracy was to suppress such information to protect the current Chinese political leadership. The panel found his opinion to be without merit. Indeed, it was difficult to view it with anything other than a sense of disbelief. It appeared more likely that this witness' single-minded focus in seeking to change the government in China coloured his outlook and affected his objectivity and his resulting opinions.

He was skeptical about the reliability of the promise by China in the diplomatic note to not impose the death penalty. It was his opinion that the Chinese government seldom keeps its' promises. He based this opinion solely upon his own version of his past experiences in China where he said he was tricked and deceived by authorities many times in the past. It would appear that this witness had no prior personal experience with either diplomatic notes or other official country to country agreements. Again, instead of not expressing an opinion on a topic for which he was not qualified to comment, he proceeded to do so.

He gave a similar response when he was asked about the treatment of the children of Mr. Lai and Ms. Tsang if they returned to China. He said the family members would all be jailed because the evidence against them was false evidence and the authorities would not want them to disclose that information. Yet it appeared that none of his own family members or relatives were ever jailed as a result of his own situation.

Again, his lack of objectivity was apparent in his willingness to answer questions based upon his own political agenda in opposition to the current Chinese

government. His opinions and much of his testimony as to his own past experiences was of little assistance to this panel and the issues involved in these claims. It was obvious that his real focus was to express his own political views concerning China and he saw this opportunity to testify as another venue to do so. It was obvious that he was a person with considerable courage in his willingness to propound his political views in the past in China. However, the evidence he provided here was of very limited value and given little weight.

Dr. James Feinerman

Dr. James Feinerman was presented as an expert witness by the claimants' counsel. He provided his curriculum vitae and an expert report³⁹⁴. Dr. Feinerman is currently a professor at the Georgetown University Law School in Washington, D.C. where he teaches on Asian legal systems. He has taught at various law schools in the USA for over fifteen years. He taught Anglo-American common law and international law in China at the Beijing University Law School during 1982/83. He has been back to China periodically each year to attend conferences, lasting from a few days up to several weeks. It appeared that Dr. Feinerman's more recent academic pursuits regarding China have been concerned mainly with commercial law, such as relating to China's membership into the World Trade Organization (WTO), rather than any focus on Chinese criminal law or procedure.

Dr. Feinerman discussed the periodic anti-crime campaigns in China designed to deal with real or perceived criminal or social problems in the public mind and to demonstrate that such public concerns are being taken seriously by the authorities. He admitted that the claimants are not political dissidents. He also admitted that he had not

³⁹⁴ Exhibit A12.

seen the actual documentary evidence of wrongdoing acquired by the Chinese authorities and submitted in these proceedings against Mr. Lai and Ms. Tsang. His only source of information about their cases appeared to be from news reports and the transcripts of some of the other expert witnesses. In spite of that lack of knowledge about the actual evidence, he was still willing to then conclude that there “seems to be relatively little evidence”³⁹⁵ against them. That opinion appeared to be more a result of his own pre-existing negative views about Chinese legal affairs than anything to do with this case.

In considering the weight to be applied to Dr. Feinerman’s evidence, it was only when he was being cross-examined that he admitted that numerous references in his expert report were not to the revised 1996-97 versions of the Criminal Law and Criminal Procedure Law, but rather to the older and outdated 1980 versions. He also appeared to suggest that he did not even know if he had access to the newer 1996-97 versions when he prepared his report. It was also apparent that some of his comments about the actual provisions of the old laws gave the misleading impression that they were still in effect in 2001. At one point, the following question and answer exchange took place with the Minister’s counsel:

Q. But you don’t know whether --I mean you’re citing the 1980 law--
Articles from the 1980 law and you don’t know if they read the same
now: am I right?

A. I don’t know that they read the same now, right.³⁹⁶

It was also noticeable that most of the sourced footnotes in this section³⁹⁷ of his report are for other publications also dated prior to 1996-97. It was not until a week after his testimony that he subsequently filed a revised version³⁹⁸ of his report. In it, he updated

³⁹⁵ Transcript, 18 October 2001, page 77, line 52.

³⁹⁶ Transcript, October 18, 2001, page 58, lines 51-52, page 59, line 1.

³⁹⁷ Exhibit A12, pages 12 -15.

³⁹⁸ Exhibit A49.

the old citations to reflect the new laws and also added more recent source materials. His failure to do so in his original report lessened the weight that the panel gave to his evidence.

There were other concerns about this witness's evidence as well. His evidence indicated it was his opinion that results are pre-ordained in the Chinese criminal justice system. Persons once entangled in it are not able to extricate themselves without being found guilty. However, there were two examples that indicated a different reality to his opinion about the Chinese system. Firstly, he was unaware that according to court judgments, charges against some of the other accused in the Yuan Hua cases were dismissed as a result of their defence counsel's efforts.

Secondly, although both China and Japan have similarly high conviction rates, the witness said that in Japan (unlike China), the thoroughness of the investigation means many uncertain cases are not taken to trial and that accounts for the high conviction rate there. He said he had confidence in the Japanese system but did not in the Chinese one. Dr. Feinerman had provided some statistics on Chinese criminal matters (5.35 million charges per year, some 1,000,000 trials and yet only 640,000 persons punished). The witness was asked if he could reconcile this apparent discrepancy between the numbers of charges and trials, and the much lower number of persons punished. The witness then gave one justification for the difference by saying that in China, as in other countries such as the USA and Japan, large numbers of criminal cases are initiated but are eventually thrown out of the system before trial. In effect, the panel would conclude that the Chinese system is not as lacking in the independence necessary to abandon criminal cases as he suggested.

Dr. Feinerman was asked to comment on the previous testimony of Dr. Jerome Cohen and Cohen's opinion about fabricated evidence. Dr. Cohen stated:

...I rarely have encountered a case where the evidence has been fabricated, where there's been an attempt simply to make up evidence in order to achieve a conviction.

I find a process that is intent on producing an accurate version of the facts of the case, by and large, but a process that acts in ways that we often don't consider appropriate. But they are concerned with the real world, not with a fabricated world³⁹⁹

Asked to comment on to Dr. Cohen's testimony, Professor Feinerman said:

...I think, as a matter of strict accuracy, he may be right about the fabricating point; that is, to create evidence out of whole cloth, to forge documents, and such. I have no reason to believe they would do it in this case, although it is not beyond the realm of possibility.

Dr. Feinerman's opinion about the Chinese criminal justice system was that it did not, in practice, live up to what it was required to do by law. He did admit that torture is forbidden in China and that the Chinese government does recognize torture as a problem, "although maybe not enough"⁴⁰⁰. He did admit that officials have been convicted of violating the laws against torture. However, he was unaware of a book published by the Chinese Procuratorate entitled *The Offence of Extracting Confessions by Torture*.⁴⁰¹ The witness did admit that an accused person in China has the right to be represented by defense counsel and that new laws permit lawyers today to have greater latitude to conducting their clients' defence than they did in years past.

He did admit, in general, that smuggling and bribery are not political offences and the claimants are not political dissidents. As far as the children's treatment if they returned to China, he speculated that they would likely suffer some discrimination but was unprepared to say what that included whether it would just amount to teasing about their parents, or extend to denial of a job or education. As far as the promises contained in the diplomatic note, Dr. Feinerman had no past experience

³⁹⁹ Transcript, 26 July 2001, page 17, lines 8 – 16.

⁴⁰⁰ Transcript, 18 October 2001, page 60, line 39.

⁴⁰¹ Exhibit C29, Tab 2.

with them and had not actually seen the contents of this note prior to testifying. However, he did say that he was not aware of any past violations of diplomatic notes by the Chinese government.⁴⁰² He admitted that it would be contrary to China's interest to violate such a promise, but speculated that the national authorities could not provide an absolute safeguard that at some time in the future, problems might not occur for Mr. Lai at the local level. The panel puts no weight on such vague speculation.

This witness did provide a general picture of the Chinese system, a system in flux, and the attempts to reform it. Overall, his evidence was given more weight than any of the other experts presented by the claimants, but less weight than the experts presented by the Minister. In any conflict between their evidence and that of this witness, the panel prefers their evidence.

Dr. Jerome Cohen

Dr. Jerome Cohen was presented as an expert witness by the Minister's counsel. He possessed extensive qualifications on criminal and commercial law in China, including criminal law and procedure, acquired over a long career in legal academia (currently at New York University Law School) and in legal practice. This witness also provided a written report⁴⁰³ in advance of his testimony. Counsel for the claimants did not challenge his expertise.

In addition to his other qualifications, Dr. Cohen has a unique perspective from which to offer his evidence. As well as his academic and legal activities concerning China, he has also continued to represent individuals, often originally from China but with US residency or citizenship, who have been arrested in China on criminal charges

⁴⁰² Transcript, 18 October 2001, page 48, lines 12-27.

⁴⁰³ Exhibit C33.

such as espionage. He has acted as their American lawyer and has retained legal counsel in China to appear in Chinese courts on their behalf. Only hours before his testimony began, he had been interviewed by CNN about one of these clients who had just been released to return to the USA after her criminal trial in China had been concluded.

Dr. Cohen gave an overview of the changes, reforms and current functioning of the Chinese legal system. He described the implementation of new criminal laws and procedures that started in 1979 and further reforms have continued to be enacted since then. In his opinion, he believes that the 1997 criminal law reforms exhibit a continuing

...trend, as far as the development of Chinese criminal justice goes, is toward a more humane and enlightened system, one that is deemed to be more efficient in terms of carrying out the demands of the state for the suppression of anti-social behaviour, but at the same time one that is likely to protect the rights of the individual.⁴⁰⁴

Dr. Cohen also reviewed the role of the various components of the Chinese criminal justice system and their particular role and responsibilities. Certain crimes are investigated by the police or by the prosecutor's office (procuracy). Cases of great complexity and importance are usually investigated by a specially established team composed of officials from a number of government departments, as in this case. Then there are the issues of arrest and indictment, defence counsel, trial, sentence and appeal.

In Dr. Cohen's opinion, the Chinese evidence concerning the criminal allegations against the Mr. Lai and Ms. Tsang "...certainly seems to be very, very substantial in laying a foundation for charges of bribery and smuggling."⁴⁰⁵ In his opinion, the monetary amounts involved are so large that Mr. Lai would be eligible for prosecution for bribery. It was his opinion that because the Lai case has become of

⁴⁰⁴ Transcript, 26 July 2001, page 9, lines 1-6.

⁴⁰⁵ Transcript, 26 July 2001, page 12, line 17.

international interest, that notoriety makes it more likely that the Chinese authorities would adhere strictly to the demands of the criminal law and procedure to investigate and prosecute the claimants if they returned to China. It was his opinion that any such trial would be open to the public and to the press, both as a result of the notoriety about their case and also because of the media coverage of the trials of the associated individuals, which have already been completed.

Dr. Cohen also compared the similarity of the Chinese criminal justice system to the continental European criminal process, not to the Anglo-American one. In that continental system (as in China), cases are not normally sent on to trial unless the prosecution has investigated and acquired a sufficient body of evidence to convince them of the person's guilt. As a result, acquittals are rare in China. In his experience, there are now competent Chinese defence lawyers who are willing and available to defend high profile cases in China, and that is one of encouraging developments of recent years. For example, he had no problem engaging Chinese defence counsel for his recent client charged with espionage. Her lawyer did put up a vigorous defence on her behalf at the trial.

Although he had some concerns about aspects of the current Chinese justice system, he did not state that overall, the system and its procedures were unfair or unjust. Some of his concerns about certain aspects of the Chinese system were based upon a comparison between the Anglo-American common law system and the continental European civil law system. There is also some similarity between the reality of certain aspects of the Chinese and US criminal justice systems. In both countries, people confess their guilt to enhance the likelihood that it will make things easier for themselves. Often, what they say is quite true. They also get credit for revealing relationships that can implicate others in their criminal enterprise.

In Dr. Cohen's opinion, Chinese judges today are no longer simply clerks, although they may still not yet function as judges do in Canada or the US. In his opinion, it is grossly inaccurate to state that all judges are subject to bribery or corruption. According to him, bribery is a serious problem in China, including a problem in the legal system, and the system is attempting to deal with it.

In Dr. Cohen's opinion, the contents of statements from other persons accused of involvement in these particular bribery and smuggling cases are probably true. He also believed that if any statements were illegally obtained, they would be excluded from the evidence by the court in the trial process. In the case of Mr. Lai and Ms. Tsang, he was of the opinion that the pressure on the Chinese authorities is such that they will be treated according to the strict requirements of the 1997 Criminal Law and Criminal Procedure Law. He also stated that in the case against Mr. Lai and Ms. Tsang, the authorities already have "...a mountain of evidence that's been sufficient in lots of other cases....".⁴⁰⁶

In his opinion, the Chinese authorities do not need to fabricate evidence here. In his experience, he has rarely encountered a case where evidence has been fabricated by the Chinese authorities to create a foundation for criminal charges. There is even less likelihood of fabrication of evidence in cases of great notoriety, such as in these cases. In his opinion regarding criminal cases in China, he found "...a process that is intent on producing an accurate version of the facts of the case...".⁴⁰⁷ On the use of a centrally directed team such as the 4-20 investigate this case, Dr. Cohen expressed no

⁴⁰⁶ Transcript, 26 July 2001, page 21, lines 44 - 45.

⁴⁰⁷ Transcript, 26 July 2001, page 17, lines 13 - 14.

misgivings about it. He said that in such a large-scale bribery/smuggling case involving local, regional and even national aspects, a federally organised multi-agency group of investigators is used “to ferret out the facts of the case”.⁴⁰⁸

In his opinion, Professor Cohen had no doubt that the Chinese government would honour their promises to Canada contained in the diplomatic note. He gave a number of reasons for his opinion. One practical reason to comply was because no country in the world would honour future Chinese promises if they were not kept in this case. Another reason had to do with the great visibility of these particular cases involving Mr. Lai and Ms. Tsang. He believed that the Chinese authorities would also ensure that the promises contained in that note would be carried out before, during and after their trial. He also stated in his report that they “will probably also enjoy special protection during post-conviction custody”.⁴⁰⁹

Dr. Cohen also gave his opinion that he did not believe that the Lai children would be discriminated against because their parents might be convicted of criminal charges. He saw little evidence of such discrimination in the last twenty years. For example, he stated that the parents of his espionage client had not suffered any adverse repercussions as a result of her charges.

Overall, the panel found Professor Cohen to be a very impressive witness. Unlike several of the expert witnesses presented by the claimants, his evidence was far more objective and balanced. It was also relevant and very persuasive, based upon his legal perspective and his long experience in Chinese affairs. He had no obvious bias either for the claimants or for the Chinese authorities. In any conflict between Dr. Cohen

⁴⁰⁸ Transcript, 26 July 2001, page 16, line 40.

⁴⁰⁹ Exhibit C33, page 10.

and any of the claimants' expert witnesses, the panel had no hesitation in preferring his evidence.

Dr. Charles Burton

Dr. Charles Burton was presented as an expert witness by the Minister's counsel. He is an Associate Professor of Political Science at Brock University in St. Catharines, Ontario, where he has worked since June 1989. He also worked at the Canadian Embassy in Beijing as a counsellor from 1991 until 1993 and from 1998 to 2000. His responsibilities at the Embassy were to advise the Canadian government on all aspects of China. He worked in the political section, and reported to the Canadian government on both internal political developments and on legal developments involving judges and politicians. He has also completed a number of research and reports for the Canadian government outside of his employment at the Embassy. He went to Fujian province at the request of the Embassy to investigate conditions for returnees sent back from Canada and also to investigate the situation of Christians. In the course of his activities on behalf of the Embassy, he was involved in an interchange with Chinese government officials on human rights issues and regularly advised the Canadian government on Chinese affairs.

Dr. Burton lived in the People's Republic of China (PRC) from 1978 until 1981 and is fluent in Mandarin. He has visited China two or three times each year for a total of about six weeks per year. He was in China in June 2001 for three weeks to participate in a conference on human rights. He also took part in a debate at Beijing Foreign Studies University. He has advised law firms on culture and politics in China and has acquired an extensive knowledge of "rule of law" issues there. When he was first posted at the Beijing Embassy, he was the First Secretary. He was then promoted to Counsellor. During his time at the Embassy, he was there as a result of an agreement

between the Government of Canada and Brock University. He was seconded to the government, but the University paid his salary.

Dr. Burton gave an overview of recent Chinese developments, starting in 1978 when the Communist Party of China adopted a modernization program in economic affairs. The government then realized that once free market institutions began to function as a result of modernization, social controls had to change as well. China's imminent membership into the World Trade Organization (WTO) has demanded that they adopt the norms of the WTO which require a high degree of transparency in business dealings.

Before 1978, the prestige of the law in China was not high. Criminals were seen as deviants from society's rules. Today, criminals generally are not seen as challenging the social order. However, there remains a problem in the legal system of a lack of trained judges and defence lawyers. Since the recent adoption of the Law on Criminal Procedure in 1997, there has been a big push to train competent judges and lawyers. Canada is assisting with funding coming from the Canadian International Development Agency to assist in improvements in legal education and legal aid. The goal is to have a legal aid centre in each court in the PRC. Today, there are already thousands of them that have been established. However, many graduates from the Judges Institute then go instead to work for private law firms, such as foreign ones, because the pay is much better.

Dr. Burton has been focused on justice issues in China and in the development of a civil society program. There has been significant progress on these issues during the past five years. China's legal system is not as developed as in Canada, so networks and personal relationships often take the place of contracts. Trust is important. Bribery and smuggling are illegal in China. According to Dr. Burton, people there do have sufficient social skills to know the difference between small gifts and

bribes. Although corruption and smuggling is certainly a problem, there is a growing public revulsion against government officials living above their means. The problem often arises because official pay is low for senior bureaucrats and there is pressure from family to increase income, so corruption becomes much more common.

According to Dr. Burton, corruption is worse in Fujian province, where Xiamen is located, than it is in Beijing. There are a number of reasons for its' prevalence there. They speak a different dialect in Fujian, it is far away from Beijing, and there is a feeling that the central government has allowed Fujian to have a lower economic level than neighbouring Taiwan. Accordingly, there is a perception that the local Fujian authorities are less likely to act against smuggling and corruption. In Dr. Burton's opinion, Beijing sent in the 4-20 Investigation team to Xiamen due to a fear that the local police and prosecutors were possibly tainted by corruption or bribery. As well, such a central investigating authority would have the best police and legal officials attached to such a group. The 4-20 Investigation team has been involved in hundreds of investigations there over a two-year period. In Dr. Burton's opinion, the level of professionalism of the prosecutors and police involved would be high because they are selected from different ministries and regions. They are sent in to deal with high priority corruption cases, such as the Lai case. Because of the great loss of revenue that was discovered after a preliminary investigation, the Lai investigation was given high priority.

As well, Prime Minister Zhu Rong Ji has been deeply involved in stopping corruption. In Dr. Burton's opinion, Prime Minister Zhu has no reason to have a personal interest in the Lai case, other than seeing it through as another one of his anti- corruption efforts. As proof of this interest in attacking the ongoing corruption problem, Dr. Burton cited the widespread investigation of many smuggling cases. According to a report in

2000 to the National Peoples Congress, such cases had increased by 122 percent from the previous year.⁴¹⁰

Dr. Burton also gave his opinion about the allegations made by Mr. Lai in his Personal Information Form that the new Minister of Public Security wanted to replace Li Ji Zhou, so he framed Mr. Lai in false allegations of smuggling and bribery with Li. Dr. Burton said that in his position at the Canadian Embassy, he kept a close watch on factional political struggles in the higher echelons of the Chinese government. In his opinion, there was no basis for Mr. Lai's version of such a political struggle as the basis of his problems, nor was there any evidence that such events ever took place. Dr. Burton testified that he met regularly with political analysts at other embassies in Beijing and none of them believed that there was any alleged political conspiracy involved. In Dr. Burton's view, Mr. Lai is not an actor in the political hierarchy and he is therefore not someone that they would seek to involve in such a struggle. In Dr. Burton's opinion, he cannot discern any truth to the allegations that Mr. Lai has made. He added that it does not make any logical sense that Mr. Lai would have fallen victim to such factional political in-fighting.

Dr. Burton also explained that because foreign goods were not readily available in China prior to 1978, prices of commodities were higher in China than outside world prices. After 1978, high custom duties were imposed on imported foreign goods. If someone could evade those high duties, it would become a very profitable operation, as some duties can reach one hundred percent or more. Smuggling means not only is there an evasion of Chinese taxes and duties and consequent loss to government revenues, it also means that large sums of money are sent abroad. As China now prepares to enter the WTO, it needs to open up its' domestic market to foreign competition. The Chinese

⁴¹⁰ Transcript, 27 July 2001, page 32, line 41.

authorities also have to enforce their own laws to stop corruption and also encourage efficiency in domestic industry. Dr. Burton cited a newspaper article in the “*Peoples Daily*” which indicated that tax revenues had increased since the corruption crackdown had started in Fujian province. According to the statistics in that article, there was a 37 percent increase of revenue in six months from Fujian and a 16.8 percent increase over the past year from Xiamen, since the demise of the Yuan Hua organization.

Dr. Burton also stated that the Chinese authorities are known for the thoroughness of their criminal investigations and he had never heard of situations where they fabricated evidence. He also felt that the publicity involved in this case meant that the Chinese authorities would be scrupulously correct in their future treatment of Mr. Lai and Ms. Tsang. In his opinion, their trial would be open to the public and Canadian government representatives would want to attend the trial. He also stated that aspect was partly the reason why there has been such overwhelming evidence produced as a result of the very thorough criminal investigation. To Dr. Burton, that evidence indicates clearly that Lai’s wealth did not come through legitimate business means.

Dr. Burton also indicated that generally, abuses in Chinese jails are decreasing. He also believed that in any event, white-collar criminals receive more favourable treatment than common criminals and the crimes alleged against Mr. Lai and Ms. Tsang are in that particular category. In his opinion, family members, such as the Lai children, who were not involved in any past criminal activities would not be subject to mistreatment if they returned to China. There was no reason for the Chinese authorities to act against the children because it would adversely affect the perception of Canadians about China. He also does not believe that there would be any adverse effect on the Lai children’s future education or employment in China by virtue of their parent’s criminal problems.

Regarding the diplomatic note, Dr. Burton said that irrespective of any change in governments in China, its contents would be treated with great respect. Diplomatic notes are numbered and have a special seal. In his opinion, he is completely satisfied that the PRC will honour their undertakings in such a diplomatic note, both in practise and in spirit. If they failed to carry out their promises, the alternative would be to call into question the whole basis of such diplomatic notes, an unthinkable consequence. It could also mean that Canada would not co-operate in a similar situation in the future and other countries could also feel constrained in their official dealings with the Chinese government.

Dr. Burton was asked for his opinion about another proposed expert witness to be presented by Mr. Lai's counsel. Regarding Wei Jing Sheng, he saw him as a voice from the past and someone who is no longer a significant voice. When he came to the United States from China, Mr. Wei hoped that he could unite the external pro-democracy forces, but it proved difficult and he was not able to do so. In Dr. Burton's opinion, Wei Jing Sheng is not an expert in corruption or legal matters. His interest has been in democratic governance.

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In Dr. Burton's opinion, most anti-smuggling activities do not involve a political struggle, but they are an attack on corruption and corrosive effects of corruption.

In his opinion, Mr. Lai has always been referred to in the Chinese media as a criminal, whose companies were engaged in criminal activities. Dr. Burton also said that the reason that there is more reporting of crimes and executions in China is because there are more efforts against crime and more emphasis on punishments, including executions. There is also now more openness in China, so these events are better known.

In Dr. Burton's opinion, any trial verdict that may be reached in the Lai case will be determined, not because of political pressure, but rather due to the investigation efforts that has been put into this case and the overwhelming amount of evidence that has been acquired.

Dr. Burton did not believe that Prime Minister Zhu Rong Ji has a lot invested in Mr. Lai's return and his trial. In his opinion, there is much speculation, particularly in the press in Hong Kong about political affairs in Beijing, but it is not reliable. He also testified that while Li Ji Zhou had been in a position in the higher levels of the Chinese central hierarchy, he was not in one of the highest levels. In his view, there were possibly thousands of vice ministers and hundreds of ministries. In Dr. Burton's opinion, it would be difficult for the authorities to coerce Li Ji Zhou to say things that are not true, and it is unlikely that Mr. Li would give statements that were not true.

In particular, he held a unique perspective as to political matters. He alone of the expert witnesses actually worked in Beijing during a time period relevant to these claims. One of his functions as a political officer was to be aware and knowledgeable about political matters there. In his opinion, there was no factual foundation to support the claim that the criminal allegations against Mr. Lai and Ms. Tsang arose from a political struggle in which the evidence was fabricated. He had also acquired first-hand and recent information from Fujian province.

Overall, Dr. Burton was an impressive expert witness. The panel accepted that he had considerable expertise in Chinese affairs and provided extensive and relevant evidence, which was given considerable weight. His evidence was given preference over the evidence of the claimants' expert witnesses.

Dr. Vincent Yang

Dr. Vincent Yang was called as an expert witness by the Minister's counsel. Dr. Yang filed a curriculum vitae and expert report.⁴¹¹ Dr. Yang, a Canadian citizen, currently teaches constitutional and criminal law at the University of Macao. He has graduate degrees from both Canada and China and has taught at universities, law schools and colleges inside and outside China. He appeared to have maintained a broad expertise in the area of Chinese criminal law and criminal procedure, both in the academic field and also from his past experience as a criminal defense lawyer in Shanghai in the 1980s. By his own estimate, he spends up to 100 days per year in China on work related to criminal law and procedure and regularly meets with judges, lawyers and academics there. His evidence provided an additional and worthwhile perspective. Currently he is working with the Canadian government on projects to assist the Chinese authorities in their improvement and enactment of legal reforms and compliance with international agreements.

