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BRIEF FOR THE LEGISLATIVE COUNCIL

The Director of Administration submits the following note for Member's information:

Title of the Note

Resolution under section 7A of the
Hong Kong Court of Final Appeal Ordinance (Cap.484)

17 June 2000

Administration Wing
Chief Secretary for Administration's
Office

LEGISLATIVE COUNCIL BRIEF

Resolution under section 7A of the Hong Kong Court of Final Appeal Ordinance (Cap.484)

INTRODUCTION

Pursuant to section 7A of the Hong Kong Court of Final Appeal Ordinance (Cap.484), the Administration gave notice on 5 June 2000 to move a motion, at the Legislative Council meeting on 21 June 2000, to obtain the endorsement of the Council for the appointment of Mr Justice Patrick Chan Siu Oi and Mr Justice Roberto Alexander Vieira Ribeiro as permanent judges of the Court of Final Appeal (CFA); the appointment of Mr Justice Henry Denis Litton and Mr Justice Charles Ching as non-permanent Hong Kong judges of the CFA; and the appointment of Sir Gerard Brennan, Sir Thomas Eichelbaum and Lord Millett as judges of the CFA from other common law jurisdictions. The curriculum vitae of the Judges are at the Annex.

BACKGROUND

The Court of Final Appeal

2. The Court of Final Appeal is the final appellate court in Hong Kong, hearing both civil and criminal appeals. It consists of the Chief Justice and the three permanent judges. The CFA is required to invite one non-permanent judge to sit in each appeal. The Hong Kong Court of Final Appeal Ordinance provides for a list of non-permanent Hong Kong judges and a list of non-permanent judges from other common law jurisdictions. The maximum number of non-permanent judges is 30.

Legal and Constitutional Provisions

3. In accordance with Article 88 of the Basic law and sections 7, 8 and 9 of the Hong Kong Court of Final Appeal Ordinance, both permanent and non-permanent judges of the Court of Final Appeal shall be appointed by the Chief Executive in accordance with the recommendation of the Judicial Officers Recommendation Commission ("JORC"). As regards whether it would be

lawful for the Chief Executive not to appoint a person recommended by the JORC cannot be dealt with in the abstract since the lawfulness of the Chief Executive's actions might depend on the particular factual circumstances at the time. In the case of the appointment of judges of the CFA and the Chief Judge of the High Court, Article 90 of the Basic Law and Section 7A of the Hong Kong Court of Final Appeal Ordinance provide that the Chief Executive shall, in addition to following the procedures prescribed in Article 88, obtain the endorsement of the Legislative Council. The Chief Executive shall also report such appointment to the Standing Committee of the National people's Congress for the record under Article 90.

Judicial Officers Recommendation Commission

4. Pursuant to Article 88 of the Basic Law and the Judicial Officers Recommendation Commission Ordinance (Cap 92), the Commission is entrusted with the function to, inter alia, advise or make recommendations to the Chief Executive regarding the appointment of judges of the courts. The Commission consists of the Chief Justice as the chairman, the Secretary for Justice and 7 other members appointed by the Chief Executive (2 judges, 1 barrister, 1 solicitor and 3 persons not connected with the practice of law). Under section 3(3A) of the JORC Ordinance, a resolution is not effective if there are more than 2 votes not in favour. The advice or recommendation of the Commission is then communicated to the Chief Executive. In the case of the judges of the CFA and then the Chief Judge of the High Court, the Chief Executive shall, pursuant to Article 90 of the Basic Law, make the appointment(s) in accordance with the recommendation of the Commission. The appointment(s) will not be legally effective until and unless LegCo has given its endorsement.

Statutory Legal Qualifications of Judges

5. Under section 12(1) of the Hong Kong Court of Final Appeal Ordinance, a person shall be eligible to be appointed as a permanent judge if he is the Chief Judge of the High Court, a Justice of Appeal or a judge of the Court of First Instance; or a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years.

6. Under section 12(3) of the Hong Kong Court of Final Appeal Ordinance, a person shall be eligible to be appointed as a non-permanent Hong Kong judge if he is a retired Chief Judge of the High Court; a retired Chief Justice of the Court; a retired permanent judge of the Court; a Justice or retired Justice of Appeal; or a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years, whether or not he is ordinarily resident in Hong Kong.

7. Under section 12(4) of the Hong Kong Court of Final Appeal Ordinance, a person shall be eligible to be appointed as a non-permanent judge from another common law jurisdiction if he is a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction; provided he is ordinarily resident outside Hong Kong and has never been a judge of the High Court, a District Court or a permanent magistrate, in Hong Kong.

Role of the Legislative Council

8. Article 90 of the Basic Law provides that the Chief Executive shall obtain the endorsement of the Legislative Council for the appointment of CFA judges and the Chief Judge of the High Court. Article 73(7) correspondingly confers on the Legislative Council the power and function to endorse the appointment of CFA judges and the Chief Judge of the High Court.