Dr. Yang appeared to have the most up-to-date and detailed knowledge on the current status and practice of Chinese criminal law and procedure than any of the other expert witnesses. He described the antecedence of current Chinese criminal law and procedure as being part of the civil law family (particularly from the German branch) and explained how it differed from concepts applicable to the common law family. The

⁴¹¹ Exhibit C24.

standard of proof required for criminal guilt in Chinese law is less than beyond a reasonable doubt, as it is in the common law system, and closer to the civil standard of liability. However, the prosecutor always has the burden to prove the guilt of the accused. In his opinion, Article 48 of the Criminal Procedure Law does not impose a duty on the accused person to testify at his trial.⁴¹²

He believed that Mr. Lai would have no difficulty retaining a capable defence lawyer to represent him for any criminal trial in China and, if necessary, he would have a legal aid lawyer appointed for him. In his opinion, any trials would take place in Xiamen, a relatively wealthy area of China, which has a higher standard for judicial proceedings than in many other areas of China. Public access to criminal trials has increased since he was a lawyer in Shanghai and he believed that most trials are open to the public now. While witnesses should be available to testify if their presence was requested at a trial, he admitted that there are still instances where this does not always occur. There are a number of different reasons for this, such as the refusal or reluctance of witnesses to attend court, poor knowledge of the law by some judges, etc.

Dr. Yang also described the common phenomena of a high conviction and a low acquittal rate in both China and Japan. Although they have differing political systems, he attributed this similarity in both countries to the thoroughness of the investigation. They first collect overwhelming evidence to satisfy the prosecutors of the accused's guilt before they will proceed with the case to trial.

Dr. Yang was willing to admit to a number of problems in the current Chinese criminal law and procedure. However, he was optimistic that there was no overriding malevolent intent on the part of the authorities there. Problems are being

⁴¹² Transcript 10 October 2001, page 23, lines 32-33.

discussed openly in China and improvements are being made. The system is being reviewed and will continue to be improved. As to published criticisms of some aspects of the criminal justice system in China, he admitted that there will be some problems in such a huge country, but their numbers are very small in proportion to the total population of China.

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In Dr. Yang's opinion, there is no linkage between the criminal charges against Mr. Lai and Ms. Tsang and any high level political conflict among the leadership in Beijing as was alleged. If the new Minister wanted to remove Li Ji Zhou from his post as deputy minister, Dr. Yang's opinion was that it could be achieved easily by either firing him, moving him to another position, or finding a sinecure for him elsewhere in the government organization. It was also Dr. Yang's opinion that any investigation and criminal charges arising from the investigation of Mr. Lai are a result of a desire to

enforce the criminal law against bribery and smuggling. The Yuan Hua cases are a “stand alone” investigation and not connected to any campaign. In his opinion, the attempt to stop corruption in China is no more political than it is in other countries. The fight against corruption is an international one, and it is assisted by organizations such as the World Bank and the United Nations. In his opinion, there have been many large-scale corruption cases in China. Many people were involved in investigating those cases, just as was the situation here in the Yuan Hua investigations.

In his opinion, Dr. Yang was unaware of the Chinese authorities using fabricated documents or other evidence in criminal cases, and it is inconceivable to him that they would fabricate evidence against Mr. Lai as he has alleged. In his opinion, the evidence against Mr. Lai and Ms. Tsang is overwhelming and sufficient for their cases to go to trial in China. The use of prosecutors to supervise the police investigation in China is similar to the situation in Germany also. The rate of conviction in Germany, more than 95%, is also similar to the rate in China.

In Dr. Yang’s opinion, the promises contained in the diplomatic note between Canada and China will be strictly honoured by the Chinese authorities and it applies to all past crimes they may have committed. Any adverse publicity that might arise in the future regarding their treatment in China would seriously embarrass the Chinese authorities. Because of the high profile of these cases, it is even more likely that Mr. Lai and Ms. Tsang will be subjected to the full and proper application of the Chinese Criminal Law and Criminal Procedure Law in the future. According to Dr. Yang, there is a de facto presumption of innocence and sufficient evidence of their guilt must be presented at their trial, which will be public, just as other trials involved in the Yuan Hua cases have been public.

Overall, the panel found Dr. Yang to be a witness with a broad expertise in the area of Chinese criminal law and criminal procedure. Although he expressed a somewhat idealized view of the Chinese criminal justice system, it was balanced by his willingness to admit problems did exist. His particular qualifications and experience gave his evidence considerable weight and the panel preferred it over the evidence of the experts presented on behalf of the claimants.

9. DIPLOMATIC NOTE

Diplomatic Note from the Government of the People's Republic of China

In the spring of 2001, the government of China and Canada entered into negotiations and correspondence regarding the potential return of the claimants to China and the imposition of the death penalty on Mr. Lai and Ms. Tsang. The process culminated in a diplomatic note from China to Canada.

A photocopy of the diplomatic note was filed as evidence by the Minister's counsel.⁴¹⁴ Other evidence was called by the parties as to the content and reliability of the diplomatic note.

Evidence of John T. Holmes

Mr. John T. Holmes gave evidence at the hearing⁴¹⁵ on October 17, 2001. As well, an affidavit, sworn by him on 5 June 2001, was filed as evidence.⁴¹⁶

Mr. Holmes has been an employee of the Department of Foreign Affairs and International Trade of the Government of Canada since 1982. From 1996 to August

⁴¹⁴ Exhibit C18, tab 1.

⁴¹⁵ Evidence given by means of a telephone conference call.

⁴¹⁶ Exhibit C28, tab 12.

2000, he served as the Legal Counselor to the Permanent Mission of Canada to the United Nations. From August 2000 to the present he has been employed as the Director, United Nations, Criminal and Treaty Law Division in Ottawa, Ontario. Mr. Holmes' evidence concerned the nature and effect of diplomatic notes. He was credible and knowledgeable. Although presented as a fact witness, his qualifications are such that his opinion evidence on the ramifications of a diplomatic note are highly probative.

In his affidavit, he states that a diplomatic note constitutes a formal communication from one government to another. It is a numbered, dated communication, most commonly written in the third person. It is the most formal level of communication between states and is not a communication between individuals. Depending on the nature of a diplomatic note and the intent of the parties to it, a diplomatic note may constitute:

- 1) an agreement, binding at international law, or
- 2) a commitment of a political nature from one state to another, or
- 3) a communication conveying information or acknowledging some fact or event.

He indicates in his affidavit that Note No. 085/01 from the Embassy of the People's Republic of China to the Department of Foreign Affairs and International Trade Canada⁴¹⁷ is a state to state political commitment of type 2 specifically concerning Mr. Lai and Ms. Tsang.

He goes on to say that diplomatic notes of type 2 establish political commitments or undertakings but are not binding obligations in international law. However, they reflect the intention of one party to fulfil the specific commitment or undertaking. Therefore, such a document creates political commitments by the state concerned.

⁴¹⁷ Exhibit C18, tab 1 and repeated in exhibit C28, tab 12, page 8.

In his opinion, a failure by a state to fulfil a commitment or undertaking would seriously undermine the credibility of that state. It would, therefore, be very unusual for a state not to fulfil a commitment or undertaking freely expressed in a diplomatic note.

In the affidavit, he sets out the history of contacts between the government of China and Canada concerning Mr. Lai and Ms. Tsang that preceded the note. It was preceded by correspondence between the Chinese Ambassador to Canada, Mei Ping, and the Honorable John Manley, the Minister of Foreign Affairs for the Government of Canada, as well as Joseph Caron, Assistant Deputy Minister Asia Pacific and Africa of the Department of Foreign Affairs and International Trade. The correspondence is attached to the affidavit as exhibits C and D.

The diplomatic note is of central importance and is reproduced here in its entirety.

NOTE NO. 085/01

The Embassy of the People's Republic of China in Canada present its compliments to the Department of Foreign Affairs and International Trade Canada and has the honour to respond to Assistant Deputy Minister Caron's letter of April 27, with the following information:

Lai Changxing is the chief criminal suspect of the mega smuggling case in Xiamen of China's Fujian Province. He fled to Canada after the case was detected. It is of great importance for China's efforts to fight against corruption and smuggling to have him repatriated to China for a trial by the competent Chinese judicial departments.

The Chinese side has noted the judicial practice of Canada relating to death penalty in repatriating criminal suspects. In view of this, the Chinese Government undertakes that after his repatriation to China, the Chinese appropriate criminal court will not sentence Lai Changxing to death for all the crimes he may have committed before his repatriation. The Supreme People's Court, the highest judicial organ in China, has decided to that effect and the appropriate criminal court in charge of the alleged smuggling and bribery case will be adequately informed of this decision and will abide by it.

In accordance with the above decision and Article 199 of the Criminal Procedure Law of the People's Republic of China which stipulates that "death sentences shall be subject to approval by the Supreme People's Court", the appropriate criminal court will not sentence him to death and

even if it does, the verdict will not be approved by the Supreme People's Court, therefore, he will not be executed in any case if returned to China.

At the same time, China is a state party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the provisions of the relevant Chinese laws, during the period of investigation and trial of Lai after his repatriation and, if convicted, during his term of imprisonment, Lai will not be subject to torture and other cruel, inhuman or degrading treatment or punishment.

Zeng Mingna, Lai's wife, is also a suspect involved in the same smuggling case. She fled with Lai to Canada. If Zeng is repatriated to China, the above-mentioned commitments will be equally applicable to her.

The Embassy of the People's Republic of China avails itself of this opportunity to renew to the Department of Foreign Affairs and International Trade Canada the assurances of its highest consideration.

At the hearing, Mr. Holmes stated that during his career he had dealt with hundreds of notes from various countries, including a significant number from the government of China. In his experience, the government of China had never violated the substance of any of these notes. He expresses the opinion that it would be very unusual for a state not to fulfil a commitment that was freely expressed in such a document. He was not aware of any situation where the government of Canada had not relied on a note of this type. He also gave the opinion that no one would argue that the assurances contained in the note were anything but a commitment by the Government of China as opposed to an individual within that government.

In his experience, a note of type 2 is used when a country makes assurances to Canada on issues such as the imposition of the death penalty. For example, a note of type 2 was given by the United States of America to Canada after the recent decision of the Supreme Court of Canada in *United States v. Burns*.⁴¹⁸ The Court considered the extradition of two men, Burns and Rafay, who were accused of murder in the United States and were facing the death penalty in that country. The United States agreed that

⁴¹⁸ *United States v. Burns*, [2001] 1 SCR 283.

the subjects of the extradition request would not be executed. He distinguished a type 1 diplomatic noted as being essentially a treaty between two countries requiring a ratification by the signatories.

Mr. Holmes confirmed that there is no extradition treaty between China and Canada, and that to his knowledge no request for extradition had been made by the Chinese government for Mr. Lai or Ms. Tsang pursuant to section 11 of the *Extradition Act*.

Opinion Evidence on the Diplomatic Note

Several witnesses presented as experts gave their opinions as to the import of the note. The assessment of the overall expertise of these witnesses is set out elsewhere in these reasons. On this issue, for the reasons set out in the review of the expert evidence, we prefer the opinion evidence of Drs. Cohen, Burton and Yang to the opinions to the contrary. It was the opinion of Drs. Cohen, Burton and Yang that the Chinese government would honour the commitments made in the diplomatic note in regard to the death penalty. While Dr. Cohen was unwilling to express an unqualified confidence in regard to the treatment of the claimants should they be incarcerated, Dr. Burton was of the view that the Chinese government would also honour its commitments in that regard. He stated: "I am completely convinced that the Chinese government will fully honour everything that they said in the diplomatic note, both in letter and in spirit."⁴¹⁹

Several newspapers articles were filed regarding comments made by various government officials in China and Canada regarding Mr. Lai and Ms. Tsang and the death penalty. For example, in an newspaper article from the Singtao Daily dated 15

⁴¹⁹ Transcript, 27 July 2001, page 43, line 24-28.

October 2000, Premier Zhu Rong Ji is reported to have said that executing such a person as Lai Cheong Sing ten times over would not be too much.⁴²⁰ In an article from the South China Morning Post dated 30 November 2000, legal sources in mainland China stated that there was little chance Mr. Lai's life would be spared should he return to China.⁴²¹ In an article in the Globe and Mail newspaper dated 10 May 2001, Chinese Ambassador Mei Ping is quoted as being highly critical of the Canadian legal system, and speaking in favour of the death penalty. In October 2001, after the diplomatic note was signed, it was reported that the President of China, Jiang Ze Min, met with the Prime Minister of Canada, Jean Chrétien. One article stated:⁴²²

Prime Minister Jean Chrétien got the personal guarantee of Chinese President Jiang Zemin that a Chinese businessman accused of masterminding a \$10-billion embezzlement scam would not get the death penalty if deported to China. The guarantee came during a meeting between the two leaders at the opening of the Asia-Pacific Economic Cooperation summit where Canadian Official said the PM raised China's horrendous human rights record. "Jiang gave Chrétien his personal commitment that he (Lai Cheongxing) would not receive the death penalty."

In our view, the most probative evidence as to whether Mr. Lai or Ms. Tsang would be executed or mistreated in custody if they return to China is contained in the official statement of the government of China, the diplomatic note.

We find that the note applies equally to both Mr. Lai and Ms. Tsang. We find that it refers to a sentence of death, and does not allow for the possible imposition of a "suspended" sentence of death.

We find on the balance of probabilities that the government of China will honour the terms of Note No. 085/01 concerning the non-imposition of the death penalty

⁴²⁰ Exhibit A10, tab 15.

⁴²¹ Exhibit A10, tab 16.

⁴²² Exhibit C54, "China Tells PM It Won't Execute Refugee", The Toronto Sun, Saturday October 20, 2001.

on Mr. Lai and Ms. Tsang should they return to China and be convicted of any crimes committed before their repatriation. We also find on the balance of probabilities that the government of China will honour the terms of Note No. 085/01 that Mr. Lai and Ms. Tsang will not be subject to torture and other cruel, inhuman or degrading treatment or punishment if they are convicted of any crimes committed before their repatriation.

10. WITNESSES FROM CHINA

Minister's counsel called four witnesses from China: Inspector Wu Jiang Ping, Prosecutor Li Yong Jun, Prosecutor Wang Zhong Hua and defence counsel Dr. Zhao Bing Zhi. Inspector Wu was involved in the 4-20 Investigation and was the person in charge of the team that allegedly discovered the documents in the Red Mansion that incriminate the principal claimants. Prosecutor Li was involved in the trial against 19 people accused of smuggling in Xiamen who allegedly had dealings with Mr. Lai Cheong Sing. Prosecutor Wang lead the prosecution against Mr. Li Ji Zhou. Dr. Zhao defended two accused in one of the Xiamen smuggling cases.

For the most part, the witnesses were credible. There were no obvious attempts to mislead the panel. In the case of Inspector Wu, it was clear that he was willing to give evidence damaging to his reputation as an inspector and supervisor.

The Minister's counsel no doubt presented the witnesses to establish the bona fides of the Chinese criminal justice system in general terms and in the specific terms of the smuggling and Li Ji Zhou prosecutions. Counsel for the claimants saw the four witnesses as at best hapless puppets of an overreaching state judicial apparatus bent on victimising Mr. Lai Cheong Sing, Ms. Tsang Ming Na, and their children. In our view, the four witnesses gave a generally honest account of their experiences from their own cultural and legal perspectives.

Evidence of Inspector Wu Jiang Ping

The Minister's counsel called Wu Jiang Ping, a Chinese Customs Inspector, and policeman (hereafter referred to as Inspector Wu). He gave evidence over four days⁴²³ on his role in the 4-20 Investigation of smuggling by 'cargo switching' and 'false entrepôt'.⁴²⁴ He also gave evidence on aspects of Chinese criminal law and procedure. Many of the documents provided to the Canadian government by the Chinese government, including a number of interrogation statements filed as evidence, were sent to Canada through Inspector Wu.

Inspector Wu was generally a credible witness. He was direct and at times painfully honest about the shortcomings of some of the work done under his supervision.

In August 1999, Inspector Wu was the section chief of the Smuggling Crime Investigation Sub-Bureau of Ningbo Customs under the joint administration of the Ministry of Public Security and the General Administration of Customs.

Assignment to Xiamen

In August he was asked to go to Xiamen on a temporary assignment to investigate a large smuggling case. When he arrived in Xiamen, he learned that many other investigators were being transferred to Xiamen to help in the case.

Inspector Wu testified that he was put in charge of a group investigating cigarette smuggling. Other teams were looking into alleged smuggling of things such as automobiles and fuel. There were approximately 10 subgroups. The allegations being

⁴²³ Transcripts, 31 July 2001, 1, 2, and 7 August 2001.

⁴²⁴ The Concise Oxford Dictionary, 1990, page 392, defines "entrepôt" as 1) a warehouse for temporary storage of goods in transit. 2) a commercial centre for import and export, and for collection and distribution.

looked into covered many areas: smuggling, bribery, economic crime, and crimes involving taxation.

His immediate supervisor was Mr. Lü Bin. The person in charge of the 4-20 Investigation in Xiamen was Mr. Mu Xin Sheng, the Deputy Director General of the General Administration of Customs. Mr. Mu was in turn under the supervision of Mr. He Yong, the Minister of Supervision, and the Deputy Secretary of the Central Discipline Committee.

Inspector Wu testified that the investigation started after authorities received a detailed report from a citizen about smuggling activities in Xiamen. He stated that he had never seen the report. He noted that by Article 85, clause 3 of the Criminal Procedure Law,⁴²⁵ a letter of accusation can be confidential, to be seen by a very limited number of people. He testified that his superiors briefed him as to its contents for the purposes of his work. He was told that the letter of accusation listed a large number of people and companies alleged to be involved in the smuggling business.⁴²⁶ Late in his evidence, he stated that there were 27 smuggling cases being investigated, of which all but 2 or 3 had direct or indirect connection with the Yuan Hua Group.⁴²⁷

Entrepôt Business

Inspector Wu described legitimate and illegal entrepôt. When done properly, goods from one country are shipped to a bonded warehouse or zone in a second country, in transit to a third country. The goods are not subject to duties as long as they

⁴²⁵ Exhibit C21.

⁴²⁶ Transcript, 7 August 2001, page 75, lines 22-25.

⁴²⁷ Transcript, 7 August 2001, page 80, lines 15-31.

are moved on to the third country. When the goods are ready to be shipped to the third country, the necessary paperwork is filed with Customs, and the goods are released.

False entrepôt occurs when the goods are kept in the second country. The documentation and processes are falsified to make it appear that the goods were properly shipped out when in fact they are sold in the second country without duty being paid.⁴²⁸

The Yuan Hua Company did not have the right to carry on the entrepôt business, but a company in the Yuan Hua Group, the Xiangyu Yuan Hua Import and Export Company, had the right to operate an import and export business. According to Inspector Wu, about 12 companies conducted business jointly with Xiangyu Yuan Hua Import and Export Company.

Alleged Discovery of Smuggling Documentation in the Red Mansion

Inspector Wu testified that important evidence related to the cigarette smuggling business was found in a safe in room 503 of the Red Mansion. He drew a rough diagram of a floor plan at the hearing to illustrate the location and contents of the room.⁴²⁹ The diagram shows a rectangular shaped floor plan, with an elevator and staircase in the upper left-hand corner. A hallway is shown running horizontally through the middle of the diagram. Halfway along the lower side of the hallway, Inspector Wu sketched a doorway into what he said was room 503. Another doorway from this room is shown in its lower left corner. The diagram shows another room through this doorway. The sketch indicates two rectangles he described as desks and the safe where the documents were allegedly found.

⁴²⁸ Transcript, 31 July 2001, page 15, line 34 to page 16, line 17.

⁴²⁹ Exhibit C37.

He testified that there were two safes in the second room. Inspector Wu stated that in the smaller of the two safes a yellow paper bag or envelope containing 15 pages of invoices was found. On the outside of the envelope was written "To Ms. Zeng" in pencil. Copies of the documents and the envelope were filed as evidence.⁴³⁰

Handwriting in the top right hand corner of one document in the exhibit⁴³¹ was not translated into English. Inspector Wu testified that the writing was the Chinese characters for the names of his two subordinates who found the envelope, and a date, "September the 25th".⁴³²

His evidence was that when his subordinates discovered the smaller safe it was locked. They took the safe to their office where a locksmith opened it. Inspector Wu was not present at the discovery or opening of the safe, or during the removal of the documents.

Inspector Wu stated in evidence that he had been in room 503 on many occasions and repeated several times that the safe containing the shipping documents was in it. However, after he gave his evidence, a floor plan of the Red Mansion was filed by the Minister's counsel.⁴³³ The layout of room 503 given by Inspector Wu and room 503 in the floor plan clearly do not match. The room that most closely reflects what he describes is an office space on the 7th floor, located in the extreme lower left corner of the floor plan. In the diagram, the office is shown to contain three safes and two desks. As he had left Canada before the floor plan supplied by the Minister's counsel was filed as evidence, Inspector Wu was never shown or questioned about it.

⁴³⁰ Exhibit C10, tab 3. Exhibit C42, tab 4 contains a color photocopy of the envelope.

⁴³¹ Exhibit C10, tab 5, unnumbered page 10.

⁴³² Transcript, 7 August 2001, page 92, lines 12-40.

⁴³³ An English language version of the floor plan of the Red Mansion was filed on 3 October, 2001 and is Exhibit C47.

Counsel for the claimants suggested to Inspector Wu that his team's discovery of the materials in the safe was one of the most important pieces of evidence found in the 4-20 Investigation. Inspector Wu agreed that his group had found important evidence in the safe of cigarette smuggling.⁴³⁴ He also testified that no pictures were taken of the discovery of the safe in the Red Mansion. He also confirmed that the safe was taken to the hotel being used by the investigators before it was opened. He was not called by his subordinates until after the locksmith had opened the safe and the file folder was removed.⁴³⁵ He confirmed that no contemporaneous records were kept for the discovery of the documents and that the procedures followed by his subordinates when finding the material were "terrible".⁴³⁶

Late in his evidence, he stated that a few other documents were found during the 4-20 Investigation that did not relate directly to cigarette smuggling, but rather to monies lent by Mr. Lai and accounting documents from the Haixin Container Yard.⁴³⁷ He earlier noted that there was evidence in China which was not presented to the panel about seizure of smuggled goods.⁴³⁸ Early on in his evidence, he testified that his group anticipated that much of the evidence would have been destroyed, because Mr. Lai had allegedly been "tipped off" by someone prior to the investigation starting.

Of particular note to the panel is that the name of Lai Cheong Sing was not noted on any of the documents allegedly found in the safe at the Red Mansion. In our view, it is extremely unlikely that documents fabricated to implicate Mr. Lai would never mention him by name.

⁴³⁴ Transcript, 2 August 2001, page 87, lines 17 - 42.

⁴³⁵ Transcript, 2 August 2001, page 90 and 91.

⁴³⁶ Transcript, 2 August 2001, page 92, lines 6-7.

⁴³⁷ Transcript, 7 August 2001, page 82, line 52 to page 84, line 15.

⁴³⁸ Transcript, 2 August 2001, pages 9 and 10.

Alleged Contents of the Smuggling Documentation

One of the documents allegedly found in the safe was a “Goods Delivered Report, Cigarette”, for April 1999.⁴³⁹ Inspector Wu’s testimony on this document focused on the vessel “Qing Hua”, voyage number 9906, carrying 30 containers. The date on the form for the ship’s arrival is shown as 14 March 1999. The goods were primarily foreign and domestic cigarettes with brand names such as Wan Shi Fa, 555, Hilton and Baisha.

Inspector Wu testified that his investigation lead him to the conclusion that once in port, the customs paperwork for the containers was falsified to show the contents to be polypropylene and wood pulp. The re-identification significantly reduced the duty payable. Cigarettes are subject to high duty while polypropylene and wood pulp are not.⁴⁴⁰

Inspector Wu testified that if the name of a vessel and a voyage number are known through the Goods Delivery Report, the relevant Customs documentation can be tracked down. When a ship comes into port, a declared list of cargo must be presented to Customs and other officials. The paperwork confirmed that the ship Qing Hua arrived in Xiamen on the day stated in the form.

Inspector Wu testified that he did check the “customs cleared” paperwork⁴⁴¹ necessary to release the goods. In his words, the documentation showed that the goods “had turned into pulp and polypropylene”. His team’s task was to find who had falsified the description of the goods.

⁴³⁹ Exhibit C10, tab 3, page 24.

⁴⁴⁰ In the case of the domestic brands, the taxes for cigarettes for export from China were low. Domestically manufactured cigarettes could be sold at a large profit in China if they were brought back into the country, having avoided domestic tax.

⁴⁴¹ Exhibit C9, tab 8, unnumbered page 19.

Inspector Wu referred to three invoices⁴⁴² and cargo manifests⁴⁴³ for pulp and polypropylene filed as evidence. The receiver on the cargo manifest is shown as Kai Yuan Trading Company. The declaration agent for the Kai Yuan Foreign Trade Group for the 'customs cleared' form was Ms. Wu Jia Ying. She received her instructions from Mr. Wu Min Sheng, the declaration manager for the company. Mr. Wu Min Sheng told the investigators that the customs declaration forms were given to him by a person named Lian Hui Shan from the Dong Fang Company. Mr. Lian is alleged to have gotten his instructions from Mr. Hou Xiao Hu, allegedly an employee of the Yuan Hua group of companies.⁴⁴⁴

According to Inspector Wu, both Mr. Wu Min Sheng and Ms. Wu Jia Ying of the Kai Yuan Company denied ownership of the goods listed in the fake invoices. Both said the goods belonged to the Yuan Hua Company. As the manager of the Kai Yuan Company had fled before Inspector Wu began his work, he also talked to an employee in the financial section of the company, Ms. Li Wei Hua, to confirm whether the goods belonged to Kai Yuan Company. Ms. Li told the inspector that her company had never received the goods listed in the false invoices. She went on to say that the duty on the goods was paid by Ms. Wu Ling Ting of the Yuan Hua Company.⁴⁴⁵ Ms. Wu stated that she paid the duty under the instruction of Mr. Hou Xiao Hu, also of the Yuan Hua Company.

Inspector Wu described additional evidence allegedly gathered about the production of the Goods Delivery Reports. According to evidence obtained from Mr. Lai

⁴⁴² Exhibit C9, tab 8, unnumbered pages 13, 14 and 15.

⁴⁴³ Exhibit C9, tab 8, unnumbered pages 16, 17 and 18.

⁴⁴⁴ Exhibit B6, page 3. Counsel for the claimants disputed some of the characterizations in this list of persons named in the case. The list of persons prepared by counsel for the claimants, Exhibit A10, tab 32, does not include this name.

⁴⁴⁵ Transcript, 31 July 2001, page 45, lines 16-20.

Chang Tu, the reports were prepared by Ms. Zhang Wei Qun of Yuan Hua Company in Hong Kong. Ms. Zhang Wei Qun told the 4-20 Investigation team that there were many reports similar to the “Goods Delivery Report, Cigarettes”, for April 1999. The reports were given to an employee in Yuan Hua Company in Hong Kong called Gao Tu Gai who flew from Hong Kong to Xiamen and delivered them to the Yuan Hua Company in Xiamen. Copies were provided to Ms. Tsang because Ms. Tsang wanted to know the cost or the profits from these smuggling activities.

Inspector Wu testified about his questioning of some of the owners listed on the “Goods Delivered Report, Cigarette” for April 1999. His purpose was to determine from them what the shipment was — cigarettes or wood pulp and polypropylene. In some cases, it turned out that the owners of the goods shown on the Goods Delivery Reports were not the actual owners.⁴⁴⁶ Two of the owners listed were Lai Chang Tu and Lai Shui Qiang, both brothers of Lai Cheong Sing. Lai Chang Tu told Chinese investigators that his name appeared on the Report, that the cigarettes had indeed been brought into China, but they were for a friend, not for him.

The false documentation was prepared in Hong Kong by Yuan Hua International. They were delivered to Xiamen by a Yuan Hua International employee, Gao Tu Gai.⁴⁴⁷

Process for Cargo Switching

Inspector Wu testified that some containers with imported goods were opened by Customs to compare the contents on the manifest.⁴⁴⁸ Once they arrived, the

⁴⁴⁶ Transcript, 31 July 2002, page 38, lines 36-44.

⁴⁴⁷ Transcript, 31 July 2002, page 46, line 52, to page 47, line 1.

⁴⁴⁸ Transcript, 31 July 2001, page 47, 23-25.

goods were initially stored in the Haixin Container Yard. The operator of the Haixin Container Yard was Xiamen Haixin Container Storage Company Limited. Mr. Lai Cheong Sing was the chairman of its board of directors. The person in charge of the company was Mr. Shao Jia Xi.

The Customs verification of the goods in the containers was conducted by the Tong'an Customs office. When they decide to examine a container, personnel at the Customs office notified the Yuan Hua Company as to which container would be examined the next day.

A Customs officer working in the field, Zhu Jian Guo, stated in his interrogation record⁴⁴⁹ that he took a bribe of more than 400,000 RMB from Yuan Hua Company to assist in this process. After the identification numbers of the cargo containers to be examined were known, arrangements were made to change the goods the night before the examination that was to take place. This was done in the Haixin Container Yard.

Workers at the Haixin container yard, Chen Guo Jun and Fang Jin Huan, stated in their interrogation record⁴⁵⁰ that since they have been working in the Haixin Container Yard their job had been to replace commodities in the containers. They would take the goods from the cargo container that was supposed to be examined by the Customs office, replace it with the pulp and polypropylene, close the container and seal it off, making it ready for examination by Customs officers. The goods taken out included high-duty goods such as cigarettes and automobiles.

⁴⁴⁹ Exhibit C9, tab 5, unnumbered page 39.

⁴⁵⁰ Exhibit C9, tab 6, unnumbered page 22 (Chen Guo Jun); Exhibit C9, tab 6, unnumbered page 28 (Fang Jin Huan).

From the Qing Hua 9906 voyage alone, the taxes allegedly evaded⁴⁵¹ totalled about 150 million RMB. Only 400,000 RMB was paid by Ms. Wu Ling Ting on behalf of the Yuan Hua Company.

Huang Ke Zhen, the son in law of Lai Shui Qiang, and Chen Wen Yuan, the nephew of Lai Cheong Sing, stated in their interrogation record⁴⁵² that they had been engaged with Lai Cheong Sing in the cigarette smuggling business since 1994, often conducted through the Haixin Container Yard. The Customs supervisor of the yard, Chen Zhao Zhong stated in his interrogation record⁴⁵³ that he had taken more than 1 million RMB in bribes to let the smuggling go on.

Inspector Wu added that the placement of a Customs office in the Haixin Container Yard was unusual because it was located outside the normal supervisory area of the Customs office in an isolated place.⁴⁵⁴

One of the issues that concerned Inspector Wu was how the customs seals on the containers were replaced when the Haixin Container Yard employees opened the specified containers for reloading. He testified that each container had unique numbered seals. Workers at the Haixin Container Yard told the investigators that the strips used to reseal the containers were brought in by the Yuan Hua Company from Hong Kong by a person named Liang Guo Guang.

Inspector Wu was questioned at length in cross-examination about the steps taken when containers were processed through Customs in Xiamen.⁴⁵⁵ As the panel

⁴⁵¹ The three taxes allegedly evaded were the duty, the value-added tax and consumption tax. Transcript, 31 July 2001, page 48, 33-40.

⁴⁵² Exhibit C9, tab 7, unnumbered page 27 (Huang Ke Zhen); Exhibit C9, tab 7, unnumbered page 30 (Chen Wen Yuan).

⁴⁵³ Exhibit C6.2, unnumbered page 123.

⁴⁵⁴ Transcript, 7 August 2001, page 78, lines 32-46.

⁴⁵⁵ Transcript, 2 August 2001, page 14 line 50 to page 21, line 12 and page 22, line 51 to page 31, line 12.

understands the evidence, the legitimate process for importing goods by container included several aspects. Each shipping container has a unique identifying number. After it is loaded, it is sealed with a commercial seal that also has a unique identifying number. The shipping paperwork sets out the container number, the contents of the container, and the commercial seal number. When the container arrives at its final destination, it may or may not be inspected. If it is inspected, Customs officials remove the commercial seal, inspect the contents, compare the contents to the paperwork for that container, and reseal the container with a Customs seal. The container had then 'cleared' Customs. Counsel for the claimants suggested to Inspector Wu that it would be impossible for the smugglers to know the number to be used for the fake replacement commercial seal. In the panel's view, the number could be no more than an invention, so long as it agreed with the fake documentation.

Before the Customs inspection took place on pre-selected containers, the Haixin Container Yard staff would remove the legitimate commercial seals, open the container, and replace the contents with commodities subject to lower duty. The container was then sealed with a fake commercial seal that agreed with fake documentation for the replacement contents of the container. When the container was opened by customs, the commercial seal number, the fake shipping documentation and the contents would all be in apparent order. The container would be resealed with a Customs seal and the container would have 'cleared' customs. An important step in the process was that the containers offloaded at the Xiamen docks destined for the Haixin container yard could be taken directly from the dock to the yard without any kind of inspection.⁴⁵⁶

⁴⁵⁶ Transcript, 2 August 2001, page 29, lines 33-34.

Counsel for the claimants asked Inspector Wu his opinion as to why a smuggler would want to both bribe and fool Customs officials. In counsel's view, if Customs officials were bribed, there was no need to fool them, and vice versa. If a briber was prepared to pay off some people, why would the smuggler not pay off everyone? Inspector Wu quite reasonably replied that the question could only be answered by the briber. In the panel's view, there is no fatal logical problem with an allegation of selective bribery.⁴⁵⁷

Another issue was how the falsified documents ended up on the vessels importing the goods. Inspector Wu's group interrogated the captains and crews of four vessels: the Qing Hua, Su Da, Su Chang, and Ru Jiang. These ships were contracted by the Yuan Hua Company and carried goods solely for the Yuan Hua Company for several voyages. They were paid extra for their efforts by the Yuan Hua Company.

When the vessels arrived in Xiamen from overseas they would sit at anchor before unloading. The falsified documentation would be taken to the ship by small craft. In his evidence, Inspector Wu described in some detail the people who did this task.

Using the false documents, there was no way the Customs officers could find out where the cigarettes came from, so that there is no way to find out the company involved on the other side. However, according to the Chinese law, there is no need to find out the source of the smuggled goods as long there is proof that an attempt was made to evade taxes and duty.

Inspector Wu testified that based on the statements of the suspects, he believed the Yuan Hua Company engaged in cigarette smuggling between 1994 and 1995

⁴⁵⁷ Transcript, 2 August 2001, page 31, lines 14-52.

and for the period from January 1998 to February 1999. However the investigators could not obtain the necessary corroboration to confirm their beliefs.

Several persons – Messrs. Lai Shui Qiang, Huang Ke Zhen, and Chen Wen Yuan – admitted they were involved in smuggling activities. Their evidence was that the main organizers of the enterprise were Mr. Lai Cheong Sing and Ms. Tsang Ming Na. When they obtained this information, Inspector Wu and his group applied to the Xiamen People’s Procuratorate for a warrant of arrest.

Ms. Tao Mi, allegedly a secretary to Ms. Tsang Ming Na, is reported to have said in a statement taken by Inspector Wu that she believed important documents were destroyed by Mr. Lai Cheong Sing and others after June of 1999. She said she overheard conversations at her place of work to that effect.⁴⁵⁸

Inspector Wu also participated in the interrogation of Mr. Huang Ke Zhen, the son-in-law of Mr. Lai Shui Qiang⁴⁵⁹ on 11 March 2000. In the interrogation report,⁴⁶⁰ Mr. Huang states that he turned himself in on the urging of his father-in-law on 9 March. Mr. Huang describes how he was hired by Lai Chang Biao in 1994 to come to Xiamen and manage a group of truck drivers who were hauling smuggled cigarettes. He was also involved in distribution.

He stated that he had seen documents like the “cigarette delivery report” several times over the years. The list described the cigarette brands and to whom they were to be distributed. He went on to say that copies of the lists were given to Zeng Ming-Na [Ms. Tsang Ming Na] because she controlled the money, so she needed to know

⁴⁵⁸ Exhibit C5, tab 10, unnumbered page 33

⁴⁵⁹ Mr. Lai Shui Qiang travelled to Canada with the 4-20 Investigation team in May 2000.

⁴⁶⁰ Exhibit C9, tab 7, unnumbered page 26.

who had to pay how much to the Yuanhua [Yuan Hua] Group. In his evidence, Inspector Wu stated that Mr. Huang was not in custody when the statement was taken, and was allowed to go home when the session was completed.

Inspector Wu also interrogated Mr. Lai Chung Tu, the younger brother of Mr. Lai Cheong Sing, in April of 2000. Mr. Lai Chung Tu stated that he was involved in cigarette and automobile smuggling. He noted that Ms. Tsang Ming Na regularly received delivery reports relating to smuggled cigarettes.

In cross-examination, Inspector Wu acknowledged that some of the interrogation reports were incomplete. Some did not record the time when interviews ended. He acknowledged that according to the Criminal Procedure Law, no interrogation should extend beyond 12 hours. He stated a failure to write down the time an interview ended did not mean the law had been violated. He also testified in cross-examination that during his career, he had never used violence or threats of violence while interrogating anyone.⁴⁶¹ He had read about such things happening in China, but he had no personal knowledge of such incidents. He confirmed that the documentary evidence in the smuggling case by itself would not be sufficient for a prosecution.⁴⁶² He also stated in cross-examination that no smuggled cigarettes were found on the property of Mr. Lai Cheong Sing or Ms. Tsang Ming Na.

Smuggling Allegations against Ms. Tsang Ming Na

One of the documents allegedly found in the yellow envelope⁴⁶³ in the Red Mansion safe was a report concerning polyester fibre allegedly owned by a person named

⁴⁶¹ Transcript, 7 August 2001, page 52, lines 33-43.

⁴⁶² Transcript, 1 August 2001, page 66, lines 9-14 and 2 August 2001, page 7, lines 1-5.

⁴⁶³ Exhibit C10, tab 5, unnumbered page 17 and 19.

Mrs. Xie (also known as Ms. Cai Shuang Min).⁴⁶⁴ Inspector Wu testified that the information he gathered lead him to believe that in the spring of 1999, Ms. Cai Shuang Min asked Ms. Tsang Ming Na to ship polyester fibre into China for her in a way that would avoid duty.

An agreement was reached that Ms. Tsang would facilitate such shipments for \$5,000 HK per cargo container. The goods were shipped by rail once they entered China to a location designated by Ms. Cai Shuang Min. An employee of the Railway Bureau assisted in making the necessary administrative arrangements.⁴⁶⁵

Inspector Wu stated that according to the testimony given by Cai Shuang Min and another person, the total amount of the money remitted by Ms. Cai into the account of Ms. Tsang Ming Na in Hong Kong was about \$10 million Hong Kong. He testified that in his view, by Chinese law and regulation, Ms. Tsang Ming Na had committed the crime of smuggling, as set out in the Chinese *Criminal Procedure Law*, article 153.⁴⁶⁶

Inspector Wu gave evidence about an interrogation record concerning Ms. Tao Mi.⁴⁶⁷ Ms. Tao was questioned by Inspector Wu on 4 August 2000. The interrogation took place in a room of the Xiamen Guest House. The questions and answers for the interview were written down and Ms. Tao Mi signed the record when it was complete. At the time the statement was taken, Ms. Tao Mi was out of custody and

⁴⁶⁴ Madam Xie was identified as Ms. Cai Shuang Min. The evidence of Inspector We was that according to Hong Kong custom, Ms. Cai Shuang Min, as the wife of Xie Bei Chao, would be known as Madam Xie. Transcript, 31 July 2001, page 56, lines 5-8.

⁴⁶⁵ Transcript, 31 July 2001, page 56, lines 12-30.

⁴⁶⁶ Transcript, 31 July 2001, page 57, lines 34-46.

⁴⁶⁷ Exhibit C5, tab 10, unnumbered page 33.

on bail. There was nothing in the record of the interview or the evidence of Inspector Wu to suggest Ms. Tao was mistreated in the course of the interview.

In the statement, Ms. Tao Mi is alleged to have said that while she knew of the smuggling done by the Yuan Hua group, she herself worked only in the real estate investment branch of the company. She also said she was the secretary of Ms. Tsang Ming Na. She stated that at an unspecified time Ms. Tsang told her that Mr. Lai Cheong Sing was “very stupid” because he put 200 million Yuan into the companies account. Ms. Tsang Ming Na is alleged to have said: “It is impossible for a foreign-invested company to have so much money in Chinese currency.”⁴⁶⁸

In the interview, Ms. Tao was also asked when Ms. Tsang Ming Na first came to Xiamen to live permanently. She replied that it was in February 1999 and that Ms. Tsang’s purpose in coming was to control the money made by smuggling. Ms. Tsang allegedly told Ms. Tao that her relationship with her husband was based solely on money. They had no affection for each other.

In our view, the spontaneity of this comment by Ms. Tao bolsters the statement’s probative value.

Conclusion of Inspector Wu’s Investigation

At the end of his examination in chief, Inspector Wu stated that his group submitted an “opinion recommending prosecution...” to the Procuratorate regarding 19 persons alleged to have been involved in smuggling cigarettes.⁴⁶⁹ Towards the end of his cross-examination, he stated that some of the 19 he recommended for prosecution were

⁴⁶⁸ Exhibit C5, tab 10, unnumbered page 34.

⁴⁶⁹ Transcript, 1 August 2001, page 12, lines 9-28.

eventually executed. He did not personally give evidence or attend the trials of the 19.⁴⁷⁰ Mr. Lai Cheong Sing and Ms. Tsang Ming Na were not named in the report because only suspects in the control of the investigators can be sent for prosecution.⁴⁷¹

Inspector Wu stated that his group investigated a total of 13 voyages. According to the calculations by the Customs officers, the total amount of taxes evaded by these voyages was 1.7 billion RMB. Inspector Wu testified that according to a judgement of the Xiamen Intermediate People's Court over time the total amount of the taxes evaded from these two practices – false entrepôt and cargo switching – was estimated to be approximately 8.9 billion RMB.

Evidence of Prosecutor Li Yong Jun

The Minister's counsel called Li Yong Jun to give evidence.⁴⁷² He was the "first prosecutor" on a team of eight responsible for prosecuting one of several Xiamen smuggling cases. He participated in case number 144 of the Xiamen Intermediate People's Court.⁴⁷³

Prosecutor Li was questioned on a disparate variety of issues, in a disjointed manner. He was questioned at length about the Chinese criminal justice system and how it applied to the Xiamen smuggling case. He reviewed the various provisions of the Criminal Procedure Law and the Criminal Law and their application to the 19 defendants in that case.⁴⁷⁴ He was questioned about the retrieval of documents

⁴⁷⁰ Transcript, 7 August 2001, page 57, lines33-51.

⁴⁷¹ Transcript, 1 August 2001, page 13, lines 5-6.

⁴⁷² Mr. Li Yong Jun gave evidence over 5 days: 7 and 8 August 2001 and 1, 2, and 3 October, 2001.

⁴⁷³ Exhibit C8 is the judgement of the court in case number 144.

⁴⁷⁴ Exhibits C21 and C22 respectively.

from the Red Mansion, and the various methods of smuggling allegedly engaged in by Mr. Lai Cheong Sing and Ms. Tsang Ming Na.

Red Mansion Documents

Prosecutor Li was questioned extensively on Inspector Wu's evidence that the procedures used when the envelope and documents were found in the Red Mansion were not correct. Prosecutor Li testified that evidence may or may not be used in a prosecution when such a procedural error is made. He testified that if he had noticed that the investigators had made a mistake about the location where the envelope and documents were found, he would have asked them to reinvestigate.

Prosecutor Li was questioned on the role of the prosecutor in supervising "illegalities" in police conduct.⁴⁷⁵ In particular, he was questioned about the preservation of a crime scene, pursuant to Article 102 of the Chinese Criminal Procedure Law. That article states: "Each and every unit and individual shall have the duty to preserve the scene of a crime and to immediately notify a public security organ to send officers to hold an inquest."⁴⁷⁶

He testified that he spoke to Inspector Wu about the problems and reviewed the content of the documents. He stated "...I believe that this evidence is acceptable and can be accepted."⁴⁷⁷ When counsel for the claimants pointed out again that there was confusion in the evidence of the 4-20 Investigation team as to where the envelope and documents were found in the Red Mansion, Prosecutor Li stated:⁴⁷⁸

⁴⁷⁵ Transcript, 1 October 2001, page 27, line 34 to page 28, line 3.

⁴⁷⁶ Exhibit C21, Criminal Procedure law, Article 102, page 71.

⁴⁷⁷ Transcript, 1 October 2001, page 29, lines 45-46.

⁴⁷⁸ Transcript, 1 October 2001, page 33, lines 12-23.

I personally believe that no matter where in this building the documents are, the delivery report was found, it would not affect the value, so it would not affect the credibility of the evidence as the cigarette delivery report. This report was addressed to Tsang Ming Na. This is very clear. And also the purpose that's documented in that evidence is also very clear. And furthermore, we have four witnesses that could -- could testify about this. Since I have orally expressed to the investigating authority about the inappropriateness of obtaining this evidence, I believe that I have performed my duty in this regard. Therefore, based on nature of the negligence and -- and considered the testimonies from witnesses, I -- it is my belief that the evidence -- it's my belief that this evidence can still be presented to the court. Therefore, in the final judgement of the court, so the judges are accepted this evidence.

He did agree that if it was unknown where the safe or the documents came from, it would be a problem. However, he testified that the nature and contents of the documents had been verified by several of the people involved. He had interviewed one of these individuals himself.⁴⁷⁹

Counsel for the claimants pointed out that there was also a major discrepancy with the evidence of Inspector Wu as to the location of the safe and the evidence of Ms. Tao Mi, allegedly the secretary to Ms. Tsang Ming Na. Inspector Wu stated the documents were found on the 5th floor, but there was confusion as to whether they were found in room 502 or 503.⁴⁸⁰ Tao Mi states that there were was an office with two desks in the room facing each other where the safe was located, something that does not occur anywhere on the 5th floor.

Counsel suggested that these were fruitful areas for prosecutorial supervision, and asked Prosecutor Li what he had done in this regard.⁴⁸¹ Prosecutor Li again replied that there were insufficiencies in how the evidence was obtained, but that he had reviewed the contents of the report and the statements of the witnesses, which

⁴⁷⁹ Transcript, 1 October 2001, page 31, line 12.

⁴⁸⁰ See Exhibit C42, tab 4, affidavit of Bai Kin Sheng, 4-20 Investigation inspector, sworn 31 August 2001.

⁴⁸¹ Transcript, 1 October 2001, page 32, line 34-43.

confirmed the contents. The evidence confirmed that Gao Tu Gai of Hong Kong brought the goods delivery report documentation to Ms. Tsang Ming Na in Xiamen.⁴⁸²

Returning to the point of the confusion about where the envelope and goods delivery report documents were found, counsel for the claimants reviewed the contents of the English language versions⁴⁸³ of the notations made by the investigators who discovered the goods delivery reports on those reports. Prosecutor Li confirmed that the room number given in the materials is wrong, but had no comment on whether the room where the documents were found was Ms. Tsang Ming Na's office.

Counsel for the claimants suggested to Prosecutor Li that the goods delivery report did not come from where Inspector Wu said it did. Either Inspector Wu was mistaken or Ms. Tao Mi had lied about the location of the documents. Prosecutor Li declined to comment on counsel's position.⁴⁸⁴

Evidentiary Basis for the Xiamen Smuggling Trial

In answer to questions from the Refugee Claims Officer, Prosecutor Li stated that the documents found in the Red Mansion related only to the alleged practice of 'cargo switching', i.e., falsifying the names of the imported goods to reduce the duties to be paid. They did not relate to the false entrepôt business. The latter practice allegedly accounted for the majority of the unpaid taxes and duties. He testified that his investigation of the false entrepôt business traced the shipment of the goods into China, and the shipment of the consequent empty containers to Hong Kong. The description of the goods in the recovered documents were correct, unlike in the other practice of 'cargo

⁴⁸² Transcript, 1 October 2001, page 32, line 45 to page 33, line 8.

⁴⁸³ Exhibit C10, tab 3, unnumbered page 20, Exhibits B-F to the Statutory Declaration of translator, Ms. Winnifred Liu.

⁴⁸⁴ Transcript, 1 October 2001, page 38, lines 36-50.

switching'. Prosecutor Li said accounting books relating to the false entrepôt business had also been located for use in the prosecution.⁴⁸⁵ The dates for the 13 incidents of smuggling set out in the case 144 judgement⁴⁸⁶ were based not on confessions but on genuine documentation that had been retrieved.⁴⁸⁷

In regard to the charges against Mr. Lai Shui Qiang, the brother of Mr. Lai Cheong Sing, the judgement stated that a large amount of the cigarettes he was alleged to have obtained by the false entrepôt business had been recovered.⁴⁸⁸ Prosecutor Li stated that his investigation obtained documentation confirming that cigarettes connected to Mr. Lai Shui Qiang had been seized by the authorities and had been disposed of.⁴⁸⁹

Seal Tampering at the Haixin Container Yard

A great deal of time was spent with the witness on the system allegedly used for changing the commercial seals on the containers used in the 'cargo switching' scheme. Counsel for the claimants was of the view that there was a gap in the evidence and that there could be no conviction for smuggling based solely on hypotheses and assumption by the prosecution. He argued that there was inexplicable behaviour in the alleged activity. He went on to argue that the Prosecutor's response to the dilemma consisted solely of hypothetical possibilities without a basis in evidence.⁴⁹⁰ Prosecutor Li replied that there were a number of statements from persons involved in the smuggling who said that documents were faked as part of the inspection process. Several Custom officers had been bribed to assist in the process of clearing the containers.⁴⁹¹ Later in the

⁴⁸⁵ Transcript, 3 October 2001, page 41, lines 25-34.

⁴⁸⁶ Exhibit C8, English translation page 19.

⁴⁸⁷ Transcript, 3 October 2001, page 42, lines 14-51.

⁴⁸⁸ Exhibit C8, English translation page 75.

⁴⁸⁹ Transcript, 3 October, 2001, page 43, lines 8-28.

⁴⁹⁰ Transcript, 8 August, 2001, page 66, lines 41-52.