9. The system of judicial appointment by the Chief Executive acting in accordance with the recommendation of an independent commission, the JORC, as laid down in Article 88 of the Basic Law, together with the additional requirement of endorsement by the Legislative Council of the appointment of CFA judges and the Chief Judge of the High Court under Article 90 of the Basic Law, provides the necessary checks and balances, and reinforces the constitutional guarantee of the independence of the judiciary stipulated in Article 85 of the Basic Law.

CURRENT APPOINTMENT EXERCISE

A. The CFA Appointments in this Exercise

10. In accordance with the Basic Law and the Hong Kong Court of Final Appeal Ordinance, the JORC has recommended the appointment of Mr Justice Patrick Chan and Mr Justice Ribeiro as permanent judges of the Court of Final Appeal, Mr Justice Litton and Mr Justice Ching as non-permanent Hong Kong judges of the Court of Final Appeal, and Sir Gerard Brennan, Sir Thomas Eichelbaum and Lord Millett as non-permanent CFA judges from other common law jurisdictions. These recommendations have been communicated to the Chief Executive.

11. In accordance with Articles 88 and 90 of the Basic Law and Sections 7(1), 7A(1), 8(2) and 9(2) of the Hong Kong Court of Final Appeal Ordinance ("CFA Ordinance"), the Chief Executive has accepted the recommendations of JORC on the seven CFA appointments and is obtaining the endorsement of the Legislative Council for these appointments. The Administration is of the view that these appointments will not be legally effective until and unless

LegCo has given its endorsement.

(i) Appointment of the two Permanent Judges

12. In exercising his power pursuant to section 7(1) of the CFA Ordinance, the Chief Executive noted the background to the need for appointments following the resignation of Mr. Justice Litton and the retirement of Mr Justice Ching respectively. The Chief Executive also noted that Mr Justice Litton will be on pre-resignation leave as from 1 August 2000 and that Mr Justice Ching will have completed his tenure of office on 6 October 2000. The Chief Executive also noted that the appointments of Mr Justice Patrick Chan and Mr Justice Ribeiro are intended to take effect as from 1 September 2000 to ensure that the effective functioning of the CFA would not be adversely affected; those two judges are intended to succeed Mr Justice Litton and Mr Justice Ching.

13. The Chief Executive noted that the CFA Ordinance does not prescribe a maximum number for permanent judges at any one time. The Chief Executive noted that subject to LegCo's endorsement and the completing of the reporting procedure as prescribed by the Basic Law and the CFA Ordinance by 31 August 2000, there are no legal prohibition for these two new appointments to take effect on 1 September as intended.

(ii) Effective dates of the seven CFA appointment

14. The Chief Executive noted that with the completion of legal and administrative requirements, it is intended that:

- (a) The appointments of Mr Justice Patrick Chan and Mr Justice Ribeiro as permanent judges of the CFA will take effect on 1 September 2000;
- (b) The appointment of Mr Justice Litton as non-permanent judge of the CFA will take effect on 14 September 2000, i.e. after he has ceased to hold office as permanent judge of the CFA;
- (c) The appointment of Mr Justice Ching as non-permanent judge of the CFA will take effect on 7 October 2000, i.e. after he has completed his tenure of office as permanent judge of the CFA; and
- (d) The appointment of Sir Gerard Brennan, Sir Thomas Eichelbaum and Lord Millett as non-permanent judges from other common law jurisdictions will take effect on 28 July 2000 for a period of three years to coincide with the commencement of the extended term of other non-permanent judges.

B. Application of Statutory Procedures

15. In this exercise, three JORC members were eligible to be appointed as permanent judges. The Chief Executive was satisfied that they duly made the

statutory disclosure under Section 3(5B) of the JORC Ordinance as to whether they were willing to accept appointment if selected, and that Section 3(5C) was properly complied with.

16. The Chief Executive was satisfied that a quorum as required by Section 3(3) of the JORC Ordinance was present at the meeting at which these appointments were considered.

17. The Chief Executive noted that over 90 names of eligible persons were put before JORC by the Secretary in consultation with the Chairman. The seven appointees were among those put forward. The Chief Executive was satisfied that the appointees fulfilled the statutory legal qualifications.

18. The Chief Executive noted that JORC based the criteria of selection on Article 92 of the Basic Law which requires judges to be chosen on the basis of their judicial and professional qualities.