⁴⁹¹ Transcript, 8 August, 2001, page 67-69.

hearing, Prosecutor Li stated that there was no evidence to prove conclusively what happened with the changing of the seals numbers.⁴⁹² However, in his view, this was not a crucial issue. The key point was whether there was goods switching and whether goods were sold without paying taxes.⁴⁹³

Counsel for the claimants repeated his questions about why it would be necessary to both fool and bribe Customs personnel. Prosecutor Li did not agree that a dilemma existed. He stated that not all of the Customs staff could be bribed and some steps would have to follow proper procedures. The goods that were flowing from the Haixin Container Yard were being handled by two different Customs facilities, the Dong Du supervisory group and the Tong'an office.⁴⁹⁴

As an example of some persons being involved in the smuggling and some not, he testified that the Director General of Xiamen Customs was sentenced to death for his smuggling activities. There were some 700 people under his supervision who were investigated and found to be innocent.⁴⁹⁵ However, between 130 and 150 customs officers were arrested.⁴⁹⁶

Detention for Investigation and Prosecution

Prosecutor Li was questioned about the length of time a person could be held in custody in China during the investigation and prosecution stages of a criminal and prosecutorial investigation. He testified that a person could be held in detention for more than a year up until the bill of prosecution was filed with the courts and the suspect

⁴⁹² Transcript, 1 October, 2001, page 39, lines 44-47.

⁴⁹³ Transcript, 1 October 2001, page 40, lines 15-19.

⁴⁹⁴ Transcript, 1 October 2001, page 41, lines 23-31.

⁴⁹⁵ Transcript, 1 October 2001, page 41, line 49 to page 46, line 3.

⁴⁹⁶ Transcript, 1 October 2001, page 45, lines 30-32.

became an accused. He also stated he received the opinion report for prosecution from the investigators sometime in either July or August 2000. After this report was received, he and his team of prosecutors questioned each of the 19 accused, without defence counsel being present. Prosecutor Li confirmed that he personally interviewed several of the persons charged in the Xiamen smuggling case prior to their trials. At no time was defence counsel present.⁴⁹⁷

He also testified that in Chinese criminal law, there is no right to silence.⁴⁹⁸ Later in his evidence he qualified that by saying that in Chinese law there are no stipulations regarding the right of silence.⁴⁹⁹ He stated that under article 48 of the Criminal Procedure Law of China, all person who have information about a case are required to testify. He alleged that there is no punishment if a witness refuses to do so.⁵⁰⁰

The purpose of the meetings with the accused was to get at the true facts of the criminal event.⁵⁰¹ Prosecutor Li said that he had no idea if any of the 19 persons charged in case number 144 had met with their defence lawyers prior to being interviewed by the prosecution team.

According to standard procedures, during the period after the opinion for prosecution is filed by the investigators with the prosecution, but before the bill of prosecution is filed by the prosecutors with the court, defence counsel are able to review some of the evidence in the possession of the prosecution. Defence counsel are not entitled to see the interrogation statements taken from the accused by the prosecution

⁴⁹⁷ Transcript, 1 October 2001, page 3- 6.

⁴⁹⁸ Transcript, 1 October 2001, page 6, lines 17 – 19.

⁴⁹⁹ Transcript, 1 October 2001, page 15, line 51.

⁵⁰⁰ Transcript, 1 October 2001, pages 7 – 9.

⁵⁰¹ Transcript, 2 October 2001, page 55, lines 16 and 17.

until after the case is filed with the courts. They are entitled to see the opinion for prosecution. Generally the only documents defence counsel are entitled to see are those the prosecutor files with the court.⁵⁰²

Mitigation of Sentence in Chinese Criminal Law

Counsel for the claimants questioned Prosecutor Li about the Chinese criminal law provisions for “voluntary surrender”, “meritorious service”, “good attitude”, and “enticement”. He agreed that in Chinese law it was to an accused’s benefit to perform “meritorious service”, to have a good attitude, or for a person to surrender voluntarily. These factors are taken into consideration when a prosecutor drafts the bill of prosecution. Prosecutor Li described enticement as the opposite of threatening, to try to erroneously make the accused believe something may be favourable to them when it is not. He was then asked if offering some favourable result was an enticement. He replied that truthfully telling someone the effect of meritorious service was not enticement but was stated as a “true fact”.⁵⁰³

After reviewing the materials and evidence on the first three phrases, it is our view that these terms are terms of art in Chinese criminal procedure. Certain prerequisites must be met before they apply. We note that confession, co-operation, and remorse are matters taken into account in sentencing for criminal matters in Canada. The issue is whether an accused is coerced into a particular behaviour, not whether the behaviour can have an impact on the outcome of a case.

As one example, according to Prosecutor Li, meritorious service does not occur if a person gives information about a crime in which they are a co-accused. Mr.

⁵⁰² Transcript, 2 October 2001, page 54, lines 5 to page 55, line 45.

⁵⁰³ Transcript, 2 October 2001, page 58, line 44 to page 60, line 38.

Lai Sui Chang, Mr. Lai Cheong Sing's brother, would not be seen as performing meritorious service for the information he gave about the alleged smuggling activities of his brother, Mr. Lai Cheong Sing⁵⁰⁴ or for his cooperation with Canadian authorities in giving his statement.⁵⁰⁵

Use of Torture in Obtaining Confessions

Prosecutor Li was also questioned about the use of torture to extract confessions in Chinese criminal proceedings. He stated that torture had been used in the past and may still be happening at present. If a judicial officer is found to use torture, he or she may be punished severely.⁵⁰⁶ There was no suggestion in his testimony that he participated in the mistreatment of any of the 19 accused prosecuted by his team.

The Xiamen Smuggling Trial

As noted, the court that conducted the 4-20 Investigation trials at the first level was the Xiamen Intermediate Peoples Court. For case 144, Prosecutor Li testified that there were between 300 and 350 observers, including journalists and members of the accused' families.⁵⁰⁷ For each trial, there was a panel of three judges. Prosecutor Li confirmed that some of the judges on 4-20 Investigation trials were the same. He also noted that multiple judgements were released on the same day.

Prosecutor Li stated that the trial for the 19 accused lasted 5 days. The verdicts were delivered about 40 days after the commencement of the trial. All 19 were found guilty, and 4 persons were sentenced to death. Of the 4, 2 had their death

⁵⁰⁴ Transcript, 2 October 2001, page 72, lines 30-44.

⁵⁰⁵ Transcript, 3 October 2001, page 67, line 51 to page 68, line 10.

⁵⁰⁶ Transcript, 3 October 2001, page 17, lines 22-23.

⁵⁰⁷ Transcript, 3 October 2001, page 46, lines 40 to page 47, line 43.

sentences suspended for 2 years, while the other 2 individuals were executed. Prosecutor Li was involved in the supervision of the executions.

Treatment of Mr. Lai Cheong Sing and Tsang Ming Na Upon Return to China

In cross examination, Prosecutor Li stated that Mr. Lai would be arrested if he returned to China, pursuant to the procedural steps already taken against him in China.⁵⁰⁸ Prosecutor Li went on to state the courts have the responsibility for determining the guilt or innocence of a criminal suspect, not the prosecution. The investigation against Mr. Lai had begun, but has not been concluded.

Counsel for the claimants noted that the official press of China regularly reported that Mr. Lai was guilty of smuggling and that the Prime Minister of China had said that Mr. Lai should be executed several times over for his misdeeds. Counsel suggested that the reality of the situation was different than the witnesses alleged – that a decision on prosecution would only be made after an investigation was completed. In counsel's view, Mr. Lai Cheong Sing had already been convicted politically. Prosecutor Li replied that only the courts of China have the authority to determine whether a crime has been committed.⁵⁰⁹

Diplomatic Note from the Government of China

Prosecutor Li was asked about the diplomatic note from the government of China to the government of Canada concerning the application of the death penalty against Mr. Lai and Ms. Tsang. Specifically, he was asked what right the author of the note has to influence a penalty that might be imposed in China. He replied that this is something beyond his knowledge. He noted in response to a hypothetical question that

⁵⁰⁸ Transcript, 8 August, 2001, page 38, lines 25-26.

⁵⁰⁹ Transcript, 8 August, 2001, page 44, lines 13-38.

the imposition of a penalty is the responsibility of the court. He declined to be more definitive on the point, stating that the diplomatic note was a matter of international law or regulation.⁵¹⁰

Evidence of Prosecutor Wang Zhong Hua

Prosecutor Wang Zhong Hua gave evidence at the hearing for two days.⁵¹¹ He is a graduate from the China Political and Law University with a major in criminal law in 1984. He was assigned as the chief prosecutor in the bribery case against Li Ji Zhou.

At times, Prosecutor Wang indirectly answered questions put to him and appeared to be addressing inferences he detected in the questions. Counsel for the claimants repeatedly stated that Prosecutor Wang was not answering questions. A review of the transcript indicates that for the most part, while he was wordy in his answers, his answers were not deceptive. Overall, we do not find he was attempting to deliberately mislead the panel but was attempting to give a complete picture, from his point of view, of the Chinese criminal justice system.

Prosecutor Wang set out the relationship between investigators and prosecutors in criminal matters in China. Investigators have the responsibility of collecting evidence and finding out the criminal facts in a case. The responsibility of the prosecution authority is to examine the evidence and file the public prosecution on behalf of the state and to supervise the investigation authority.⁵¹² Prosecutor Wang also set out

⁵¹⁰ Transcript, 3 October 2001, page 14, line 38 to page 15, line 48.

⁵¹¹ See transcripts for 9 August 2001 and 4 October 2001.

⁵¹² Transcript, 9 August 2001, page 8, line 32-40.

the provisions of the Chinese *Criminal Procedure Act* for dealing with the falsification of evidence by investigators and the rights of an accused to speak to counsel.

Proceedings Against Li Ji Zhou

Prosecutor Wang noted that he had personally interviewed Mr. Li Ji Zhou, and that Mr. Li Ji Zhou did not raise any questions about the evidence against him. He confirmed that Mr. Li had defence counsel from the investigation stage of the proceedings. As of the date Prosecutor Wang gave his evidence,⁵¹³ the trial of Mr. Li Ji Zhou had been completed but sentence had not been passed.

Prosecutor Wang stated that the investigation of Mr. Li began as a result of a letter received from a woman by the name of Ma Ying. In the letter Ms. Ma Ying accused Mr. Li Ji Zhou of having received a bribe from a Mr. Liang Yao Hua. The letter made no mention of Lai Cheong Sing.⁵¹⁴

Because he was a high ranking Chinese official, the accusations made against Mr. Li Ji Zhou were first referred to the Central Discipline Committee of the Chinese Communist Party. The Central Committee investigated the allegations and determined that Mr. Li Ji Zhou had breached Party discipline and, in its opinion, breached the criminal law. During the investigation, Mr. Li Ji Zhou was in some form of custody. After the Central Discipline Committee investigation, the matter was then transferred to the Investigation Department of the Supreme People's Procuratorate, which carried out its own investigation. The bill of prosecution was then transferred to the Prosecution Department of the Supreme People's Procuratorate and assigned to the office of Prosecutor Wang.

⁵¹³ 9 August 2001.

⁵¹⁴ Transcript, 9 August 2001, page 16, line 33 to page 17, line 47.

He noted that the decision to arrest Mr. Li Ji Zhou was made on 29 October 1999, after Mr. Lai Cheong Sing and Ms. Tsang Ming Na were already in Canada. The actual arrest was made on 29 December 1999. At the time he was arrested, Mr. Li Ji Zhou was the Deputy Minister of Public Security of the People's Republic of China. The prosecution of Mr. Li Ji Zhou began on the 19 September 2000, the date of the bill of prosecution.

Funds Allegedly Received by Li Ji Zhou from Lai Cheong Sing

The bill of prosecution against Mr. Li Ji Zhou sets out 5 incidents of bribery.⁵¹⁵ The total amount of the bribes was 8.49 million RMB, of which 5.19 million RMB was attributed to Mr. Lai Cheong Sing. The other individuals accused of offering bribes was Mr. Liang Yao Jua and Mr. Zhou Min Xing.⁵¹⁶ Prosecutor Wang was of the opinion he had enough evidence to prosecute Mr. Li Ji Zhou without referring to the allegations concerning Mr. Lai Cheong Sing.⁵¹⁷

Prosecutor Wang then described in detail the circuitous arrangements by which 1 million RMB was allegedly transferred in 1994 to Ms. Cheng Xin Lian, wife of Li Ji Zhou, at the instance of Mr. Lai Cheong Sing.⁵¹⁸ He stated that the investigation against Mr. Li Ji Zhou was based on the statements from 4 individuals, including Mr. Li Ji Zhou and Ms. Cheng Xin Lian. The investigation also located bank records for some of the movement of the money.

⁵¹⁵ Exhibit C18, tab 7.

⁵¹⁶ Transcript, 9 August 2001, page 25, line 42 to page 26, line 19.

⁵¹⁷ Transcript, 9 August 2001, page 26, line 39 to page 27, line 1.

⁵¹⁸ Transcript, 9 August 2001, page 28, line 12 to page 30, line 15.

Prosecutor Wang testified that the daughter of Mr. Li Ji Zhou, Ms. Li Qian, also received money from Mr. Lai Cheong Sing, \$500,000 US, in the second half of 1997. He stated that there were six pieces of evidence on this allegation. There were statements from Mr. Li Ji Zhou, Ms. Cheng Xin Lian, Mr. Zhuang Ru Shun and Mr. Lai Wen Feng, Mr. Lai's nephew. There was also a recording of a telephone conversation between Ms. Cheng Xin Lian and her daughter, Ms. Li Qian. In the phone call, Ms. Cheng Xin Lian asked her daughter to return the money in order to improve the situation Mr. Li Ji Zhou was in. In the conversation, Ms. Li Qian admitted receiving the money, but refused to return it.

Both transfers of money were noted by Mr. Lai Cheong Sing in his own evidence and his amended Personal Information Form. He characterized them as loans.

When Prosecutor Wang was testifying about the \$30,000 HK cash allegedly given to Mr. Li Ji Zhou by Mr. Lai Cheong Sing, the following exchange took place.⁵¹⁹

Q And can you describe to us how this money was given to Li Ji Zhou by Lai Cheong Sing?

A So this thing is very simple, that it was in the first half of 1997. Lai Cheong Sing came to Beijing and Li Ji Zhou went to see him. At the time when Li Ji Zhou was leaving the hotel, Lai Cheong Sing follow him. And Lai Cheong Sing took out 30,000 Hong Kong dollars from his bank and put it into Li Ji Zhou's car. So when Li Ji Zhou went home, so he gave the money to Cheng Xian Lian.

The evidence on this point was based on statements from Ms. Cheng Xian Lian, Mr. Li Ji Zhou, and his driver, Mr. Zhang Jin Li.

⁵¹⁹ Transcript, 9 August 2001, page 40, line 48 to page 41, line 3.

Prosecutor Wang also noted that a \$5.6 million HK transaction, first mentioned in the Personal Information Form of Mr. Lai Cheong Sing as a loan to Mr. Li and Ms. Cheng, had also been investigated. However, it was the opinion of the prosecution that no crime had been committed as the money had been repaid. Mr. Li Ji Zhou was not charged with an offence in regard to this amount.⁵²⁰

Prosecutor Wu also testified that there were statements by Mr. Li Ji Zhou and Ms. Cheng Xian Lian as to other gifts of cash and jewellery from Mr. Lai Cheong Sing. However, as there were no other witnesses available on this aspect of the case, under Article 46 of the *Criminal Procedure Act*, the prosecution did not identify the allegations as ‘criminal facts’.⁵²¹

Another piece of evidence that was not used by the prosecution in the charges against Mr. Li Ji Zhou was an audio tape recording of a conversation between a person believed to be Mr. Lai Cheong Sing and Mr. Liu Xiao Hui.⁵²² At the time Mr. Lai was in Canada while Mr. Liu was in China. The main reason it was not used was because the prosecution could not authenticate Mr. Lai’s voice.

Prosecutor Wang stated that none of the statements given by Mr. Li Ji Zhou were obtained by means of mistreatment.⁵²³

⁵²⁰ Transcript, 9 August 2001, page 42, lines 29-31.

⁵²¹ Transcript, 9 August 2001, page 44, lines 34-36.

⁵²² Mr. Liu Xiao Hui was one of the persons who entered Canada clandestinely to meet with Mr. Lai Cheong Sing in early June of 2000.

⁵²³ Transcript, 9 August 2001, page 33, lines 34-37.

Assistance from Li Ji Zhou to Lai Cheong Sing

Prosecutor Wang was asked by the Minister's counsel if Mr. Li Ji Zhou did anything for Mr. Lai "...in return for Mr. Lai's financial generosity". He replied that there were 2 known instances.⁵²⁴

The first was in April of 1997. Mr. Lai Cheong Sing called Mr. Li Ji Zhou in Beijing. Mr. Lai Cheong Sing said that one of his friends' ships had been seized by the Hainan border patrol in the Qionghai area. He asked Mr. Li Ji Zhou to look into the matter, because at that time Mr. Li Ji Zhou was in charge of the border patrol.

The name of the ship involved can be translated as "Olympic Bravery" or "Olympic Warrior". Mr. Lai Cheong Sing asked Mr. Li Ji Zhou if he could get the ship released. It was loaded with 32,000 tonnes of diesel oil, and had an estimated value of over 60 million RMB. Mr. Lai Cheong Sing told Mr. Li Ji Zhou that the ship belonged to his friend and asked that it be handed over to Customs. Mr. Li Ji Zhou contacted Mr. Feng Hai Long, the chief director of the Hainan province Border Patrol Bureau, and requested that he be lenient in the treatment of the seized ship. After the telephone call from Mr. Li Ji Zhou, the investigation and examination stopped and the ship was handed over to the Haikou Customs office. The Haikou Customs office imposed administrative punishment, which meant that while the oil was confiscated, the persons involved escaped criminal investigation. This avoidance of a criminal investigation was a benefit to the persons involved, as the only punishment was administrative. The evidence for these allegations was contained in the statement of Mr. Feng Hai Long, the records of the punishment decision in the Haikou Customs office, and statements from Mr. Li Ji Zhou.

⁵²⁴ Transcript, 9 August 2001, page 47, line 28 to page 53, line 8.

The second incident occurred in August of 1997. Mr. Lai Cheong Sing made a request to Mr. Li Ji Zhou for a license plate good for both Guangdong and Hong Kong. Mr. Li Ji Zhou assisted in the request by giving a supporting note to the deputy chief of the Public Security Department of Guangdong province in charge of traffic communication, Mr. Liu Guang Run. In the note, Mr. Li Ji Zhou indicated that he also wanted Mr. He Guang Ping to co-operate and help to handle this matter. Mr. He Guang Ping was then the chief of the traffic administrative department. The approval for the two location license plate was therefore given with the backing of Mr. Li Ji Zhou. Without the help of Mr. Li Ji Zhou, Mr. Lai Cheong Sing could not have obtained the license plate as it was restricted to business persons operating within Guangdong province, not Xiamen. In addition to not having the right qualifications, Mr. Lai Cheong Sing obtained the license plate in a very short period of time

The benefit of having the license plate was primarily one of convenience. He could go in and out of Hong Kong without examination and routine check-ups. He could also carry goods and persons in the car in and out China freely, greatly reducing complicated examinations. As well, this type of license plate was considered a status symbol.

The evidence on the second benefit came from Mr. Liu Guang Run, the deputy head of the provincial Ministry of Public Security in Guangdong province, and from records from the traffic administrative institutions in Guangdong province, documents from the Yuan Hua company, and statements from Mr. Li Ji Zhou.

Prosecutor Wang's evidence on the two points was detailed and paralleled the evidence of Mr. Lai Cheong Sing in which he stated that he had contacted Mr. Li about the seized ship and had received a special license plate.

Prosecutor Wang went on to testify that there was no possibility of Mr. Li Ji Zhou repaying the large amounts of money given to him by Mr. Lai Cheong Sing, given the salary Mr. Li Ji Zhou received.⁵²⁵ Therefore, the excuse of borrowing the money cannot be used. The second point Prosecutor Wang made was that Mr. Lai was alleged to be smuggling by means of, and as head of, the Yuan Hua Company. Mr. Li Ji Zhou was the deputy chief of the Public Security Ministry in charge of a nation wide bureaucracy concerned with anti-smuggling and border control. Prosecutor Wang stated:⁵²⁶

Obviously, very obviously, Lai Cheong Sing gave money to Li Ji Zhou. Subjectively, there is a very clear intention to obtain some favour from him. In fact, he did indeed obtain some good favour from Li Ji Zhou, and he obtained help from Li Ji Zhou. This is a typical example of the trade of money and power.

He went on to say that there was no requirement in Chinese law that there be an equivalency between the size of the bribe and what is done in return.

Cross Examination

Prosecutor Wang was questioned on a variety of matters by counsel for the claimants.

He noted that the trial of Mr. Li Ji Zhou was held on 27 February 2001. The trial lasted one day, covering 5 allegations of bribery. As of the date Prosecutor Wang initially gave his evidence, 9 August 2001, no verdict had been reached. This continued to be the case when he returned to complete his testimony on 4 October 2001.

⁵²⁵ Transcript, 9 August 2001, page 55, lines 39 to page 56, line 13. Prosecutor Wang estimated Mr. Li's salary to be 2,000 RMB per month.

⁵²⁶ Transcript, 9 August 2001, page 56, lines 26-29.

Prosecutor Wang confirmed in cross-examination that Mr. Li Ji Zhou gave information about the alleged bribery by Mr. Lai Cheong Sing only after he was charged with bribery in regard to other individuals.⁵²⁷ The evidence from Mr. Li was that he had been “separated for investigation” from 17 December 1998, and that he had been arrested in October 1999.

Prosecutor Wang would not agree that Mr. Li was in detention from December of 1998. He testified that his freedom was restricted after his arrest in October 1999.⁵²⁸ It is clear to the panel that Mr. Li Ji Zhou was in the custody of various state organs, pursuant to different investigatory process, beginning in December 1998. Prosecutor Wang did agree that the information shared with the prosecution by the Central Committee up until the arrest decision in October 1999 had nothing to do with Mr. Lai Cheong Sing.⁵²⁹

He also stated that there was no requirement that defence counsel be present when a prosecutor questions an accused. He testified that Mr. Li Ji Zhou had counsel representing him from the time of his arrest in October 1999. He also stated that until a verdict is delivered the accused or his counsel can present further evidence to the court.⁵³⁰ He testified initially that in his experience, the time between the close of the first phase of the trial of Mr. Li Ji Zhou and the verdict was considerably longer than the norm.⁵³¹ Later he testified that the delay was not unusual as the court was within its legal time limit.⁵³²

⁵²⁷ Transcript, 9 August 2001, page 68, lines 32-35.

⁵²⁸ Transcript, 9 August 2001, page 70, line 52 to page 71, line 6.

⁵²⁹ Transcript, 9 August 2001, page 71, lines 24 - 36.

⁵³⁰ Transcript, 9 August 2001, page 86, lines 23-30.

⁵³¹ Transcript, 9 August 2001, page 87, line 52 to page 88, line 5

⁵³² Transcript, 4 October 2001, page 18, lines 46-50.

Prosecutor Wang testified that the wife of Mr. Li Ji Zhou, Ms. Cheng Xin Lian, was convicted of accepting a commercial bribe, and received a sentence of two years imprisonment.⁵³³ The charges have nothing to do with Mr. Lai Cheong Sing. Prosecutor Wang stated that Ms. Cheng Xin Lian had displayed a good attitude in her dealings with the prosecution. She suggested that she would contact her daughter in the US in an attempt to retrieve some of the money from Mr. Lai Cheong Sing that had been sent to her daughter.

Prosecutor Wang testified that he first heard about Mr. Lai Cheong Sing and Ms. Tsang Ming Na being in Canada about the time of the trial of Mr. Li Ji Zhou in February 2001. He was first contacted about participating in this hearing in April of 2001.⁵³⁴ He was asked to gather documents having to do with the alleged bribery of Mr. Li Ji Zhou by Mr. Lai Cheong Sing. He instructed his assistants to gather the material, which was sent to the Ministry of Public Security at the direction of the Supreme Procuratorate, which had initially made the request for materials.

Prosecutor Wang was questioned about the use of evidence that is improperly or illegally obtained. He stated that where the manner in which the evidence is obtained is 'incomplete' it may still be used. The decision would depend on the degree of incompleteness and the importance of the evidence in the case.⁵³⁵ He also confirmed that he had never seen the report of Ma Ying that was the basis for the initial investigation of Mr. Li Ji Zhou⁵³⁶ and that the decision to arrest Mr. Lai Cheong Sing was made before Mr. Li Ji Zhou implicated him.⁵³⁷

⁵³³ Transcript, 4 October 2001, page 12, line 1 to page 13, line 47.

⁵³⁴ Transcript, 4 October 2001, page 21, line 16-line 41.

⁵³⁵ Transcript, 4 October 2001, page 37, lines 3-9.

⁵³⁶ Transcript, 4 October 2001, page 38, lines 34-42.

⁵³⁷ Transcript, 4 October 2001, page 40, lines 32-34.

Prosecutor Wang was asked about the status of the tape of a telephone conversation between Mr. Lai Cheong Sing and Mr. Liu Xiao Hui, one of the investigators that came to Canada in May of 1999 to meet with Mr. Lai Cheong Sing.⁵³⁸ Prosecutor Wang stated that the tape recording was not used in evidence against Mr. Li Ji Zhou for three reasons. The conversation was recorded without Mr. Lai's consent, the prosecution could not verify that the voice as that of Mr. Lai, and the conversation raised questions of enticement.⁵³⁹

Prosecutor Wang was of the opinion that if Mr. Li Ji Zhou had repaid the money to Mr. Lai Cheong Sing, there would have been no offence of bribery. However, he had neither the ability nor the desire to repay.⁵⁴⁰

Evidence of Dr. Zhao Bing Zhi

Minister's counsel called Zhao Bing Zhi to give evidence on the role of defence counsel in China.⁵⁴¹ Dr. Zhao has a Ph.D. in law, specializing in criminal law. He is a part time lawyer in a law firm in China and an instructor for doctoral students at the law school of Renmin University of China, where he is also an associate dean. Despite counsel for the claimants characterization of Dr. Zhou as being an apologist for the Chinese criminal justice system, the panel found him to be generally credible as to his own experience as defence counsel.