19. As regards the appointment of non-permanent judges, the Chief Executive noted that the JORC took into account the following matters:

- (a) before the current exercise, there was a total of 17 (11 non-permanent Hong Kong judges and 6 non-permanent common law judges). With five appointees, the total number of non-permanent judges will be 22, well below the legal maximum of 30;
- (b) the need to have more non-permanent common law judges to give more flexibility for dealing with CFA's caseload as some retired non-permanent judges have commitments such as part time judicial commitments overseas, inquiries and arbitration's and the serving non-permanent judges have judicial commitments overseas;
- (c) the likely availability of non-permanent common law judges to sit;
- (d) the desirability of having two of the first bench of permanent judges to serve as non-permanent Hong Kong judges, having regard to their experience on the CFA itself; and
- (e) the expertise, experience and prestige that non-permanent judges will bring to the Court.

20. More specifically, in his communication to the Chief Executive on the recommendations of JORC on the seven CFA appointments, the secretary of JORC has set out:

- (i) the background to the current exercise, including the resignation of Mr. Justice Litton and the impending retirement of Mr. Justice

- Ching;
- (ii) the present composition and functioning of the CFA;
 - (iii) the legal qualifications for permanent judges, non-permanent Hong Kong CFA judges and non-permanent judges from other common law jurisdictions;
 - (iv) how the statutory disclosure under section 3(5B) and how the requirements of section 3(5C) of the JORC Ordinance were compiled with;
 - (v) the lists of names of over 90 eligible persons;
 - (vi) the deliberations of JORC leading to its recommendations of the seven appointments including the names of and discussion concerning individual eligible persons involved in this appointment exercise;
 - (vi) the intended effective dates of the seven appointments; and
 - (vii) the reasons why the seven appointments should be dealt with now;

21. From the written communication from secretary of JORC, the Chief Executive was satisfied that the recommendations of the seven appointments made by JORC were in order.

C. The Appointees

22. Mr Justice Patrick Chan, currently Chief Judge of the High Court, is highly respected by members of the Judiciary, the profession and the community for his utmost integrity and his distinguished judicial qualities. Mr Justice Patrick Chan's appointment will increase the bilingual capability of the Court of Final Appeal. He would also be the first locally trained law graduate to reach the Court of Final Appeal. Mr Justice Ribeiro was an outstanding legal practitioner. He has served with great distinction in the Court of First Instance and the Court of Appeal since he joined the bench. Mr Justice Patrick Chan and Mr Justice Ribeiro are appointed with a view to succeed Mr Justice Litton and Mr Justice Ching.

23. Mr Justice Litton, who has already reached the retirement age of 65, is on an extended term of 3 years from 1999 to 2002. He is resigning as a permanent judge of the Court of Final Appeal with effect from 14 September 2000 to give priority to his family commitments overseas.

24. Mr Justice Ching will be reaching his retirement age of 65 in October 2000.

25. Upon their retirement as permanent judges of the Court of Final Appeal, Mr Justice Litton and Mr Justice Ching are eligible to be appointed as non-permanent Hong Kong judges. They will be invaluable additions to the list having regard to their recent judicial experience in the Court of Final

Appeal. The term of their new appointment is 3 years.

26. As regards appointees from other common law jurisdictions, Sir Gerard Brennan and Sir Thomas Eichelbaum are the immediate past Chief Justice of Australia and the immediate past Chief Justice of New Zealand respectively, and Lord Millett is Lord of Appeal in Ordinary in the UK. All three judges have a pre-eminent reputation not only in their respective jurisdictions, but also throughout the common law world. They are invaluable additions to the overseas component of the Court of Final Appeal and will help further enhance the international standing of the Court.

BASIC LAW AND HUMAN RIGHTS IMPLICATIONS

27. Department of Justice advises that the proposed appointments are consistent with the relevant provisions of the Basic Law.

FINANCIAL IMPLICATIONS

28. The Administration notes that it is the intention of the Judiciary Administrator, supported by the Chief Justice, that he, as Controlling Officer, will create a supernumerary post of permanent judge of the CFA for a period of 13 days from 1 to 13 September 2000 under delegated authority to accommodate a replacement for a CFA permanent judge (i.e. Mr. Justice Litton) whilst on leave prior to completion of agreement. The Administration further notes that it is the intention of the Judiciary Administrator, again supported by the Chief Justice, that he will, under delegated authority, create another supernumerary post for a period of 36 days from 1 September to 6 October 2000 to accommodate another replacement for a CFA permanent judge (i.e. Mr. Justice Ching) prior to the completion of his tenure of office.

ENQUIRIES

29. For any enquiries on this brief, please contact Ms Miranda Chiu, Deputy Director of Administration, at 2810 3008.

Administration Wing
Chief Secretary for Administration's Office
June 2000

CURRICULUM VITAE

Personal Particulars

Name : Mr. CHAN Siu-oi, Patrick
Nationality : Chinese
Date of Birth : 21 October 1948
Age : 51
Place of Birth : Hong Kong

Academic Qualifications

1971-74 : LL.B, University of Hong Kong
1974-75 : P.C.LL., University of Hong Kong

Professional Qualifications

1976 : Called to the Bar, Hong Kong

Career

1987-1991 : District Judge, Hong Kong Judiciary
1991-1992 : Deputy Registrar, Supreme Court, Hong Kong
Judiciary
1992-30 June 1997 : Judge of the High Court, Hong Kong Judiciary
1 July 1997- : Chief Judge of the High Court, Hong Kong Judiciary

CURRICULUM VITAE

Personal Particulars

Name : Mr. Roberto Alexandre Vieira RIBEIRO
Nationality : British
Date of Birth : 20 March 1949
Age : 51
Place of Birth : Hong Kong

Academic Qualifications

1971 : LL.B, London School of Economics
1972 : LL.M, London School of Economics

Professional Qualifications

1978 : Called to the Bar, Inner Temple
1978 : Called to the Bar, Hong Kong
1990 : Appointed as Queen's Counsel
1995 : Admitted as Advocate & Solicitor, Singapore

Career

1972-1979 : Lecturer in Law, University of Hong Kong
1979-June 1999 : Private practice
Sept-Oct 1992 : Deputy High Court Judge, Hong Kong Judiciary
Dec 1997-June 1999 : Recorder of the Court of the First Instance of the High Court, Hong Kong Judiciary
July 1999-26 Jan 2000 : Judge of the Court of the First Instance of the High Court, Hong Kong Judiciary
27 Jan 2000 -: Justice of Appeal of the Court of Appeal of the High Court, Hong Kong Judiciary

CURRICULUM VITAE

Personal Particulars

Name : Mr. Henry Denis Litton
Nationality : British
Date of Birth : 7 August 1934
Age : 65
Place of Birth : Hong Kong

Academic Qualifications

1946-50 : Diocesan Boys' School
1951-53 : King's College, Taunton Somerset
1953-56 : Merton College, Oxford

Professional Qualifications

1959 : Called to the Bar, England
1960 : Called to the Bar, Hong Kong
1970 : Appointed as Queen's Counsel

Career

1959-92 : Private Practice
1992-30 June 1997 : Justice of Appeal, Hong Kong Judiciary
1995-30 June 1997 : Vice President, Court of Appeal
1 July 1997- : Permanent Judge of the Court of Final Appeal

1999

: Honorary Bencher, Gray's Inn

CURRICULUM VITAE

Personal Particulars

Name : Mr. Charles Arthur Ching
Nationality : Australian
Date of Birth : 7 October 1935
Age : 64
Place of Birth : Hong Kong

Academic Qualifications

1957 : M.A. in Jurisprudence (OXON)

Professional Qualifications

1959 : Called to the Bar, Gray's Inn
1959 : Called to the Bar, Hong Kong
1974 : Appointed as Queen's Counsel

Career

1959-95 : Private Practice, Hong Kong
1995-30 June 97 : Justice of Appeal, Hong Kong Judiciary
1 July 1997- : Permanent Judge of the Court of Final Appeal

CURRICULUM VITAE

Personal Particulars

Name : The Hon Sir Gerard Brennan

Nationality : Australian

Date of Birth : 22 May 1928

Age : 72

Academic Qualifications

BA, LL.B, University of Queensland

Professional Qualifications

1951 : Called to the Bar, Queensland

1965 : Appointed as Queen's Counsel (Australia)

Career

1976-1981 : Judge, Australia Industrial Court and Additional Judge of
Supreme Court of ACT

1977-1981 : Judge, Federal Court of Australia

1981-1995 : Justice of the High Court, Australia

1995-1998 : Chief Justice of Australia

1999- : External Judge, Supreme Court of the Republic of Fiji

: Chancellor, University of Technology, Sydney

CURRICULUM VITAE

Personal Particulars

Name : The Rt Hon Sir Thomas Eichelbaum

Nationality : New Zealand

Date of Birth : 17 May 1931

Age : 69

Academic Qualifications

LL.B, Victoria University College

Professional Qualifications

1978 : Appointed as Queen's Counsel

Career

1958-1978 : Private practice

1982-1988 : Judge of High Court of New Zealand

1989-1999 : Chief Justice of New Zealand

CURRICULUM VITAE

Personal Particulars

Name : The Rt Hon the Lord Millett

Nationality : British

Date of Birth : 23 June 1932

Age : 67

Academic Qualifications

Trinity Hall, Cambridge University

Professional Qualifications

1955 : Called to the Bar, Middle Temple

1959 : Called to the Bar, ad eundem Lincoln's Inn (Bencher,
1980)

1973 : Appointed as Queen's Counsel

1976 : Called to the Bar, Singapore

1979 : Called to the Bar, Hong Kong

Career

1958-1986 : Practised at Chancery Bar

1986-1994 : Judge of the High Court of Justice, Chancery Division

1994-1998 : Lord Justice of Appeal

1998- : Lord of Appeal in Ordinary