Dr. Zhou gave evidence on various aspects of the Criminal Law and the Criminal Procedure Law of the PRC⁵⁴² and his own work as defence counsel. He acted

⁵³⁸ Exhibit C14 is a transcript of the conversation. Exhibit C20 is a copy of the recording.

⁵³⁹ Transcript, 4 October 2001, page 44, lines 1-19.

⁵⁴⁰ Transcript, 9 August 2001, page 55, lines 39-44.

⁵⁴¹ 8 August 2001 and 23 October 2001.

⁵⁴² Exhibits C21 and C22.

as defence co-counsel for two of the persons charged in one of the Xiamen smuggling cases described in Judgement 156.⁵⁴³ His clients were Mr. Huang Chun and Mr. Chen Yan Xin (for an appeal). Mr. Huang was charged with smuggling of ordinary goods. Mr. Chen was charged with five matters including smuggling, accepting bribes, and corruption.⁵⁴⁴

Dr. Zhou explained how he went about making arrangements to meet privately with his clients while they were in custody, noting that since the beginning of the 1990s, he has never been prevented from meeting with any clients.⁵⁴⁵ To his knowledge, no clandestine recordings were made of his conversations with these or any other of his clients, although he did state he was not an expert in finding surveillance devices.

He noted that during the investigation phase of a criminal matter an investigator may decide to be present during meetings of the criminal suspect and a lawyer. Once the matter is before the courts, investigators are not allowed to attend meetings between a lawyer and client. Dr. Zhou testified that he was never told by the government what he could or could not say to his clients,⁵⁴⁶ nor was he ever intimidated, threatened, or offered any promise or advantage by anyone concerning his representation of Mr. Chen or Mr. Huang. To his knowledge, none of the other defence counsel in case 156 were either.⁵⁴⁷

⁵⁴³ Exhibit C7.4.

⁵⁴⁴ Transcript, 10 August 2001, page 16, lines 15-35.

⁵⁴⁵ Transcript, 10 August 2001, page 25, line 38 to page 26 line 1.

⁵⁴⁶ Transcript, 10 August 2001, page 29, lines 7-10.

⁵⁴⁷ Transcript, 10 August 2001, page 29, lines 17-35.

Dr. Zhou testified that the trials of his clients were open to the Chinese public. Foreigners and foreign journalists must seek permission to attend, presumably from the court. Several relatives of one of his clients attended the trial.

He testified that his clients showed no indication of mistreatment while he was dealing with them. He has had other clients who complained to him of unfair treatment. When this occurred, he brought the matter to the attention of the court. Sometimes his view of the situation was accepted. It was unclear from his evidence what the remedy, if any, was.

He also stated that he had never come across a case where the evidence was completely falsified or fabricated. He had encountered situations where the accused indicated there were major differences between the evidence presented by the accused and the prosecutor. In these cases, if the discrepancy cannot be excluded by the prosecution, the evidence cannot be used against the accused.⁵⁴⁸

Dr. Zhou testified that to his knowledge, there were no meetings of defence counsel about the Xiamen smuggling case called by the lawyer's association or the Ministry of Justice to tell them how to conduct the case. He noted that he had been called to such a meeting early in his career to discuss his defence of a client in the 1980's. This did not occur again after the beginning of the 1990s.⁵⁴⁹

He was asked about reports in the media⁵⁵⁰ of relatives of those charged being denied access to the accused and that the sentencing was not impartial but pre-arranged. Dr. Zhou said he had no such experience in the cases he had handled.⁵⁵¹

⁵⁴⁸ Transcript, 10 August 2001, page 36, lines 6-17.

⁵⁴⁹ Transcript, 10 August 2001, page 43, lines 13-22.

⁵⁵⁰ Exhibit A6, tab 11.

⁵⁵¹ Transcript, 10 August 2001, page 44, lines 37 to page 45, line 12.

Dr. Zhou was asked about the application of article 306 of the Criminal Law. One of the witnesses for the claimants stated that 15 lawyers have been convicted under the provision between 1997 and 1999. It states in part:⁵⁵²

If, in criminal proceedings, a defender or agent ad litem destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.

Dr. Zhou stated that he had had a great deal of input into the application of this article, and that it was only applied extremely carefully.⁵⁵³ To put this number in some context, later in his evidence he stated that there are in excess of 100,000 lawyers in China.

He testified that his client Mr. Huang was sentenced to 13 years imprisonment while Mr. Chen was sentenced to death.⁵⁵⁴ At the time Dr. Zhou gave his evidence, Mr. Chen's sentence was under appeal to the Fujian Provincial Higher People's Court.

Dr. Zhou went on to describe the provisions of Article 50 of the Criminal Law. That provision allows for a suspension of the death penalty for 2 years. A very small number of persons sentenced in this manner are eventually executed.⁵⁵⁵

Cross Examination

Dr. Zhou testified that the Chinese Criminal Procedure Law does not specifically state or accept the concept of the presumption of innocence⁵⁵⁶ nor the right to

⁵⁵² Exhibit C22, page 257.

⁵⁵³ Transcript, 10 August 2001, page 48, lines 10-17.

⁵⁵⁴ Transcript, 10 August 2001, page 30, lines 13-16.

⁵⁵⁵ Transcript, 10 August 2001, page 33, lines 36-45.

⁵⁵⁶ Transcript, 10 August 2001, page 53, line 25-28.

remain silent.⁵⁵⁷ He also testified that while a person is under investigation, they have the right to retain a lawyer as a legal advisor. However, he reiterated that the lawyer cannot act as defence counsel at this point.⁵⁵⁸ Generally a legal advisor has fewer rights than defence counsel. When a criminal suspect becomes an accused, the legal advisor may become that person's defence counsel.

Dr. Zhou testified that in the Chinese criminal justice system, he is entitled to keep confidences obtained from his clients and he is not required to disclose whatever his clients tell him.

Dr. Zhou testified that lawyers in China are governed by a department of the Ministry of Justice and by the Lawyers Association. Either organization can take away a lawyer's license.⁵⁵⁹

Counsel for the claimants questioned Dr. Zhou about his co-counsel in Xiamen. Dr. Zhou testified that they were highly respected and well-known counsel. He was then asked how defence counsel of lesser reputation are treated by prosecutors, judges and staff at correction facilities. Dr. Zhou stated that it would depend on the defence counsel's attitude in handling the case. If defence counsel displayed a bad attitude in the way they handled their cases – for example, by violating the law, or acting illegitimately during the processing of the case – their working attitude would be considered inappropriate and their work poor.

⁵⁵⁷ Transcript, 10 August 2001, page 55, lines 34-47.

⁵⁵⁸ Transcript, 10 August 2001, page 56, lines 9-17.

⁵⁵⁹ Transcript, 23 October 2001, page 12, lines 23-31.

He was then asked if defence counsel who have a poor attitude and practices would be met with more restrictions and more obstructions by the system. Dr. Zhou replied that if this were the situation, the lawyer would have no cases.⁵⁶⁰

Counsel for the claimants went through a summarization of Dr. Zhou evidence. The points covered were as follows:⁵⁶¹

1. Since the 1990s Dr. Zhou has had no problems meeting with clients in detention.
2. He has not found a situation where the accused was tortured or treated unfairly.
3. He was not required as a lawyer to encourage his clients to confess or to admit to guilt.
4. He was not required to go to mandatory lawyer study sessions.
5. He has never been threatened for defending a client.
6. He was able to get postponements to prepare his case adequately and to carry on investigations the way he saw necessary.
7. He was allowed to receive the documents that the prosecutor used to support the case against the accused and had no difficulty with disclosure.
8. That based on past conversations with a number of lawyers, prosecutors, judges, and members of the profession, he believed this was generally the case in China.

After going through the list, counsel for the claimants began reading sections from a Chinese language publication of the Lawyer's Association called *Chinese Lawyer*. The article states that in September 2000 the National People's Congress set out inspection teams to 6 provinces in China (not including the province of Fujian or the city of Beijing) to gather information on the criminal justice system since the revision of the Criminal Procedure Law in 1996. The problems found formed the basis of the article.

⁵⁶⁰ Transcript, 23 October 2001, page 34, line 18 to page 35, line 6.

⁵⁶¹ Transcript, 23 October 2001, page 44, line 13 to page 45, line 18.

One section of the article was translated as follows:

In practice, there still exists a large amount of over-the-limit detention, inquisition by torture; illegally obtaining evidence; decisions first, trial later; hastily adoption of compulsory measures; and restriction of lawyers to intervene in criminal procedures.

Another section stated that defence lawyers are accused of producing false evidence when the testimony at a hearing goes against the prosecution. Counsel for the claimants suggested that the article conflicted with the evidence of Dr. Zhou on almost every particular. Dr. Zhou replied that if the whole article were read, it would be seen that the situation was generally good, but there were many problems.

Counsel for the claimants suggested that Dr. Zhou was an apologist for the Chinese legal system, and had nothing bad to say about the criminal procedure, judges, the rights of lawyers, or the trial process. He suggested that the evidence Dr. Zhou gave was completely one sided. The following exchange then took place:⁵⁶²

Q Your reason for being in Canada is one only: to apologize and to prop up the judicial system in China and make it look better than it is. Do you understand that as a question?

A I'm here only to answer the questions about my practice as a lawyer. So I could only answer the questions with my own experience in the practice. And also, just now that he referred to that -- he said that I did not make any criticism on the Chinese laws. This statement is incorrect. If you look at the transcript, you will be able to find out that I have, frankly, criticized Article 306, that I have said that several times when I was in China. But I cannot agree with -- with the conduct that when someone's got an article, only reads part of article and did not read whole article.

At this point in the hearing, it became apparent that counsel for the claimants intended to put a number of partially translated articles to the witness. These articles had not yet been filed as evidence. Counsel argued that he had to deal with the evidence in this manner as he had only just been given the material. The panel ruled that

⁵⁶² Transcript, 23 October 2001, page 50, lines 33-44.

while he was free to use the material to formulate questions, he could not quote directly from material that was not fully translated⁵⁶³ into English and not yet properly put before the panel, the RCO, and the other party. The materials were filed fully translated a few days later.

Towards the end of the cross-examination, Dr. Zhou indicated that a suspended death sentence could be carried out if the prisoner committed intentional crimes such as escape, assault causing injury harm, or major theft.⁵⁶⁴ Dr. Zhou stated that in his experience, it was rare for a suspended death sentence to be set aside and the prisoner executed. He stated that according to government statistics, 99.99% of those given the suspended death penalty were not subsequently executed.⁵⁶⁵

Chinese Lawyer Magazine Articles

As noted, Dr. Zhao Bing Zhi was questioned on excerpts from the publication Chinese Language Journal on 23 October 2001. At the time of the hearing, only partial translations were available. The full texts were entered as Exhibits on 6 November 2001.

A review of the publications⁵⁶⁶ raises some interesting points. First, the sections of the first article quoted to Dr. Zhao at the hearing were correct, but incomplete. To give a sense of the context of the article, a long excerpt is reproduced here:⁵⁶⁷

According to these reports, the state of the implementation of the new Criminal Procedure Code is generally good. The New Criminal Procedure Code reformed the criminal proceeding system in China and

⁵⁶³ See Convention Refugee Determination Rules, Rule 37(3).

⁵⁶⁴ Transcript, 23 October 2001. page 64, line 1 to page 65, line 12.

⁵⁶⁵ Transcript, 23 October 2001. page 72, lines 22-26.

⁵⁶⁶ Exhibit A53, 14 attachments.

⁵⁶⁷ Exhibit A53, page 3.

greatly revised the legislative purpose, litigation principles, investigation, prosecution and trial systems and lawyers' participation in the proceedings. In order to adapt to the reform of the criminal proceeding systems and to develop understanding of the new law, police offices and judicial organizations of all levels have organized training courses, seminars and law enforcement discussions for their staff. Police offices and judicial organizations of all levels have actively carried out work to implement many regulations and systems of case acceptance, investigation, examination on arrest, prosecution and hearings and punishment, which guaranteed the implementation of the new Criminal Procedure Code. During the implementation of the Criminal Procedure Code, police offices of all levels focused on the establishment of the internal system of supervision and measure to deal with existing problems. During the four years after the new Criminal Procedure Code was promulgated, police offices and the judicial organizations of all levels carried out work to investigate their cases and to remedy mistakes. Particular attention was given to over-long detention and measures were taken to prevent the re-occurrence of this problem. The result of the inspection carried out in September 2000 by the National People's Congress Standing Committee shows that the number of over-long detentions has decreased. Police offices of all levels have taken measures to punish acts of torture used to obtain evidence, ensuring that individual policemen will incur liability for their actions.

As Huo Zongbing stated in the report, "there has been progress in the implementation of the Criminal Procedure Code during these three years. The attitudes of the courts, procuratorates, police and judicial organizations are positive and serious. They have put more effort into their work. The Party committee and the government have also strengthened their leadership. The People's Congress has strengthened its supervising power. Citizen's rights are better protected under the correct implantation of the Criminal Procedure Code and criminals have been hit hard. The quality of the cases has obviously improved. The Criminal Procedure Code has also served a positive purpose in maintain impartial justice.

There have also been problems in the implementation of the new Criminal Procedure Code. First of all the problem of over-long detention is still relatively serious. Although the police and the judicial organizations have all tried to solve this problem, the problem is still very serious in some areas due to unbalanced work development. A) A number of new over-long detention problems have not been solved; B) when old problems are solved, new over-long detentions occur; C) there are serious problems with over-long detention in disguise. Second, torture is still commonly used to obtain confessions in many areas. Although the problem of torture has decline since the implementation of the new Criminal Procedure Code, this problem still exists to different extents in many areas. Third, insufficient protection is given to lawyers to perform their duties. Last, the officials understanding and opinions have to be improved. Although the police and judicial organizations of all levels make efforts to propagate the Criminal Procedure Code and organize study courses on the law, there are still officials and even some leaders whose opinions need to be improved. Some comrades incorrectly believe that the new Criminal Procedure Code attempts to change China's current situation too quickly; some don't understand that many procedural regulations, which are in conformity with the principles of the socialist legal system, are intended to protect the citizen's legal rights and to guarantee the powerful blow against criminals. In practice, a great number of over-long detentions, torture, illegal methods of obtaining evidence, judgements before trial, reckless adoptions of compulsory measures and limitations on lawyers to participate in

criminal proceedings are the result of the incorrect understanding of the Criminal Procedure Code by some comrades.

As Dr. Zhao said at the hearing, the general view of the author is that the implementation of the new criminal procedure law has been good. There are, however, serious and acknowledged problems. The defects do not appear to be universal or all pervading. In other words, the articles indicate there are locations where the procedural law is misapplied and, by implication, areas and situations where they are not. This reality does not discredit Dr. Zhao's description of his own work, but does qualify it.

It is also clear that the subject of the work of defence counsel is being debated openly at the highest levels of government. The director of the Justice Committee of the National Peoples Congress first gave the report on 27 December 2000 during the Nineteenth Meeting of the Ninth National People's Congress Standing Committee. The report would not have been made public if the commentary were not supported by the government organisation that commissioned it.

Summary

In our view, the evidence of the four witnesses on the Chinese criminal justice system suggests that it is a system in flux. It is fundamentally different than the Canadian common law system to the extent that comparisons in some aspects of the criminal process are almost meaningless. Defence counsel are not automatons subject to the whims of a monolithic central government. On the other hand, some rights taken as fundamental in the Canadian system simply do not exist.

As stated in *Schmidt v. The Queen*,⁵⁶⁸ by La Forest J. of the Supreme Court of Canada:

A judicial system is not, for example, fundamentally unjust – indeed it may in its practical workings be as just as ours – because it functions on the basis of an investigatory system without a presumption of innocence, or generally, because its procedural or evidentiary safeguard have none of the rigours of our system.

That is not to say that the Chinese system does not have serious and well-known flaws. It is to say that the system cannot be described as having no claim on legitimacy whatsoever.

11. GENERAL DOCUMENTATION

General country documentation was filed concerning various human rights issues in China. For example, exhibit A7 filed by counsel for the claimants included recent reports from Amnesty International and Human Rights Watch decrying the mistreatment of some detainees in police custody. The exhibit also included graphic photographs of persons allegedly tortured because of their affiliation with the Falun Gong movement.

General documentation on country conditions filed by the Refugee Claim Officer⁵⁶⁹ contains references to the use of torture by the police. For example, the US Department of State Report “*China: Country Reports of Human Rights Practices for 2000*” states:⁵⁷⁰

The law prohibits torture; however, police and other elements of the security apparatus employ torture and degrading treatment in dealing with some detainees and prisoners. Senior officials acknowledge that

⁵⁶⁸ *Schmidt v. The Queen*, (1987), 33 C.C.C. (3d) 193 (S.C.C.) at 214. The case concerned an extradition hearing. Extradition law itself is not directly related to the jurisdiction of this panel.

⁵⁶⁹ Exhibits B2, B3, B4.

⁵⁷⁰ Reference contained in Exhibit B3.

torture and coerced confessions are chronic problems but have not taken sufficient measures to end these practices.

The document states that arbitrary arrest and detention remain serious problems. Many other documents include references to unacceptable interrogation practices in dealing with criminal suspects. Particular condemnation is noted in the documentation for the mistreatment of members of so-called cults such as the Falun Gong. Political dissidents can also suffer from harsh interrogation and detention. Some members of minority groups such as Tibetans can suffer from repressive treatment. The claimants fall into none of these three categories.

One of the unique features of the claims now being considered is that a lead investigator and prosecutor directly involved with the 4-20 Investigation, and a lead prosecutor from the trial of Li Ji Zhou appeared at the hearing to give evidence. As noted elsewhere in these reasons, the panel found these witnesses to be generally credible in their evidence. They testified that to their knowledge, the suspects in the 4-20 Investigation and in the trial against Li Ji Zhou were not mistreated during the course of their interrogations. The witnesses were not seriously challenged on this evidence at the hearing. Dr. Zhao, the defence counsel from China, also testified that to his knowledge, in the trial he participated in, there was no mistreatment or intimidation of the accused. The evidence to the contrary given by witnesses such as Zang Xi Hong (also known as Sheng Xue) cannot be given much weight for reasons noted elsewhere.

The panel also had the benefit of hearing from expert witnesses who were particularly knowledgeable. Drs. Cohen, Burton and Yang were of the view that the Chinese authorities would be scrupulous in their application of the criminal law and procedure should Mr. Lai and Ms. Tsang return to China to face charges.

On the issues of mistreatment and torture of detainees, taking all the evidence into account, both on country conditions and that of the probative witnesses at

the hearing, we conclude that while mistreatment of detainees occurs in China, it has not been established on a balance of probabilities that it occurred in regard to any specific statement or confession obtained by the 4-20 Investigation team or for the Li Ji Zhou trial.

Numerous media articles were also filed as to the alleged size and impact of the Yuan Hua smuggling operations, the trials pursuant to the 4-20 Investigation, and the trial of Li Ji Zhou.⁵⁷¹ One report from the *Far Eastern Economic Review* states:⁵⁷²

The scale of the operation run by Lai Changxing and his Yuanhua Group is only now becoming clear. Between 1994 and 1999 it smuggled into the country \$6.4 billion worth of goods, mainly cigarettes, cars, and petroleum, but also telecoms equipment, medicine, textiles and computers. That figure is slightly more than Xiamen's annual GDP, and five times the size of China's previously biggest smuggling case, a military-run scam uncovered in the southern port of Zhanjiang in 1998. Unpaid tariffs and taxes totalled \$3.6 billion.

12. REVIEW OF SUBMISSIONS

Counsel for the claimants and the Minister's counsel both filed extensive written submissions. These were supplemented orally at the close of the hearing. As well, the parties responded orally to each others written submissions at the close of the hearing. Written submissions continued to be filed after the close of the hearing on new evidence. The Refugee Claims Officer also filed observations dealing with a number of evidentiary issues.

What follows is a review of the major points in the submissions of the parties.

⁵⁷¹ For example, Exhibits C4.1, C4.2, C4.3 and C4.4, Books of Media Extracts.

⁵⁷² Exhibit B4, *Far Eastern Economic Review*, "Hooked on Dirty Money", May 31, 2001, page 28.

Submissions of Counsel for the Claimants

In his opening address to the panel, counsel for the claimants was clear as to Mr. Lai's position.⁵⁷³ Mr. Lai is guilty of nothing. The evidence against him was extracted through fraudulent documents, fear of torture, or threats of the death penalty. In essence, it is a fabricated case.

Counsel argued in the alternative that if panel finds that the Mr. Lai has done something wrong, then the wrong must be balanced against the danger he faces. The balancing test comes out in his favour in that the wrongs he is accused of pale in significance to the fate that awaits him in China.

This review follows the Table of Contents of the written submissions provided by the Counsel for the claimants. The version the panel relies on is that presented on November 5, 2001.⁵⁷⁴

I. The Facts

Counsel for the claimants begins his written submissions with a recital of his understanding of the evidence concerning Mr. Lai and Ms. Tsang. He also included separate fact submissions on Lai Chan Wai, the eldest son of Mr. Lai and Ms. Tsang.

Counsel for the claimants does not comment on the credibility of the principal claimants until well into his submissions⁵⁷⁵ where he states that the principal claimants are credible. He argues that the presumption of credibility has not been

⁵⁷³ Transcript, 3 July 2001, page 38, lines 11-19.

⁵⁷⁴ Counsel for the claimants filed multiple versions of his submissions. The last version was received by the CRDD on 14 November 2001. It differs from the version used by the parties and the panel during oral submission on 5 and 6 November 2001 in paragraph numbering and pagination. As well, some comments of an editorial nature have been removed in the 14 November 2001 version. As stated by counsel in a letter dated 13 November 2001 to the panel and parties, the last version of the submissions is in substance the same as the version previously filed with the Board.

⁵⁷⁵ Page 180.

rebutted. He states that “one cannot help but be struck by the genuineness of the demeanor of the claimants.” He states the claimants provided “plenty of detail” and that the testimony was internally consistent. He states that all Ms. Tsang can be accused of is little more than signing untranslated documents. He alleges that all they said was inherently plausible. Even if they are not believed, there is sufficient evidence to include them and insufficient evidence to exclude them.

The panel has reviewed the credibility of the claimants extensively elsewhere in these reasons.

II The Law: Introduction

Counsel briefly sets out the grounds for the principal claims, political opinion and membership in a particular social group. He also notes that exclusion is being sought because of the commission of serious non-political crimes prior to the principal claimants’ admission into Canada

III. Inclusion

A. Inclusion before Exclusion

Counsel argues that the inclusion of the claimants should be determined before exclusion.⁵⁷⁶ The panel had indicated previously to the parties that it intended to make findings on both inclusion and exclusion. He suggests that the issues of inclusion and exclusion overlap where 1F(b) exclusion is being considered. He states that Ms. Tsang is making her claim on the second refugee ground, membership in a particular social group. He states that she is not excludable and her claim must be decided on

⁵⁷⁶ Page 79-80.

inclusion alone.⁵⁷⁷ He argues that a finding on inclusion can only be made for her if inclusion is first decided for Mr. Lai.

B. Subjective Fear

Counsel goes on to argue that there exists a subjective fear of persecution because Mr. Lai was warned that he was in danger of arrest while in Hong Kong. He believed that the 4-20 Investigation team members who came to Canada wanted him to implicate innocent people. He also argued that there was “no significant delay between the time that Mr. Lai realized he was in irretrievable danger and the time he made his refugee claim.”⁵⁷⁸

C. Forms of Persecution

In his oral submissions, counsel makes the following statement.

What I’m talking about here -- what I’m talking about here is just about persecution. Is there persecution, a well-founded fear of persecution? But the issue of unfairness of the trial connects to the whole case. I mean, if the trial is unfair, then the obvious political opinion we see of Zhu Rong Ji and so on would penetrate into the trial. You cannot get the independence and impartiality of the court if the trial is unfair. It also breaks into exclusion, because the crime becomes a political crime if you cannot get a fair trial. So that the whole case founders if they cannot establish that the Chinese system is fair. And of course, they cannot.

Counsel sets out in his written submissions the forms of persecution Mr. Lai allegedly faces. They are:

- i) arbitrary arrest,
- ii) unfair trial,
- iii) execution,
- iv) cruel treatment,

⁵⁷⁷ Page 82, paragraph 14.

⁵⁷⁸ Pages 83-84, paragraph 23.

- v) inability to protect, and
- vi) discrimination.

i) *Arbitrary Arrest*

Under the heading “arbitrary arrest”, counsel argues that the International Covenant on Civil and Political Rights⁵⁷⁹ provides that no one shall be subject to arbitrary arrest.⁵⁸⁰ He notes that the Chinese government has put out a request for Mr. Lai and Ms. Tsang that states extradition will be sought. He notes that Minister’s counsel has not set out why there is no extradition treaty with China.

He states that the International Covenant on Civil and Political Rights provides for being informed promptly of the charges against an accused. He then goes on to note that under the laws of China, a person can be held for an extended period for questioning before being informed of the charges. The period of pre-charge detention can extend to fifteen months.⁵⁸¹

He goes on to describe the concept of “double designation”. He quotes the evidence of Sheng Xue on this point.

He next notes the provision of the International Covenant on Civil and Political Rights which state: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁵⁸² He then notes that one of the Minister’s experts, Dr. Cohen, has commented that

⁵⁷⁹ Counsel notes later in his submissions that China has signed but not ratified the Covenant.

⁵⁸⁰ Page 85, paragraph 2.

⁵⁸¹ Page 86, paragraph 5.

⁵⁸² Page 88. paragraph 9.

investigations often exceed the proscribed time limits. Counsel notes that two common law concepts, *habeas corpus*, and exclusion of evidence obtained illegally, the doctrine of “fruit of the poisoned tree” do not exist in Chinese law.

Counsel argues that the rights stated to exist in Chinese law are largely rights without attendant remedies for violation. If one’s rights are violated, there is little that can be done about it.

Counsel for the claimants does not assert that the offences alleged against Mr. Lai in themselves violate human rights. He asserts that the punishment, the death penalty, is excessive and that the prosecution is discriminatory.⁵⁸³

He then states that:⁵⁸⁴

For China to seek or impose the death penalty against the principal claimant would defeat the object and purpose of the International Covenant on Civil and Political Rights obligation not to impose the sentence of death, except for the most serious crimes.

He ends this section of the submissions by stating that the Chinese legal system is not fair in general. He suggests that the criteria of the Canada *Extradition Act* allows the Minister of Justice to refuse surrender of an accused where it would be unjust or oppressive to do so, having regard to all the relevant circumstances. He suggests that this criteria should be read into an application of the distinction between persecution and prosecution. Unjust or oppressive prosecution amounts to persecution for purpose of the definition of Convention refugee.⁵⁸⁵

⁵⁸³ Page 92, paragraph 21.

⁵⁸⁴ Page 94, paragraph 27.

⁵⁸⁵ Page 95, paragraph 29-31.

ii) Unfair Trial

Under the heading “unfair trial”, counsel for the claimants list 12 sub-headings. They are:

- a) equality,
- b) public hearing,
- c) competent tribunal,
- d) independent tribunal,
- e) impartial tribunal
- f) presumption of innocence,
- g) time and facilities for preparation of a defense,
- h) right to communicate with counsel of choice,
- i) right of an accused to be tried in his presence,
- j) right to examine witnesses,
- k) right to silence,
- l) right to an effective remedy.

He said there is virtually no aspect of the Chinese criminal justice system that is not seriously wanting. The nub of his argument on the Chinese criminal justice system is that “...an unfair trial, as a serious violation of human rights, is persecution.”⁵⁸⁶ All that is done in China under its criminal code and its criminal procedure is a politically driven exercise.

In order for a trial against Mr. Lai and Ms. Tsang to be fair, Chinese law must construct a “fire-wall” between the courts and politics. As it cannot do so, it is impossible to call the crimes alleged in the case of Mr. Lai and Ms. Tsang non-political

⁵⁸⁶ Page 97, paragraph 8.

economic crimes. He argues that the existence of a fair trial and an official promise not to execute them cannot co-exist.⁵⁸⁷

a) Equality

He argues under the section headed “equality” that in criminal matters, the prosecution and defense are not on equal footing. The advantage is all to the prosecution. He states that the claimants will not be able to find anyone to defend them in China. Prosecutors can and do meet with accused without defense counsel present during the investigation phase of a criminal matter. Defense counsel can be interfered with in their work by the public organs that control and monitor them.

b) Public Hearing

Under the heading “public hearing,” counsel for the claimant argues that the hearings are not open to the public, and states categorically that officials “pack public hearings with the attendees of their choice.” To support this proposition he cites an anecdote of one of his witnesses from an experience in the 1980s.⁵⁸⁸

c) Competent tribunal

He goes on to argue that many judges in China are not competent, and that Canadian indices of independence are missing from the Chinese construct.

d) Independent tribunal

He argues that the courts are not impartial and are organs of a dictatorial state and its political pronouncements.

⁵⁸⁷ Page 98, paragraph 13.

⁵⁸⁸ Page 108, paragraph 40.

e) Impartial Tribunal

The judicial panel that hears a case will not necessarily decide it, especially in cases that are complex. The panel will refer it to a Court Adjudication Committee made up of leading officials of the court.⁵⁸⁹ There is also a very limited opportunity to examine witnesses and experts, as often their evidence is given by statement read into the court record.

f - l) Presumption of Innocence and Rights of the Accused

In the remaining sections, f-l, he argues that the hallmarks of the common law justice system are absent or curtailed in the Chinese criminal justice system. The chief among these concerns are the presumption of innocence, the right to instruct counsel and the right to silence.

iii) Execution

Counsel for the claimant then goes on to the issue of execution as a form of persecution, and argues that the diplomatic note given to the government of Canada by the government of China must be considered very carefully. He states that “assurances alone do not resolve the matter.”⁵⁹⁰ Counsel then goes on to describe several cases that involved assurances by various countries not to execute persons of interest to those governments. He then argues that the government of China has already shown that it cannot be trusted because of the clandestine visit of the 4-20 Investigation team in May and June of 2000. Counsel argued that the promises in the diplomatic note do not apply to Ms. Tsang.

⁵⁸⁹ Page 119, paragraph 75.

⁵⁹⁰ Page 122, paragraph 7.

iv) Cruel Treatment

Counsel goes on to state that Mr. Lai and Ms. Tsang likely face torture in China should they return in order to extract confessions. He goes on to allege that there is credible evidence of torture being conducted in the 4-20 Investigation. Among other witnesses and affidavits, he cites the testimony of Zang Xi Hong, also known as Sheng Xue. He notes that the evidence of Ms. Tsang was that her parents had been mistreated. The evidence of Wei Jing Sheng was also raised.

v) Inability to Protect

He also argues that the Chinese government cannot protect the Lai family from the hostility of private citizens and family members of victims of the 4-20 Investigation.⁵⁹¹ He argues that the Lai children will be discriminated against should they return to China to such an extent that it would amount to persecution.

vii) Discrimination

Counsel argues that the children of Mr. Lai and Ms. Tsang will be victims of the failure to protect, as well as discrimination and harassment.⁵⁹² He quotes the evidence of Wei Jing Sheng, in which Mr. Wei stated that the family members will not be able to stay out of prison.

⁵⁹¹ Page 132, paragraph 6 to page 133, paragraph 8.

⁵⁹² Page 134, paragraph 9 to page 136, paragraph 10.

D. Nexus

i) Political Opinion

Of note is the arrangement of the issues in the submissions. Counsel for the claimants addresses the issue of nexus after he completes his critique of the Chinese criminal justice system. He submits that the nexus in this claim is the political opinion attributed to Mr. Lai. He then states “If we can assume for the moment that the claimant faces persecution and the only question is why, that question has to be answered by making a determination on the reason for the anticipated persecution by the Government of China and not a determination on the reason for the claimant to have behaved the way he did.”⁵⁹³

Counsel sets out the reasons for the “anticipated persecution”. The various suggestions, he posits, are 1) a power struggle between the central government and the regions, 2) the rivalry of various factions , 3) the desire to undercut or get rid of Ji Sheng De, Li Ji Zhou and Jia Qing Lin, or 4) the value of winning public support through large anti-corruption cases.⁵⁹⁴

Counsel for the claimants states that the panel need not settle on one motive or the other to conclude the case to be highly political in China. He submits that the Minister’s counsel’s argument that the politicization of the case will not impact on the outcome of the potential criminal proceedings in China is unsustainable.

⁵⁹³ Page 137, paragraph 2.

⁵⁹⁴ Page 139, paragraph 8.

ii) Social Group

Counsel goes on to argue that Mr. Lai is also a member of a particular social group – prominent successful business people in China.⁵⁹⁵ He argues these people become particularly susceptible to persecution at certain times and places.

E. Credible Basis

Counsel for the claimants reviews for the panel what the effect of a finding of no credible basis would mean for Mr. Lai and Ms. Tsang. He argues that even if the claimants are not found credible, there is sufficient credible evidence such that a finding of no credible basis cannot be justified.

IV. Exclusion

A) Serious Reasons

i) The Standard

Counsel notes that technically, exclusion need only be considered where inclusion is found. However, he notes that under the circumstances of this case, both headings ought to be fully canvassed and determined. Counsel notes the caution in the decision of the Federal Court of Canada in *Cardenas*.⁵⁹⁶ In that decision, the court states that the panel must base its decision only on “clear and convincing evidence, not simply on suspicion and speculation.” He argues that an outstanding charge by itself is not enough to sustain an exclusion. He states that the panel may only base a decision on credible and trustworthy evidence, and that evidence that is obtained by torture or is forged cannot be the basis for a finding of exclusion under 1F(b).

⁵⁹⁵ Page 140, paragraph 11.

⁵⁹⁶ *Cardenas v. M.E.I.*, 93-A-171 February 4, 1994, (F.C.T.D.) Jerome A.C.J.

He argues that the government of China is known to practice torture, fabricate documents, deny the reality of true documents, and engage in political repression and persecution.⁵⁹⁷ He goes on to state that given these circumstances, it is incumbent that the Minister's counsel demonstrate that no witness subject to the jurisdiction of the Government of China who gives testimony against the claimants has been persecuted for that testimony or is likely to be persecuted for refusing to testify or to give contrary evidence. The Minister's counsel must further demonstrate that no document emanating from the government of China has been fabricated.⁵⁹⁸

Counsel for the claimants states that the evidence against the claimants emanating from the Government of China and those under its jurisdiction is admissible. In his view, the issue, the key issue is what weight that evidence can be given.⁵⁹⁹

ii) The Need for Notice

Counsel argues that no notice has been provided for the exclusion issue raised by the Minister's counsel. He states that because such a wide variety of offences for political purposes have been put forward, there is no notice.

Counsel argues that it is impossible to know the specific allegations against the claimants because the arrest warrants are incomplete.⁶⁰⁰

Counsel for the claimants argues that the claimants were given notice of so many different allegations without any indication which ones were to be taken seriously

⁵⁹⁷ Page 146, paragraph 6.

⁵⁹⁸ Page 146-147, paragraph 7.

⁵⁹⁹ Page 148, paragraph 11.

⁶⁰⁰ Page 150, paragraph 19.

and which were considered irrelevant that it has become impossible for the claimants to figure out what the subject matter of these exclusion proceedings are.⁶⁰¹

Counsel goes on to review two of the accusations against Mr. Lai and Ms. Tsang to demonstrate how “flimsy” the accusations against Mr. Lai and Ms. Tsang are. He states “They are chosen simply as examples of how insubstantial is each and every accusation made against the claimants.”⁶⁰²

iii) Cigarette Smuggling

Counsel for the claimants goes on to describe his view of the evidence concerning the allegations of cigarette smuggling, with three subheadings: the witnesses for the Minister, the documents from the Minister and the testimony of the claimants. This evidence has been reviewed elsewhere in these reasons by the panel.

iv) Bribery of Li Ji Zhou

He then goes on to review the evidence concerning the alleged bribery of Li Ji Zhou. The panel has also reviewed that evidence in detail elsewhere in these reasons.

vi) [sic] A Fabrication?

Counsel for the claimants argues that the case against Mr. Lai and Ms. Tsang may be largely a fabrication. He states that the only documents implicating them are the cigarette delivery reports. He notes that they do not implicate Mr. Lai and Ms. Tsang on their face, since they are not mentioned in the documents. He states that the origin and contents of the envelope were unclear. He submits that the claimants do not have to prove that the case against them is a fabrication in order to succeed in their claim.

⁶⁰¹ Page 152, paragraph 31.

⁶⁰² Page 153, paragraph 33.

They do not have to prove their innocence. The Minister has the burden of showing that there is a serious reason to believe that the claimants have committed a serious non political crime. The presumption of innocence applies in these proceedings as much as in criminal proceedings.

vii) Wrongful Conviction

Counsel for the claimants argues that there are elements of the investigation that are common to cases of ‘wrongful conviction’. He alleges that Inspector Wu and the asset recovery team in the Red Mansion were guilty of tunnel vision, focussing on the guilt of the Lai and Tsang and accumulating evidence to establish that guilt, rather than trying to solve a crime with an open mind. The belief in the guilt of Mr. Lai and Ms. Tsang has colored the view of the evidence by the investigators, prosecutors and the courts to such an extent that they cannot recognize exculpatory evidence when it is there and see inculpatory evidence when it is not there.⁶⁰³

Counsel for the claimants goes on to state that if the Minister could produce proof beyond a reasonable doubt to this Board that the claimants were guilty of serious acts of smuggling, bribery, or tax evasion, then the Minister might argue that the fact that conviction in China is pre-ordained does not prejudice the claimants.⁶⁰⁴

Counsel refers to two publications in his submissions, “The Police Role in Wrongful Convictions: An International Comparative Study”⁶⁰⁵ and “Wrongful Convictions: An International Comparative Study”⁶⁰⁶ both by Dianne L. Martin. The papers discuss cases of wrongful conviction within a common law context, and discuss

⁶⁰³ Page 200, paragraph 5.

⁶⁰⁴ Page 201, paragraph 12.

⁶⁰⁵ Exhibit A42.

⁶⁰⁶ Exhibit A44.

the environment in which such miscarriages of justice occur. Counsel argues that the conditions for a wrongful conviction exist in China should Mr. Lai and Ms. Tsang return. The structure of the Chinese criminal justice system is such that there is an increased likelihood of a wrongful conviction.⁶⁰⁷ The case also has features that give rise to the phenomenon common in wrongful conviction cases known as “tunnel vision” and “noble cause”.⁶⁰⁸

B. Serious Crime

i) Definition

Counsel then reviews the notion of serious non-political crime as found in the Article 1F(b). He states that a refugee is not excluded if the crime is political, even if the crime is serious.⁶⁰⁹ He goes on to argue that the notion of balancing applies where 1F(b) is the basis for exclusion. If the risk to the person concerned outweighs the nature of the crime committed, then the crime is not serious⁶¹⁰. He argues that a person can only be considered to fall under 1F(b) if they are a danger to the community pursuant to article 33(2) of the *Immigration Act*.⁶¹¹ He argues that a crime is serious only if it is prosecutable by an international tribunal, prosecutable where the person is found, or by virtue of extradition for prosecution abroad.⁶¹² He argues that the crimes alleged against Mr. Lai and Ms. Tsang are not serious crimes because there are not violations of an international human rights standard.⁶¹³ He argues that the crimes alleged against Mr. Lai and Ms. Tsang are not serious crimes, since they are not based in an underlying act that is

⁶⁰⁷ Page 203, paragraph 19.

⁶⁰⁸ Page 204, paragraph 20.

⁶⁰⁹ Page 206, paragraph 2.

⁶¹⁰ Page 206, paragraph 3.

⁶¹¹ Page 206, paragraph 4-6.

⁶¹² Page 207, paragraph 8-10.

⁶¹³ Page 208, paragraph 11-12.

morally wrong.⁶¹⁴ He argues that if there were an extradition treaty between Canada and China, an extraditable crime would be a serious crime under 1F(b). However, since there is no extradition treaty, this distinction cannot be made.

ii) Balancing

Counsel argues that the decision in *Malouf*,⁶¹⁵ which states that 1F(b) does not require balancing has been overruled by the Supreme Court of Canada in *Pushpanathan*.⁶¹⁶ The approach in *Pushpanathan* has been applied by the Federal Court of Appeal in *Chan*. He argues that a refusal to 'balance' under 1F(b) would have the unintended perverse result of returning those not extraditable because they faced persecution returnable through use of the Convention refugee regime.

He goes on to state that even if the panel considered the crimes alleged against Mr. Lai and Ms. Tsang to be serious in the absence of the persecution feared, when one balances that persecution against the abstract seriousness of the crimes, the result would have to be that contextually, they are not serious. The balance in this case tilts in favour of the Mr. Lai and Ms. Tsang.⁶¹⁷

C. Political Crime

He ends his public submissions with the argument that all the crimes alleged against Mr. Lai and Ms. Tsang are political because of the politicization of the justice system in their case. He argues that if a person has a well founded fear of persecution for reasons of political opinion, and the sole basis of that fear is the

⁶¹⁴ Page 208, paragraph 13-14.

⁶¹⁵ *Malouf v. Canada* (Minister of Employment and Immigration) (1995), 190 N.R. 230 (F.C.A.).

⁶¹⁶ *Pushpanathan v. Canada* (Minister of Employment and Immigration), [1998] 1 S.C.R. 982.

⁶¹⁷ Page 213, paragraph 29.

prosecution of the charges against him, a conclusion that the crime is political is almost a foregone conclusion.⁶¹⁸

Fact Submissions

Lai Chun Wai

Separate “fact submissions” were filed concerning the eldest son of Mr. Lai and Ms. Tsang. Counsel for the claimants notes in his submissions that Lai Chun Wai has no concerns for himself.

IN CAMERA Submissions

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⁶¹⁸ Page 213, paragraph 30 to page 215, paragraph 35.
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Submissions of Counsel for the Minister

This review follows the Index found at the beginning of the Minister’s written submissions, referring to the eight main topics noted. There is also a section on the *in camera* argument.

I. Introduction

The position of counsel for Minister regarding the principal claimants is clear: Lai Cheong Sing and Tsang Ming Na are criminals. They are the heads of the largest smuggling and bribery scandal the People’s Republic of China has ever had.⁶²¹

II. Exclusion

In keeping with their later argument that exclusion pursuant to 1F(b) ought to be determined first, the next main heading of the submissions is entitled “Exclusion”.

The Minister’s counsel deal at some length with the evidence of alleged wrongdoing by Mr. Lai under the heading of bribery. Under that heading, Minister’s counsel first review the Chinese and Canadian criminal law. They note that the offence of “offering bribes” to a “State functionary” is set out in Article 389 of the *Criminal Law of China*. Under article 390, the penalty where the “the circumstances are especially serious” shall not be less than 10 years or life imprisonment”. Minister’s counsel set out section 120 of the Canadian *Criminal Code*, “Bribery of Officers”. They argue that this

⁶²⁰ XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

⁶²¹ Page 2, paragraph 11.

section applies to Mr. Lai Cheong Sing and state that the maximum sentence is 14 years. They then review the evidence of alleged bribery and the Chinese regulations concerning the acceptance of gifts. They argue that bribery is clearly prohibited under Chinese law.

They conclude their argument on the topic by stating that accepting bribes is a serious non-political crime.

Under the heading “Smuggling, Fraud and Tax Evasion” the Minister’s counsel again review the criminal law. Under Chinese law, the penalty for smuggling under article 153 where it is especially serious is 10 years to life imprisonment. Under the Canadian *Criminal Code* section 380(1)(a), defrauding the public of sums in excess of \$5,000 is punishable to a term not exceeding 10 years. Section 380(1)(b) is concerned with fraudulent activities that effect the market price of goods. Again, the maximum punishment is 10 years imprisonment. Section 718.3(4)(c) (ii) allows for consecutive sentences for multiple convictions under section 380(1)(a) and (b).

Minister’s counsel then go on to review the evidence on smuggling, fraud, and tax evasion concerning Mr. Lai and Ms. Tsang. This part of the submissions also includes a “Conclusion” section. It argues that a consideration of 1F(b) is “backward looking”. The panel cannot be concerned with whether the principal claimants will be convicted of an offence or offences should they return to China, but whether there is serious reason for considering they have committed serious offences in the past.⁶²² Minister’s counsel then goes on to review their view of the standard of proof in exclusion matters. They assert it is below “a balance of probabilities”, a standard lower than the civil law standard. They argue that the standard has been met.⁶²³

⁶²² Page 71, paragraph 294 to page 72, paragraph 296.

⁶²³ Page 72, paragraph 297 to page 76, paragraph 308.

Minister's counsel review the documents allegedly found in the Red Mansion and argues that there are a variety of reasons to reject the claimants' argument that the documents should be disregarded because there is confusion as to where they were found.⁶²⁴ There is also a section on the confusion of Inspector Wu and the principal claimants as to the layout of the Red Mansion.⁶²⁵

The next section deals with the method the Chinese government used in obtaining statements used at the hearing to support the position that the claimants ought to be excluded.⁶²⁶ The Minister's counsel argues that there is no evidence that any of the statements given to the Chinese authorities and used in the hearing before the panel were obtained by torture or any other illegal means as the claimants submit. It is further argued that the interviews conducted by Canadian authorities with Mr. Lai Shui Qiang and Mr. Li Ji Zhou were not meritorious service. According to the Minister's counsel, the provisions of the *Criminal Law of China* on meritorious service, articles 68 and 78, envision information given be about a new criminal act, not one already known.

The Minister's counsel then go on to consider the claimants' position that all the documents provided by the Chinese government were fabrications.⁶²⁷ They argue that this position is taken without any evidence to support it. They then review the evidence of various witnesses who made statements to the contrary. They conclude their argument on the topic by stating that smuggling, fraud and tax evasion are serious non-political crimes.

⁶²⁴ Page 76, paragraph 309 to page 72, paragraph 310.

⁶²⁵ Page 78, paragraph 311 to page 82, paragraph 313.

⁶²⁶ Page 83, paragraph 314 page 87, paragraph 316.

⁶²⁷ Page 89, paragraph 328 to page 91, paragraph 334.

The next section is a review of the meaning of the term “political” in the inclusion and exclusion sections of the definition. Minister’s counsel disagree with the argument of counsel for the claimant that there is an overlap between the word “political” in “well founded fear of persecution” in the inclusion provision and the word “political” in “serious non-political crime” in the exclusion provision. The argument that the terms should be looked at the same way, from the view of the alleged persecutor, is challenged. The Minister’s counsel argues that “political” in exclusion is not intended to take into account the perception of the alleged persecutor.

The Minister’s counsel also review the interplay of extradition law and refugee law, arguing that a serious non-political crime need not be a crime subject to extradition proceedings. There is no application of the “political offence exception” in exclusion as there is in extradition. The motivation of the prosecuting authorities is not an issue in the application of 1F(b).

III. Tribunal Should First Make an Exclusion Finding, Followed by Inclusion Finding

The third main heading of the submissions is an argument as to why the panel should deal with exclusion first.⁶²⁸ It contains a review of the case law on the topic. As the panel understands the underlying theme of the argument, if a finding based solely on exclusion is permissible, without reference to inclusion, then exclusion is the logical starting point for analysis.

IV. No Balancing Required

The fourth heading concerns the concept of balancing in the provisions of 1F(b).⁶²⁹ Minister’s counsel argue that contrary to the claimants’ position, no balancing

⁶²⁸ Page 113, paragraph 416 to page 117, paragraph 427.

⁶²⁹ Page 117, paragraph 428 to page 125, paragraph 454.

is required between the seriousness of the claimant's previous conduct and the alleged fear of persecution. They further argue that as the acts of the principal claimants were not for political ends, there is no requirement to balance the seriousness of the alleged crimes against a political goal being sought.

V. Inclusion

The fifth heading is "Inclusion".⁶³⁰ There are several subheadings under this section, dealing with the standard of proof, the grounds of political opinion and social group, and the distinction between persecution and prosecution.

On the grounds of political opinion, Minister's counsel argue that Mr. Lai's refusal to provide damning information about Li Ji Zhou, as alleged in his Personal Information Form, would not be seen as a political act or a manifestation of a political opinion. They further argue that there was enough information to proceed against Mr. Li without any information from Mr. Lai Cheong Sing.

Minister's counsel also argue that Mr. Lai's alleged attempt to provide exculpatory information about the activities of Mr. Li Ji Zhou would not be seen as a political act. They argue his evidence was not credible on this point, and the charges were laid against Mr. Li in any event.

The next section of the submissions reviews the evidence put forward by Mr. Lai that he was the victim of a power struggle. Minister's counsel argue that the evidence of Li Ji Zhou and several of the Minister's expert witnesses do not support this theory. Prosecutor Wang's evidence was that the investigation did not commence as a result of instructions from Jian Chun Wang, the chief of National Security or He Yong,

⁶³⁰ Beginning at page 125.

general chief of the Supervisory Ministry. Minister's counsel go on to review the evidence of witnesses for the claimant on why Mr. Lai was being pursued, and argue that for the most part their evidence should be given little weight because of a number of deficiencies.

The next section deals with the claim that Mr. Lai will be persecuted because of his membership in a particular social group, wealthy businessmen in China. Minister's counsel argue that there was no evidence put forward on this point. Minister's counsel also submit that the promises made by the 4-20 Investigation team in Vancouver to Mr. Lai about his family confirm that the government of China has no interest in persecuting Ms. Tsang or their children. There follows an extended discussion on what the children of Mr. Lai and Ms. Tsang could expect upon return to China.

The next section of the submissions is concerned with whether Mr. Lai and Ms. Tsang face prosecution or persecution. The submissions focus on the issue of whether a trial of Mr. Lai and Ms. Tsang would be fair and whether the sentence they could receive is disproportionate to the offence.

Minister's counsel quote extensively from the expert report of Dr. Vincent Yang, which describes differentiating features of the civil and common law criminal justice systems. The Minister's counsels' position is that the Chinese authorities will ensure that the processing of criminal allegations against Lai Cheong Sing and Tsang Ming Na will be in accordance with their laws and with the diplomatic note China provided to Canada. They note that their expert witnesses stated that the notoriety of the Yuan Hua case make it more likely that a trial of Mr. Lai and Ms. Tsang will be conducted in conformity with the *Criminal Law* and *Criminal Procedure Law* of China.

Minister's counsel next review the evidence of the three witnesses presented as experts on the issue of "fair trial". They are supportive of the evidence of their own experts, but are highly critical of the evidence given by the claimants' witness, Dr. James Feinerman. They state that he had not been nearly as active in the area of Chinese criminal law as are the experts put forward by the Minister. They also argue that he was not familiar with some of the evidence against the claimants and could not comment on reports of acquittals for some of the charges brought in the 4-20 Investigation trials. Finally, they note that his expert report was based on citations of out of date material.

In the next section, Minister's counsel argues that the penalties Mr. Lai and Ms. Tsang face in China are not disproportionate to the offences they are alleged to have committed, nor would they be disproportionate to the objective of the laws in the area of bribery and smuggling. They state that in jurisdictions such as Canada and the US, an individual can receive lengthy consecutive sentences for serious breaches of the criminal law. There is also a discussion about the possibility of an early release where a life sentence is imposed in China.

Minister's counsel go on to review the impact of the diplomatic note given to the government of Canada by China on the issue of the death penalty and treatment while incarcerated. They state that "the Minister's experts, whose credentials are not in dispute, all concur that there is every reason to believe that the commitment of the Chinese contained in the Diplomatic Note from the PRC to Canada in this case will be adhered to."⁶³¹

⁶³¹ Submissions, page 204, paragraph 670.

A major section of the submissions is taken up in a review of the credibility of Mr. Lai and Ms. Tsang. As stated in the review of the submissions by counsel for the claimants, the panel has considered the evidence of the claimants elsewhere and has made its own determination as to their credibility.

After the review of the evidence of the claimants, Minister's counsel go on to consider the issue of nexus. Their argument repeats some of the same points raised earlier in their submissions. The argument in its essence is that Mr. Lai is not perceived to have a political opinion. His evidence to the contrary is unreliable. On the ground of membership in a particular social group, Minister's counsel repeat the argument that no meaningful evidence has been presented to establish that he will be persecuted because of his being in the particular social group of wealthy and influential businessmen in China. The section concludes with the comment that if Mr. Lai does not face persecution because of a Convention ground, it follows that Ms. Tsang and the children cannot be found to be Convention refugees.

VI No Credible Basis

Counsel for the Minister argue that there is no credible basis for the claims, and set out their review of the facts and law on the topic in detail.⁶³²

VII Conclusion

Counsel for the Minister summarize their argument, stating that the evidence of misdeeds of Mr. Lai and Ms. Tsang is clear.⁶³³ The argument is made that

⁶³² Page 289, paragraph 998 to page 1023.

⁶³³ Page 300, paragraph 1024 to page 304, paragraph 1047.

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13. ANALYSIS OF THE CLAIM

Jurisdiction of the Panel

The panel’s jurisdiction is to determine whether the claimants come within the definition of Convention refugee. We have not been convened for the primary purpose of determining the relative merits of the Chinese criminal justice system, nor do we have jurisdiction to determining if the claimants are guilty of a criminal offence. The circumstances of this case are such that the determination process must take into account the Chinese criminal justice system. However, it is the claims that are the starting point, not Chinese criminal law and procedure.

Admissibility of Documents and Statements from China

At the beginning of the hearing, counsel for the claimants argued that some of the materials filed by Minister’s counsel should not be admitted into evidence.⁶³⁵ To put it in the most general terms, his concern was that the statements may have been

⁶³⁵ The exhibits objected to were as follows: C14, Volume 7; C15, Volume 8, Tab 1; C17, Volume 10, Tab 4; C18, Volume 11, Tab 5; C23.1, the “Shui Qiang Lai interview”; C23.2, the “Li Ji Zhou interview”; C23.4, the “six interviews” tape; C23.5, the “Fang Yong interview”; C28, Volume 13, Tabs 1 and 8.

obtained by improper means such as torture, or in such other circumstances that they should not be considered by the panel. Counsel for the Minister objected to one exhibit of the claimants being admitted into evidence.⁶³⁶ It was argued that the materials in the exhibit have nothing to do with the issues before the panel. In our view, a very broad spectrum of exhibits have been entered as exhibits, some highly critical of the government of China. The issue is what weight the documents should be given, not whether they should be admitted.

Many of the documents in question were filed with the CRDD well before the commencement of the hearing. The panel stated that it would rule on admissibility of the exhibits conditionally entered after it had heard the evidence in the claims.

The position of counsel for the claimants at the end of the hearing was that the evidence against the claimants emanating from the Government of China and those under its jurisdiction was admissible. In his view, the key issue is what weight to give that evidence.⁶³⁷

We agree with his submission. In our view, it applies to all the materials filed on behalf of the claimants and the Minister. After reviewing the materials in question, we do not find any of the exhibits of the claimants or the Minister's counsel to be inadmissible. This includes all materials filed after the close of the hearing. The issue is what weight the evidence merits.

Order of analysis: Exclusion then Inclusion

The panel will consider the issue of exclusion first and inclusion second. Exclusion involves a consideration of alleged past activities of a claimant that may deny

⁶³⁶ Exhibit A7.

⁶³⁷ Written submissions of counsel presented on 5 November 2002, page 148, paragraph 11.

him or her from inclusion in the definition of Convention refugee. The definition of Convention refugee, on the other hand, is forward looking, i.e., what might happen to a claimant in the future.

In our view, it is better to consider the evidence where there is an issue of exclusion in the following sequence: first, what is alleged to have been done by a claimant in the past and, second, what might happen to a claimant in the future.

Exclusion

Exclusion under 1F(b)

Article 1F(b) contains the following provisions:

- F. The provisions of this Convention shall not apply to any person with respect to whom there are *serious reasons for considering that*:
- (a) ...
 - (b) he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee;
 - (c) ...

[Emphasis added]

In *Pushpanathan*,⁶³⁸ the Supreme Court of Canada stated:

Thus, the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status.

Meaning of “Serious Reasons for Considering”

As stated in *Sivakumar*⁶³⁹ by the Federal Court of Appeal, “serious reasons for considering” is something more than suspicion or conjecture, but something less than

⁶³⁸ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (1998), 43 Imm. L.R. (2d) 117 (S.C.C.) at 1024.

⁶³⁹ *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433, at paragraph 18.

the balance of probabilities. While that decision concerned the application of Article 1F(a), the phrase “serious reasons for considering” applies equally to all three grounds of exclusion.

Meaning of “Serious” Crime

The next issue to be considered is what constitutes a “serious” crime. The Federal Court of Appeal decision of *Chan*⁶⁴⁰ presumed without deciding that a serious political crime is to be equated with one in which a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada.⁶⁴¹ A recent decision of the Federal Court Trial Division, *Zrig*,⁶⁴² includes a review of some of the commentators on the word “serious” and the interrelation of 1F(b) exclusion and extradition under the Extradition Act. The court states:

[89] On the meaning of the word “serious”, James Hathaway in *Law of Refugee Status*, Butterworths, 1991, at p.222, mentioned that these are crimes that warrant an especially severe punishment, thus making clear the commitment of signatories of the Convention to withholding protection from those who have committed truly abhorrent wrongs. The following passage at p. 224 of his text is relevant:

Atle Grahl-Madsen interprets this clause to mean that only crimes punishable by *several years’ imprisonment are of sufficient gravity* to offset a fear of persecution. UNHCR defines seriousness by reference to crimes which involve significant violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs traffic, and armed robbery. These are crimes which ordinarily warrant severe punishment, thus making clear the Convention’s commitment to the withholding of protection only from those who have committed truly abhorrent wrongs.

[Emphasis added]

[90] The Handbook on Procedures and Criteria for Determining Refugee Status (United Nations High Commission for Refugees, New Edition, Geneva, January 1992) gives the following definition of what constitutes a “serious” non-political crime:

⁶⁴⁰ *Chan v. Canada (Minister of Employment and Immigration)*, (2000), 10 Imm.L.R. (3d) 167 (F.C.A.) page 173.

⁶⁴¹ *Chan v. Canada (Minister of Employment and Immigration)*, (2000), 10 Imm.L.R. (3d) 167 (F.C.A.) at page 173, paragraph 9.

⁶⁴² *Zrig v. Canada (Minister of Employment and Immigration)*, F.C.T.D. no. IMM-5256-99, Tremblay-Lamer, September 24, 2001.

155. What constitutes a “serious” non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term “crime” has different connotations in different legal systems. In some countries the word “crime” denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a “serious” crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as “crimes” in the penal law of the country concerned.

Non violent crimes have been found to be “serious” for the purposes of 1F(b) in previous decisions of the CRDD. These include the following decisions: U97-00765, where the evidence indicated that a warrant of arrest had been issued in China against the respondent (in a vacation application), that he had been convicted of fraud in China, and that he had operated a large trading business in several Chinese cities;⁶⁴³ V94-00412, where the claimant had been charged in Germany with 18 counts of receiving stolen trucks, and 109 counts of altering and forging the initial registration dates of used vehicles;⁶⁴⁴ U96-05511, where the claimant had admitted committing the act of criminal impersonation in the second degree under the New York Penal Code, in that he had tried to enter the US with a false passport and landing document;⁶⁴⁵ T98-06157, where the claimant, a South Korean, had been convicted in South Korea for fraud concerning a large amount of money;⁶⁴⁶ A97-01015, where the claimant was involved in an organization that conducted money laundering and extortion in Russia;⁶⁴⁷ and finally, A97-00542, where the claimant had been convicted of three counts of mail fraud in the US and had received a sentence of 10 years. In that claim, the CRDD rejected the claimant’s argument that to constitute a “serious” non-political crime, the offence must

⁶⁴³ CRDD U97-00765, Berman, Ghosh, Mora, November 4, 1997.

⁶⁴⁴ CRDD V94-00412, Vanderkooy, Brisson, September 15, 1997.

⁶⁴⁵ CRDD U96-05511, Sotto, Doran, July 22, 1997.

⁶⁴⁶ CRDD T98-06157, Joakim, Simeon, April 4, 2000.

⁶⁴⁷ CRDD A97-01015, Gaboury, Coyne, August 11, 2000.

have an equivalent in Canada which could result in a sentence of 10 years or more. The panel ruled that no such hard and fast standard had been set.

In U92-04272, Minister's counsel sought to exclude the claimant because he had used an altered Canadian passport to travel to Canada. The panel reviewed the commentaries of the above noted authors, Hathaway and Grahl-Madsen, and determined that the claimant had not committed a "serious non-political crime". What he had done was not a capital crime or a "very grave" punishable act.⁶⁴⁸

Guy Goodwin-Gill, in *The Refugee In International Law*, Clarendon Press, 1983, at page 62, also discusses factors going into the determination of what might constitute serious crimes.

The following offences might also be considered to constitute serious crimes, provided other factors were present: breaking and entry (burglary); stealing (theft and simple robbery); receiving stolen property, embezzlement; drugs possession and use; and assault. Factors to support a finding of seriousness included use of weapons, injury to persons; *value of property involved*; type of drugs involved; *evidence of habitual criminal conduct*.

[*Emphasis added*]

Interrelation of Extradition Law and 1F(b) Exclusion

The court in *Zrig* makes the following comment on the reference to extradition in the *Pushpanathan* decision.

[91] In *Pushpanathan, supra*, Bastarache J. said at 1034 that "Article 1F(b) contains a balancing mechanism in so far as the specific adjectives 'serious' and 'non-political' must be satisfied". He added that serious "non-political" crimes in section F(b) are those which may result in extradition pursuant to a treaty:

It is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status, but that this exclusion is limited to serious crimes committed before entry in the state of asylum. *Pushpanathan, supra*, at 1033.

⁶⁴⁸ CRDD U92-04272, Hanson, Harnett, October 8, 1992.

The court in *Zrig* goes on to say:

[92] From this passage I conclude that he provided a general indication of the nature of crimes which may be the subject of exclusion under section F(b). I do not think that Bastarache J. intended to limit non-political crimes to those which were extraditable under a treaty, since such an approach would have the effect of excluding from section F(b) countries with which no extradition treaty existed.

[93] I also note the distinction made by the Court of Appeal in *Gil*, supra, at 518: “The refugee exception is limited to ‘serious’ crimes; extradition law has no such qualification” (my emphasis). In my opinion, therefore, caution should be used in comparing serious non-political crimes with extraditable crimes.

As we understand the decision in *Zrig*, whether Mr. Lai is extraditable and whether Canada has an extradition treaty with China is not relevant to the decision this panel must make.

Meaning of “Non-Political”

The court in *Zrig* also addresses the meaning of the word “non-political”.

The court states:

[86] In *Gil v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 508, the Federal Court of Appeal, relying on precedents from the United Kingdom, the United States and elsewhere, applied the so-called “incidence” test for determining whether an offence is of a political character. There were two parts to this test: the first concerned the political objective and the second the nexus between the objective and the alleged crime. The headnote offers a concise summary of the Court’s decision on this point, at 509:

The first requirement of the test is that the alleged crimes must be committed in the course of and incidental to a violent political disturbance such as of war, revolution or rebellion. The “political offense” exception is thus applicable only when a certain level of violence exists and when those resorting to violence are seeking to accomplish a particular objective such as to bring about political change or to combat violent political opposition. The second branch of the test is focused on the need for a nexus between the crime and the alleged political objective. The nature and purpose of the offense require examination, including whether it was committed out of genuine political motives or merely for personal reasons or gain, whether it was directed towards a modification of the political organization or the very structure of the state, and whether there is a close and direct causal link between the crime committed and its alleged political purpose and object. The political element should in principle outweigh the common law character of the offence, which may not be the case if the acts committed are grossly disproportionate to the objective, or are of an atrocious or barbarous nature.

[87] I also note in this passage that the Federal Court of Appeal recognized that it will be difficult to accept that a crime was political in nature when it is an atrocious or barbarous act or grossly disproportionate to the object.

[88] More recently, a majority of the judges in the House of Lords, in *T. v. Secretary of State for the Home Department*, [1996] 2 All E.R. 865, after citing with approval the Federal Court of Appeal's decision in *Gil*, *supra*, defined a non-political [sic] crime for the purposes of para. (b) as follows at 899:

A crime is a political crime for the purposes of art 1F(b) of the 1951 Convention if, and only if; (1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and (2) there is a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link exists, the court will bear in mind the means used to achieve the political end, and will have particular regard to whether the crime was aimed at a military or governmental target, on the one hand, or a civilian target on the other, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.

In *Gil*,⁶⁴⁹ the court sets out the two prongs of the incidence test. To quote from the submissions of the Minister's counsel in regard to *Gil*,⁶⁵⁰

The first requirement of the "incidence" test is that the alleged crime must be committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion. The "political offence" exception is therefore applicable only when a certain level of violence exists and when those resorting to violence are seeking to accomplish a particular objective such as to bring about political change or to combat violent political opposition.

The second branch of the "incidence" test is focused on the need for a nexus between the crime and the alleged objective. According to Court [sic] in *Gil*, the nature and purpose of the offence require examination, including *whether it was committed out of genuine political motives or merely for personal reasons or gain*, whether it was directed towards a modification of the political organization or the very structure of the state, and whether there is a close and direct causal link between the crime committed and its alleged political purpose and object.

[Emphasis added]

⁶⁴⁹ *Gil, Goody v. M.E.I.* (F.C.A., no. A-375-92), Hugessen, Desjardins, Décary, October 21, 1994. Reported: *Gil v. Canada* (Minister of Employment and Immigration), [1995] 1 F.C. 508 (C.A.); (1994), 25 Imm. L.R. (2d) 209 (F.C.A.)

⁶⁵⁰ Written submission of the Minister's counsel, page 118, paragraph 435 to page 119, paragraph 436.

“Balancing”

The issue of balancing has also been addressed by the Federal Court of Appeal in *Malouf*.⁶⁵¹ In that case, the claimant was a citizen of Lebanon. While in the United States, he was convicted of theft and narcotic offences. He fled to Canada before sentencing and claimed refugee status. The court stated:

Paragraph (b) of Article 1F of the Convention should receive no different treatment than paragraphs (a) and (c) thereof: none of them requires the Board to balance the seriousness of the applicants conduct against the alleged fear of persecution.

The court goes on to state that a proportionality test was only appropriate “...for the purposes of determining whether or not a serious crime should be viewed as political.”

Characterization of the Reasons for Prosecution by the Country of Reference

The Minister’s counsel argues that Article 1F(b) does not require an examination of the offence in question from the point of view of the motivation of the prosecuting authorities.⁶⁵² We agree with this submission. What is important is the motivation of the claimant at the time the crime was committed. Exclusion under 1F(b) can occur if the commission of the crime is unknown in the state where it occurred. The fact that it is known and may be prosecuted if the claimant returns to that country does not effect whether the exclusion arises in the first place. The motivation for prosecution is relevant only in the analysis of inclusion in the definition of Convention refugee.

⁶⁵¹ *Malouf, Francois* (F.C.A., no. A-19-95), Hugessen, Décary, Robertson, November 9, 1995. Reported: *Canada (Minister of Citizenship and Immigration) v. Malouf* (1995), 190 N.R. 230 (F.C.A.).

⁶⁵² Submissions, page 110, paragraph 404.

Lai Cheong Sing, Exclusion under IF(b) for Bribery

Are There “Serious Reasons” for Considering the offence of Bribery has Occurred?

As noted in the review of the evidence and findings of fact, there is a great deal of evidence that indicates Mr. Lai gave large amounts of money to a large number of officials. The best evidence on this point comes from Mr. Lai himself. He “loaned” large sums to at least three government officials with no apparent concern as to repayment. Sound business proposals were absent. He let customs officials and bureaucrats use houses and cars he owned. Mr. Lai gave large sums to numerous bureaucrats passing through Hong Kong with no expectation of repayment. Sometimes he did not even know to whom the money was given.

Mr. Li Ji Zhou, once the Deputy Chief of the Ministry of Public Security, in charge of anti-smuggling, was a major recipient of funds from Mr. Lai, running into millions of RMB for himself, his wife and daughter. The amounts loaned were far beyond Mr. Li’s ability to repay. Nothing about the transfers of money from Mr. Lai to Mr. Li was set out in writing. There was no security for the money. There were no terms of repayment. Interest payments were not an issue. Mr. Li stated that that these were bribes. On one occasion, Mr. Lai handed Mr. Li \$30,000 HK with little or no discussion. We find that there are serious reasons for considering that Mr. Lai bribed Mr. Li with the intent that Mr. Lai receive a benefit from him in the future. In two incidents – the intervention of Mr. Li for the special license and the release of a large cargo of oil – there was actual benefit. Mr. Li corroborated the existence of the transactions and the benefits that passed to Mr. Lai. We find the statement of Mr. Li given to Canada Immigration of significant probative value.

We also find that there are serious reasons for considering that Mr. Lai bribed a number of public officials holding various posts within the police and customs

offices in the Xiamen area. We base this conclusion on the evidence of Mr. Lai himself and the numerous interrogation reports and judgements filed as exhibits.⁶⁵³

Overall the evidence gives the panel serious reasons for considering that Mr. Lai was engaged in large scale bribery over a number of years.

Is Bribery a “Serious” crime?

Bribery is defined differently in Canada and China. However, it can result in a lengthy term of imprisonment in both countries. Articles 389 and 390 of the *Criminal Law of the Peoples Republic of China* set out the offences of accepting and offering bribes. The person offering the bribe, if the circumstances are “especially serious”, is liable to a sentenced of not less that 10 years, life imprisonment, or a sentence of death. To be found guilty in Chinese law of bribery, the person offering the bribe must be shown to have received a benefit. However, there is no necessity to establish equivalency between the bribe and the benefit, or that the benefit be an illegal one.

The section of the *Criminal Code of Canada* that applies to bribery of a public official is s. 120 (b). It states in part:

Bribery of Officers

Every one who gives or offers, corruptly, to a person mentioned in paragraph (a) [includes peace officer, public officer and customs officer] any money, valuable consideration, office, place or employment *with intent that the person should do anything mentioned in subparagraph (a)(iv), (v) or (vi)* [interfere with the administration of justice, facilitate

⁶⁵³ For example, Exhibit C7.1, Judgement 138 against Cai Hai Peng for receiving bribes of 450,000; Exhibit C7.4, Judgement No. 156 against Wang Ke Xiang, Director of the International Liaison Division of the Xiamen City Public Security Bureau, for accepting bribes of amounting to 900,000 from Mr. Lai Cheong Sing; Exhibit C7.3, Judgement No. 155 against Zhang Yong Ding, Chief of the Second Division of Marine Police of the Frontier Defence Department of the Armed Police in Fujian Province; exhibit C5, tab 8, Chen Zhao Zhong, the supervisor of the custom’s inspection team and Haixin Storage between May 1996 and June 1999, admits to taking in excess of 1 million RMB from employees of Mr. Lai Cheong Sing.

the commission of an offence, protect from detection], is guilty of an indictable offence and liable to imprisonment for *a term not exceeding fourteen years*.

[*Emphasis added*]

Canadian law does not include the requirement that some benefit be received as a result of a bribe, only that the bribe be given with the intent that some benefit be gained.

The sentence that could be imposed on Mr. Lai had the crime been committed in Canada is fourteen years. In China, the penalty that could be imposed for bribery is potentially life imprisonment or execution,⁶⁵⁴ the most severe of sentences available. Given the number of incidents alleged over a number of years and the amounts involved, we find that the crime of bribery in these circumstances is indeed serious.

Is Bribery a “Non-Political” Crime?

The activities of Mr. Lai had nothing to do with any desire to effect political change in China. The crime was not committed “in the course of and incidental to a violent political disturbance”, as set out in the “incidence test” in *Gil*.⁶⁵⁵ There was no desire on Mr. Lai’s part to bring about political change or to combat violent political opposition. In our view, there is no nexus between the crime and any political motive. The motive was one of personal gain. The crime was “non-political”.

The Need to Balance Conduct against Fear of Persecution?

As the panel understands the law, none of the subparagraphs of 1F require the panel to balance the seriousness of the claimant’s conduct against the alleged fear of

⁶⁵⁴ As discussed elsewhere, we are of the view that the diplomatic note from the Chinese government to Canada confirms that the death penalty will not be imposed on Mr. Lai.

⁶⁵⁵ *Gil, Goody v. M.E.I.* (F.C.A., no. A-375-92), Hugessen, Desjardins, Décary, October 21, 1994. Reported: *Gil v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 508 (C.A.); (1994), 25 Imm. L.R. (2d) 209 (F.C.A.).

persecution. Again, balancing is only appropriate for the purposes of determining whether or not a serious crime should be viewed as political.

Is the Crime Political for 1F(b) because the Prosecuting State is China?

We reject the argument of counsel for the claimants on this issue. To put his argument in its simplest terms, he alleges that the Chinese judicial system is generally politically driven and would be particularly politically driven against Mr. Lai should he return to China. Crimes should be considered political for the purposes of 1F(b) if charges arise from a political system not accepted as fair by Canada (as witnessed by the lack of an extradition treaty). He further argues that as there is an obvious political animus against Mr. Lai, and given the shortcomings of the Chinese political system, the alleged crimes are political in nature.

We accept the argument of the Minister's counsel that 1F(b) does not require an examination of the offence from the point of view of the prosecutor. It is the motivation of the claimant when the crime was committed that is important.

Summary

To summarize, we are of the view that there are serious reasons for considering that Mr. Lai has committed the serious non-political crime of bribery outside Canada prior to his admission to Canada. Therefore, we find that he is excluded from the definition of Convention refugee pursuant to Article 1F(b).

Lai Cheong Sing and Tsang Ming Na, Exclusion under 1F(b) for Smuggling

Are There “Serious Reasons” for Considering that Lai Cheong Sing and Tsang Ming Na Committed the Offence of Smuggling?

Lai Cheong Sing

As noted in the review of Mr. Lai’s evidence, he was not a credible witness in many areas. He was not credible in his description of his relationship with the British American Tobacco Company, his alleged supplier, or how he conducted his business with them. The business arrangements he says he had with the company were not verified. The company knew nothing about him. His role as a ‘middle man’ was not corroborated. He was not a credible witness as to the setup of the Haixin Container Yard, and disavowed knowledge of the details of how that key business operation was run.

He often deferred questions about the details of his cigarette and real estate business to others. He provided no records of his cigarette business, saying that he destroyed all records once a transaction was complete. In fact, he provided no business records of his various companies’ day to day operations.

There were numerous interrogation statements gathered by the 4-20 Investigation of personnel from the Yuan Hua companies who stated they were involved in various aspects of the smuggling operations. The information about their involvement was detailed. There were several judgments from the Chinese courts concluding that various customs officials received bribes from Mr. Lai. Several of them were found to have facilitated the smuggling operations.

In our view, there is a significant body of evidence that gives rise to a serious reason for considering that Mr. Lai was involved in a large scale smuggling operation over an extended period of time.

Tsang Ming Na

Ms. Tsang was not a credible witness as to her dealings within the Yuan Hua group of companies generally. She alleges she signed anything put in front of her, but read nothing, including company records. Ms. Tsang was at best most cavalier in her dealings with documentation filed by her with Canada Immigration. She alleged she had no knowledge of the contents of any of the forms signed on her behalf. She displayed a willingness to acquiesce in the production of whatever paperwork a particular situation required, with little apparent regard for the content.

At the same time, the evidence is that she was one of three persons who had financial signing authority for the Yuan Hua group of companies, a multi-million RMB operation. We do not find it credible that a person with no knowledge of the companies operations would be trusted as a signing officer for the company.

As reviewed earlier, several statements taken by the 4-20 Investigation indicate that she played a significant role in the Yuan Hua group of companies beyond what she suggests. We find that these statements are of probative value and provide serious grounds for considering that she was involved to a significant degree in the operations of the Yuan Hua Group.

For example, Ms. Cai Shuang Min provided a statement to the 4-20 Investigation that Ms. Tsang arranged to have large amounts of goods smuggled into China for Ms. Cai and her clients. Ms. Cai stated that Ms. Tsang was paid approximately \$13 million HK for this service. Ms. Tsang denied ever having done business with Ms. Cai, but was noticeably ambivalent as to what dealings might have occurred between Ms. Cai and Mr. Lai. We find the interrogation statements of Ms. Cai have probative value.

We also find that Ms. Tao Mi statements to the 4-20 Investigation have probative value as to Ms. Tsang's activities in the company.

The Minister's counsel argues that the applicable sections of the *Criminal Code of Canada* for the activities of Mr. Lai and Ms. Tsang are subsections 380(1)(a) and 380(2). Those subsections come under the heading "Fraud/Affecting public market".

The *Customs Act*, also raised by the Minister's counsel, deals more directly with smuggling. Section 159 states:

Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament.

Section 160 states:

Every person who contravenes section 12, 13, 15 or 16, subsection 20(1), section 31 or 40, subsection 43(2), 95(1) or (3), 103(3) or 107(1) or section 153, 155 or 156 or commits an offence under section 159 or 159.1

(a) is guilty of an offence punishable on summary conviction and liable to a fine of not more than fifty thousand dollars or to imprisonment for a term not exceeding six months or to both that fine and that imprisonment; or

(b) is guilty of an indictable offence and liable to a fine of not more than five hundred thousand dollars or to imprisonment for a term not exceeding five years or to both that fine and that imprisonment.

[Emphasis added]

In our view, the more appropriate section to apply to general acts of smuggling is that found in the *Customs Act*, not section 380 of the *Criminal Code*.

The maximum sentence that could be imposed on Mr. Lai and Ms. Tsang for a single act of smuggling, had the crime been committed in Canada, is five years. In China, the penalty that could be imposed for smuggling is potentially life imprisonment or execution,⁶⁵⁶ the most severe of sentences available.

⁶⁵⁶ As discussed elsewhere, we are of the view that the diplomatic note from the Chinese government to Canada confirms that the death penalty will not be imposed on Mr. Lai or Ms. Tsang.

The documentation filed indicates that the smuggling operations were carried out over a number of years and involved very large sums of money. As stated elsewhere in these reasons, large-scale corruption, part of the background of smuggling, can have a major negative impact on many areas of public and private life. Given the scale of the smuggling, and the length of time it occurred, we find that smuggling in the circumstances of this case is very serious.

Is Smuggling a “Non-Political” Crime?

The remainder of this analysis parallels the preceding analysis on bribery. The smuggling activities of Mr. Lai and Ms. Tsang had nothing to do with any desire on their part to effect political change in China. The crime was not committed “in the course of and incidental to a violent political disturbance”, as set out in the “incidence test” in *Gil*.⁶⁵⁷ There was no desire on their part to bring about political change or to combat violent political opposition. In our view, there is no nexus between the crime and any political motive. Their motivation was personal gain.

The Need to Balance Conduct against Fear of Persecution?

Again, as the panel understands the law, none of the subparagraphs of 1F require the panel to balance the seriousness of the claimant’s conduct against the alleged fear of persecution. Balancing is only appropriate for the purposes of determining whether or not a serious crime should be viewed as political.

⁶⁵⁷ *Gil, Goody v. M.E.I.* (F.C.A., no. A-375-92), Hugessen, Desjardins, Décary, October 21, 1994. Reported: *Gil v. Canada Minister of Employment and Immigration*, [1995] 1 F.C. 508 (C.A.); (1994), 25 Imm. L.R. (2d) 209 (F.C.A.)

Is the Crime Political for Purposes of 1F(b) because the Prosecuting State is China?

As in the case of bribery, we reject the argument of counsel for the claimants on this issue. To put his argument in its simplest terms, he alleges that the Chinese judicial system is generally politically driven and would be particularly politically driven against Mr. Lai and Ms. Tsang should they return to China. Crimes should be considered political for the purposes of 1F(b) if charges arise from a political system not accepted as fair by Canada (as witnessed by the lack of an extradition treaty). He further argues that as there is an obvious political animus against Mr. Lai and Ms. Tsang, and given the shortcomings of the Chinese political system, the alleged crimes are political in nature.

We accept the argument of the Minister's counsel that 1F(b) does not require an examination of the offence from the point of view of the prosecutor. It is the motivation of the claimants when the crime was committed that is important.

Summary

To summarize, we conclude that there are serious reasons for considering that Lai Cheong Sing and Tsang Ming Na have committed the serious non-political crime of smuggling outside Canada prior to their admission to Canada. Therefore, we find that they are excluded from the definition of Convention refugee pursuant to Article 1F(b).

Fraud and Tax Evasion

Minister's counsel also argue that Mr. Lai and Ms. Tsang should be excluded from the definition of Convention refugee under 1F(b) because there are serious reasons for considering that they committed the serious non-political offences of fraud and tax evasion.

In our opinion, their conduct is more appropriately described under the heading of smuggling than fraud. In the case of the tax evasion, we are of the view that the evidence is more inferential than direct. In any event, we are of the view that having found Mr. Lai excluded for bribery and both Mr. Lai and Ms. Tsang excluded for smuggling, it is unnecessary to go on to consider the offences of fraud and tax evasion in considering 1F(b).

Inclusion

The claimants allege that they have a well-founded fear of persecution in China based variously on their political opinion and their membership in a particular social group. The standard of proof required on inclusion claims is that of a “serious possibility”⁶⁵⁸ of persecution.

Nexus

The first question to be determined is whether the claimants have a nexus or connection to the Convention refugee definition. In other words, is there sufficient credible or trustworthy evidence to link the fear of persecution to one of the five grounds of that Convention definition?

The Supreme Court of Canada considered the question of nexus in *Ward*.⁶⁵⁹ The determinative factor is the perception of the persecutor. The Court stated that “the international community did not intend to offer haven for all suffering individuals”.⁶⁶⁰ In these claims, it was alleged that the operative Convention grounds are political opinion and membership in a particular social group.

⁶⁵⁸ *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; (1989), 7 Imm. L.R. (2d) 169 (C.A.).

⁶⁵⁹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th), 1, 20 Imm. L.R. (2d) 85.;

⁶⁶⁰ *Ibid.*, at 732.

Political Opinion

This was one of the two primary grounds put forth by the claimants in their Personal Information Forms. The first question to be determined is whether the claimants face persecution or prosecution. It is alleged that Mr. Lai and Ms. Tsang have violated certain of the criminal laws of China, including (among others) bribery and smuggling.

There are certain considerations to determine if such laws are validly enacted laws of general application. In *Zolfagharkhani*,⁶⁶¹ the Federal Court of Appeal set out “some general propositions relating to the status of an ordinary law of general application in determining the question of persecution”:

- (1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
- (2) But the neutrality of an ordinary law of general application, *vis-à-vis* the five grounds for refugee status must be judged objectively by Canadian tribunals and courts when required.
- (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should ... be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.
- (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

It is not enough to allege that the Chinese government is repressive. That was also the situation in *Zolfagharkhani*, which dealt with the Islamic Republic of Iran. Even in that non-democratic country, the Court found that “...an ordinary law of general application...should...be given a presumption of validity and neutrality”. There was insufficient evidence advanced by the claimants that laws to prevent corruption (by bribery) and stop smuggling have any intent but to achieve general societal benefit.

⁶⁶¹ *Zolfagharkhani v. Canada (Minister of Employment and Immigration)* [1993] 3.F.C.540 (C.A.).

Such laws must, on their face, apply to the entire population of China without being targeted at specific group within that population. There was insufficient evidence to find these criminal laws only target certain groups within the Chinese population.

Another question to determine is whether the claimants would be punished for the breach of a law that does not violate human rights and does not differentiate either on its face or in its application adversely on a Convention ground. The other consideration is whether the claimants' actions might contravene such criminal laws of China in which the enforcement or punishment of such laws might infringe upon human rights and adversely differentiate between individuals.

All national states have the right to enact laws that will contribute to the functioning of the state and its' subordinate organizations. Violation of such a law that regulates behaviour implies that there will be a commensurate penalty for the violation of that law. It is not because of the claimants' political opinion or membership in a particular social group that such laws conflict with their activities. In that sense, such criminal laws are neutral and not persecutory. The relevant consideration in any refugee claim is the perception held by the persecutor.

The claimants also submitted that even if the offences themselves are a legitimate exercise of criminal law authority, the enforcement has been distorted to achieve a persecutory end, such as by selective enforcement. However, on the credible evidence before the panel, we find that an investigation in Xiamen uncovered a large-scale criminal enterprise of bribery and smuggling involving many individuals, both in the government bureaucracy and in private businesses. Many individuals were charged and tried for their roles in violating the relevant criminal laws, including important local officials. According to the evidence before the panel, other individuals were not charged,

not because of selective enforcement, but rather because it was determined that insufficient and lawfully admissible proof of their guilt was not available. According to the evidence, Mr. Lai and Ms. Tsang are simply facing prosecution because of their roles at the highest level in that criminal enterprise. The evidence before this panel clearly indicates that their criminal prosecution is neither selective nor discriminatory.

As well, the panel has also considered the seriousness of the harm that is feared by the claimants. Much time was spent on the possible application of the death penalty that may be imposed for some violations of Chinese law. It was argued that such a possible penalty is disproportionate to the offense and therefore may constitute persecution. The panel has already determined that the promise in the diplomatic note to waive the applicability of the death penalty (including any suspension for two years) means it is not a consideration in these claims. The adult claimants may be subject to lengthy periods of imprisonment if they are eventually convicted of some or all of the offences alleged by the Chinese authorities. Are such possible penalties of lengthy imprisonment, up to life imprisonment, disproportionate to the alleged offences?

With regards to laws of general application, the Federal Court of Appeal in *Cheung*⁶⁶² found that a law of general application may be persecutory where its' penalty is disproportionate to the objective of the law:

...if the punishment or treatment under a law of general application is so Draconian as to be completely disproportionate to the objective of the law, it may be viewed as persecutory. This is so regardless of whether the intent of the punishment or treatment is persecution. ... with a veneer of legality, does not render it less persecutory. ...⁶⁶³

The maximum penalty for smuggling or bribery is a possible sentence of life imprisonment and confiscation of property, according to the relevant sections of the

⁶⁶² *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.), page 323.

⁶⁶³ *Ibid.* At page 323.

Chinese Criminal Law. The sums of money involved in the allegations against Mr. Lai and Ms. Tsang are significant and the number of offences they are alleged to have committed is numerous. Other jurisdictions also impose significant penalties for similar offences (USA and Canada) and consecutive penalties for repeated offences could reach a life term. As well, both Dr. Yang and Dr. Burton, two of the expert witnesses, indicated that Mr. Lai and Ms. Tsang could be sentenced to a reduced term of less than life imprisonment or have their sentences reduced or commuted at some point while they were serving their sentences.

The evidence is insufficient to find that any possible sentence of imprisonment imposed upon Mr. Lai or Ms. Tsang for their violations of these laws of general application would be disproportionate to the offences.

Mr. Lai and Ms. Tsang say that they will suffer cruel treatment, including torture, if they are imprisoned on their return to China. A promise of humane treatment was provided in the diplomatic note between the governments of Canada and China. Several of the expert witnesses commented favourably on this promise, both in the provision of the diplomatic note regarding treatment, and in their expert opinions regarding the actual treatment. Both the comments are contained in their testimony and in their reports. The panel considers the opinions of Dr. Jerome Cohen, Dr. Charles Burton and Dr. Vincent Yang to be of considerable weight on this issue. The diplomatic note on its own provided that Lai Cheong Sing and Tsang Ming Na, if returned to China, would “not be subject to torture and other cruel, inhuman or degrading treatment or punishment”. Those experts were clear that any treatment by the Chinese authorities would adhere to such a commitment and avoid subsequent diplomatic problems with Canada. As well, Dr. Yang also gave detailed testimony about the makeup and organization of the Chinese prison system, which generally met minimum United Nations standards.

Even Dr. Feinerman, one of the claimants' expert witnesses, said that the Chinese authorities, because of their desire to preserve good diplomatic relations with Canada, would want to ensure that nothing happened to Mr. Lai or Ms. Tsang. However, he had some doubt if the central authorities would be able to guarantee that local officials would continue to do so in the future. However, the panel prefers the view that any local authorities in China, who were entrusted with the care of Lai Cheong Sing and Tsang Ming Na, would continue to honour the commitment of the central authorities and ensure that their safety and security would not be put in jeopardy in the future.

The evidence would also indicate that due to the economic nature of their crimes, Mr. Lai and Ms. Tsang would be seen as white-collar criminals. Dr. Burton suggested:

“that people who have been accused – have been convicted of white-collar crimes are inclined to be put into prisons facilities which perhaps offer a greater degree of -- I don't know the word “comfort” would be rather overstating it, but you know, a greater degree of -- respect for their basic rights as prisoners than might be possible in the more traditional, very crowded prison facilities.⁶⁶⁴

In that case, they would probably receive better treatment if they were convicted and sent to prison than the average Chinese prisoner would receive.

Overall, while there are potential problems in prisons throughout the world, the panel prefers to find that there is nothing more than the mere possibility that Lai Cheong Sing or Tsang Ming Na, if imprisoned in China, would suffer any mistreatment there that could be construed as persecutory.

Mr. Lai and Ms. Tsang also claim that they will not receive a fair trial if they are returned to China. The various expert witnesses provided evidence about this

⁶⁶⁴ Transcript, 27 July 2001, page 85, lines 13 – 19.

subject. Dr. Yang was the most knowledgeable expert on the intricate workings of the Chinese criminal justice system and he outlined the various provisions in the criminal law and procedure. The Chinese legal system is not part of the Anglo-American common law system. China has many similarities to the European civil law system and the functioning of the various participants in that system is not directly comparable to the functioning of the common law system. It was the opinion of the experts presented by the Minister that Mr. Lai and Ms. Tsang will not receive an unfair trial and the strict application of the Chinese Criminal Procedure Law and Criminal Law will be followed in their particular cases. They will be entitled to have capable lawyers provide a full defence in representing them in any criminal trials, which will be held in public. The evidence of Dr. Zhao did not indicate there was any previous attempt by the authorities to inhibit defence counsel who represented other persons tried for their criminal activity in earlier Yuan Hua trials. According to those experts, these claimants will receive proper treatment because it would clearly be in the interests of the Chinese authorities to avoid any adverse publicity in the future that might arise from the legal proceedings involving Mr. Lai and Ms. Tsang.

In his amended Personal Information Form, Mr. Lai stated that he was targeted because he refused to participate with the PRC government “in a fit-up of Li for political purposes”. Because of his refusal to co-operate regarding Li Ji Zhou, he says he was then targeted for persecution for political reasons.

The panel has already reviewed why it has not found the claimants’ evidence to be credible about this basis of persecution for their political opinion. It was denied by Mr. Li Ji Zhou himself in his interview with Canadian officials when he disavowed any political motive for his arrest. He also denied that there was a political

struggle between the old Minister of Public Security, Mr. Tao and the new Minister, Mr. Jia.⁶⁶⁵ Instead of being targeted for his refusal to assist in any political plot, we find that Mr. Lai was simply suspected of being involved in a huge corruption scheme involving large-scale bribery and smuggling, amongst other crimes. It was not until after these claimants fled from China that evidence arose that Li Ji Zhou had accepted bribes from Mr. Lai.

The Chinese authorities are not seeking Mr. Lai or Ms. Tsang because of their actual or perceived political opinion. Even if Mr. Lai was the main offender, he was only seen as one of many other participants involved in large-scale network of illegality in the Xiamen area. His involvement with Mr. Li was only one aspect of his criminal enterprises. Actions by the Chinese authorities are not (and do not) have a political opinion as their core motive. The panel finds that the Chinese government does not see Mr. Lai or Ms. Tsang as involved in political acts, nor do they see them as having a political opinion different from the government.

Membership in a Particular Social Group

Mr. Lai did not define the social group of which he claimed to be a member in his original Personal Information Form or in his amended Personal Information Form. His counsel's submissions allege that the group is "prominent successful businesspeople in China".⁶⁶⁶ The particular social group alleged by the other claimants, Tsang Ming Na and their children, is "family members of Lai Cheong Sing".

The statutory definition of "Convention refugee" does not delineate what is meant by "membership in a particular social group". The Supreme Court of Canada, in

⁶⁶⁵ Exhibit C-14, Tab 1, pages 47 to 50.

⁶⁶⁶ Written submissions , page 140.

the leading case of *Ward*⁶⁶⁷ reviewed a variety of sources concerning this ground, and went on to identify the following three categories of particular social group:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.⁶⁶⁸

The court went on to find in *Ward* that the claimant was not part of a particular social group because he was the target of highly individualized persecution due to what he did as an individual and not because of any group characteristics or association.⁶⁶⁹ If such was the case in *Ward*, concerning a defector from a terrorist organization, the panel finds that is true of Mr. Lai and Ms. Tsang in this case.

It has already been determined that there is no nexus in other claims involving victims, or potential victims, of crime, corruption⁶⁷⁰ or vendettas.⁶⁷¹ In certain cases, exposure of corruption does not place a person within a particular social group.⁶⁷² Such claimants generally cannot establish a link between their fear of persecution and a Convention reason.

⁶⁶⁷ *Canada (Attorney-General) v. Ward*, [1993] 2 S.C.R. 689.

⁶⁶⁸ *Ibid.*, at 739 and 744.

⁶⁶⁹ *Ibid.*, at 745.

⁶⁷⁰ *Leon, Johnny Edgar Orellana v. M.C.I.* (F.C.T.D., no IMM-3520-94), Jerome, September 19, 1995; *Calero, Fernando Alejandro (Alejandro) v. M.E.I.* (F.C.T.D., no. IMM-3396-93), Weston, August 8, 1994.

⁶⁷¹ *Rivero, Omar Ramon v. M.C.I.* (F.C.T.D., no. IMM-487-94), Richard, January 30, 1994.

⁶⁷² In *Munoz, Tarquino Oswaldo Padrom v. M.C.I.* (F.C.T.D., no. IMM-1884-95), McKeown, February 22, 1996, the court found that exposing corruption is a laudable goal but not fundamental to the human dignity of the claimant and therefore does not place the claimant in a particular social group.

In these claims, does Mr. Lai fear persecution because of his membership in a particular social group or rather does he fear persecution because of his actions as an individual?

The evidence indicates that business people have been and are being encouraged to be successful by the authorities in China for at least the last two decades. There have been governmental programs to assist such business development.

Mr. Lai has alleged that he was targeted, not because he was a successful businessman, but because he did not agree to provide the authorities with false evidence against Li Ji Zhou. He alleges that he has been the resulting victim of a concocted criminal case solely resulting from his unwillingness to co-operate with the PRC authorities. The panel has already found that his version of what happened is not credible. The significant weight of the evidence against him indicates that he was never targeted as a member of a particular social group. Rather, the evidence establishes that he was targeted solely because of his individual activities in illegal acts which has resulted in the PRC authorities attempting to prosecute him under the existing criminal laws of China.

There is no substance to the claimants' allegations that the authorities' pursuit of them results from Mr. Lai's membership in that particular social group. As was set out in *Ward*,⁶⁷³ there is a difference between a person who fears persecution as a result of his own activities and a person who fears persecution because of his group membership. There is a lack of credible evidence that there was any interest in Mr. Lai because of his group membership. That interest results solely "by reason of" his illegal activities in which he engaged on a large scale, not as result of being a businessman, successful or otherwise.

⁶⁷³ Ibid., pages 738-739.

According to the *Ward* analysis and the evidence in these claims, the panel does not find that any of these claimants would be subject to persecution for their membership in a particular social group described as “successful business people”.

The panel finds that the totality of the evidence shows that the harm feared by Mr. Lai is not by any ground set out in the definition of “Convention refugee”. Accordingly, no nexus to the grounds set out in the Convention refugee definition exists in his claim.

As far Tsang Ming Na is concerned, she bases her claim to have a well-founded fear of persecution upon her political opinion as he did, and also on her membership in a particular social group: “...being the family members of Cheong Sing LAI.”⁶⁷⁴ The panel has not found that Mr. Lai was being persecuted for either his political opinion or his membership in a particular social group. Likewise, the evidence clearly indicates that Tsang Ming Na is facing prosecution, not persecution, in China for her participation in criminal activities with Mr. Lai. She is also not being sought for her political opinion or for her membership in a particular social group — the family of Mr. Lai.

There is also no nexus to the grounds set out in the Convention refugee definition in her claim. As stated in the Handbook of the United Nations High Commissioner for Refugees:⁶⁷⁵

⁶⁷⁴ Exhibit A1.2 Personal Information Form of Tsang Ming Na.

⁶⁷⁵ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Reedited, Geneva, January 1992, UNHCR, at page 15.

56. Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim--or potential victim--of injustice, not a fugitive from justice.

According to the evidence, Mr. Lai and Ms. Tsang are clearly only fugitives from justice, and nothing else.

The Children

Conclusions as to the Refugee Claims of the Children

In our view, the evidence of Dr. Burton and Dr. Cohen is much more persuasive as to how the government of China would treat the three children than the evidence to the contrary. We do not find that the children would face more than a mere possibility of discrimination amounting to persecution for any Convention reasons should they return to China. The suggestion by Mr. Lai that the children would be in danger of retaliation by non-state agents was speculative. He initially stated he had not even thought about their return to China. There was no evidence that any of the three children are being sought by or of any interest to the Chinese authorities for their political opinion or their membership in a particular social group — as family members of Lai Cheong Sing.

Having said that, it is also our view that the claims of the children cannot succeed, given our findings in regard to the claims of Mr. Lai and Ms. Tsang, i.e. that they are not included in the definition of refugee status. As stated by the Federal Court in cases such as *Rodriguez*⁶⁷⁶ and *Bojaj*,⁶⁷⁷ when the primary victim of persecution does not come within the definition of a Convention refugee, any derivative claim based on family

⁶⁷⁶ *Rodriguez v. Canada* (M.C.I.), [1997] F.C.J., No. 1246.

⁶⁷⁷ *Bojaj, Edmond v. M.C.I.* (F.C.T.D., no. IMM-4185-99), Heneghan, September 21, 2000.

group cannot be sustained for the three children, just as it could not be sustained for their mother, Tsang Ming Na..

We find that the children do not face a “serious possibility” of persecution in China for a Convention reason.

Application for a Finding of “No Credible Basis”

The Minister’s counsel has requested the panel make a finding of “no credible basis” pursuant to subsection 69.1(9.1) of the Immigration Act. Counsel for the claimants argues that the panel should not make such a finding. The section is as follows:

69.1 (9.1) If each member of the Refugee Division hearing a claim is of the opinion that the person making the claim is not a Convention refugee and is of the opinion that there was no credible or trustworthy evidence on which that member could have determined that the person was a Convention refugee, the decision on the claim shall state that there was no credible basis for the claim.

The purpose of the “no credible basis” provision in the *Immigration Act* is to provide a means for the speedier removal of claimants from Canada where that finding is made. The finding limits the time a failed claimant can remain in Canada by right and in some circumstances bars access to the “Post-Determination Refugee Claimants in Canada Class” (PDRCC) process.

For the purpose of a credible basis determination, the claimant does not need to “prove” or “establish” that he is a Convention refugee.⁶⁷⁸ The only question is whether there is “any credible evidence” on which the Refugee Division ‘could have determined’ the

⁶⁷⁸ *Lee v. M.E.I.* F.C.A. 401-89, Heald, Urie, Stone, February 22, 1990, 160 N.R., page 238.

claimant to be a refugee.⁶⁷⁹ If independent, credible evidence connects the claimant to the harm feared, it is not appropriate to make a finding of “no credible basis”.

In the *Sheikh*⁶⁸⁰ decision, the Federal Court of Appeal stated

“...where the only evidence before a tribunal linking the applicant to his claim is that of the applicant himself (in addition, perhaps, to “country reports” from which nothing about the applicants claim can be directly deduced) a tribunal’s perception that he is not a credible witness effectively amounts to a find that there is no credible evidence...”.

After considering the evidence before us, we do not find that there is no credible or trustworthy evidence on which we could have determined that the claimants were Convention refugees. Therefore, it is not appropriate to make a finding of “no credible basis”.

14. CONCLUSIONS

No Credible Basis

We do not make a finding that there is no credible basis to the claims.

Exclusion under Article 1F(b)

We find that LAI Cheong Sing is excluded from the definition of Convention refugee, pursuant to Article 1F(b) of the Schedule to the *Immigration Act*.

We find that TSANG Ming Na is excluded from the definition of Convention refugee, pursuant to Article 1F(b) of the Schedule to the *Immigration Act*.

⁶⁷⁹ *Sloley v. Minister of Employment and Immigration*, (1990), 160 N.R. 239, (F.C.A.).

⁶⁸⁰ *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.) at page 244.

Inclusion in the Definition of Convention Refugee

We find that LAI Cheong Sing is not included in the definition of Convention refugee as found in the *Immigration Act*. We find that TSANG Ming Na is not included in the definition of Convention refugee as found in the *Immigration Act*. We also find that their children, LAI Chun Wai, LAI Ming Ming and LAI Chun Chun are not included in the definition of Convention refugee as found in the *Immigration Act*.

“Kurt Neuenfeldt”

Kurt Neuenfeldt

Concurred in by:

“I.W. Clague”

I.W. Clague

DATED at Vancouver, B.C., this 6th day of May 2002.