

OPINION BY LOVELL WHITE DURRANT ON BEHALF OF TUNNEL COMPANIES ON LEGAL AND CONSTITUTIONAL ISSUES ARISING OUT OF CLAUSES 7 AND 20 OF THE TELECOMMUNICATION (AMENDMENT) BILL 1999

A INTRODUCTION

1. We have been instructed to advise New Hong Kong Tunnel Company Limited, Route 3 (CPS) Company Limited, Tate's Cairn Tunnel Company Limited and Western Harbour Tunnel Company Limited (the "Tunnel Companies") on the legal and constitutional issues arising out of proposed amendments under the Telecommunication (Amendment) Bill 1999 (the "Bill") to the Telecommunication Ordinance (the "Ordinance").
2. Although a number of legal issues arise in relation to the drafting and any future exercise of powers under the Ordinance, the primary thrust of the present opinion concerns aspects of the Bill which we consider contravene the Basic Law and which consequently (under Articles 11 and 73(1) of the Basic Law) the HKSAR legislature has no power to enact.
3. We here consider the provisions of Clause 7 of the Bill, which seeks to amend Section 14 of the present Ordinance (Right of access to land to place and maintain radiocommunications service), and Clause 20 of the Bill which seeks to add a new Section 36AA (Sharing use of facilities).
4. The Basic Law contains provisions, inter alia, for:
 - (a) the preservation of Hong Kong's capitalist system (Article 5);
 - (b) the protection of property (Articles 6 and 105);
 - (c) the pursuit of free trade (Article 115);
 - (d) the provision of an economic and legal environment for encouraging investments (Article 118); and
 - (e) the continuing validity and recognition of contractual rights and obligations valid under the laws previously in force in Hong Kong provided they do not contravene the Basic Law (Article 160).
5. In our opinion the proposed right of access, fee determination and facility sharing provisions of the Bill would breach one or more of these provisions. We also argue that the effect of the Bill, if introduced and implemented, may also be subject to judicial review and/or cause the HKSAR Government to be in breach of its relevant agreements with the Tunnel Companies.
6. We further note the principle recognised by the Hong Kong Courts and the Privy Council in Rediffusion (Hong Kong) Ltd v Attorney General [1970]AC1136 that prospective legislation

in Hong Kong which may damage business interests is subject to challenge in the courts. The enactment of the Basic Law on 1 July 1997 provides a further constitutional basis for such a challenge by the courts of the HKSAR (Article 158).

B THE PROPOSED AMENDMENTS

7. Section 14(1A) - Right of access

Under proposed Section 14(1A), any licensee authorized by the Telecommunication Authority ("TA") may:

- (a) place and maintain a radiocommunications installation in, over or upon any land for the purpose of providing a radiocommunications service to a public place;
- (b) enter any such land for the purpose of -
 - (i) inspecting it; or
 - (ii) other activities which are for the purpose of or incidental to the maintenance and placement of the installation.

8. Section 14(2) and 14(5) - Payment of fee

Under proposed Section 14(2), where subsection 14(1A) applies, a fee (which may be a once only fee or a monthly or annual fee) shall be paid-

- (A) which is, in the opinion of the TA, fair and reasonable in all the circumstances of the case; and
- (B) by the licensee to any person having a lawful interest in the land.

9. Proposed Section 14(5)(b) provides that in the absence of agreement within a reasonable time between the licensee and the person "having a lawful interest in the land" as to the fee to be paid, the TA shall determine the fee.

10 Section 36AA - Sharing of use of facilities

The proposed amendment allows the TA to direct that a licensee coordinate and cooperate with another licensee or another person to share the use of any facility owned or used by it. Under Section 36AA(7), "facility" includes any tunnel.

11. Under Section 36AA(6), if the parties do not reach an agreement within a reasonable time, the TA may determine the terms and conditions for the shared use of the facility.
12. Cable & Wireless HKT have made extensive submissions (including by the joint advice of Mr. Michael Thomas SC and others) which have been tabled concerning the legality of this amendment under Articles 6 and 105 of the Basic Law with respect to property interests and the lack of any right of appeal. In so far as these arguments also apply to the Tunnel Companies (who clearly in our submission have an interest in property for the purposes of these Articles) these arguments apply with even stronger force and we agree with them.

C BASIC LAW

13. Preservation of previous capitalist system

Article 5 of the Basic Law provides:

"The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years".

14. According to the "Encyclopedia Britannica", socialism is "a system of social organization in which private property and the distribution of income are subject to social control, rather than to determination by individuals pursuing their own interests or by the market forces of capitalism." A major and predominant feature of the "capitalist system" is the "free trade, non-interventionist policy" practised by the HK Government which means that the Government does not interfere with the right of individuals to carry on business and negotiate contracts¹

15. Property rights

The Basic Law provides extensive guarantees for property rights².

Article 6 provides:

¹Classic capitalism as expressed in Adam Smith's "Wealth of Nations" (1776) recommends leaving economic decisions to the free play of self regulating market forces. (Source Encyclopedia Britannica)

²"Protection of property seems to be something of a leitmotif of the Basic Law, reflecting its concern with the capitalist market" (*Hong Kong's New Constitutional Order* by Professor Yash Ghai at p.403-404)
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"The Hong Kong Special Administration Region shall protect the right of private ownership of property in accordance with law".

Article 105 provides:

"The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay."

16. Under Section 3 of the Interpretation and General Clauses Ordinance, "property" includes -
 - (a) money, goods, choses in action and land; and
 - (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition.
17. Accordingly, the word "property" as applied to Ordinances is broadly defined and is not limited to land but includes interests in land, easements and choses in action. It is in our view under the Basic Law "property" is a sufficiently broad concept to include both the existing contractual and statutory rights of Tunnel Companies to permit access to their tunnels and to determine fees on the existing basis as provided by the relevant project agreements with the HKSAR Government and the relevant tunnel Ordinances.
18. In Article 6, the term "private ownership" of property implies that the owner of property has the exclusive right to own, access and use his property, as well as the right to exclude others from accessing and using his property. This being so, the proposed right of access to land and related fee determination clearly constitutes a derogation from "the right of private ownership of property" in contravention of Article 6 of the Basic Law.
19. Article 105 of the Basic Law further enshrines a legal right, which was not formerly expressly provided for under Hong Kong Law, to compensation for lawful deprivation of property corresponding to the real value of the property.
20. Article 105 requires that any deprivation of property shall be "lawful" and "in accordance with law". In considering the phrase "according to law" in the Bill of Rights Ordinance, the

Hong Kong Court of Appeal held³ that the phrase "according to law" did not refer to any domestic law, for otherwise the protection in the Bill of Rights would become illusory and could be easily abrogated by statutes, but that it referred to a "universal concept of justice", under which any restriction on fundamental rights and freedoms must:

- (a) pursue a legitimate purpose; and
- (b) be a necessary and proportionate means to achieve that objective.

21. We consider that the proposed access provision is neither a necessary nor proportionate means to achieve a wider coverage for public mobile communication services and that the proposed access and facility sharing provisions are not in compliance with Article 105.

22. As to necessity, in support of the Bill, the Government claims that amendments to the Telecommunication Ordinance are necessary in the public interest to "ensure ubiquitous coverage of mobile networks in shielded networks, including tunnels, if commercial agreements cannot be reached under the existing framework" (CB(1)372/99-00(01): ITBB Response to Submissions from BOT Tunnel Operators dated November 1999). However, we note that under the existing framework there is ubiquitous coverage within the BOT tunnels, but not the government tunnels. Accordingly, there appears to be no necessary basis for these amendments with respect to BOT tunnels.

23. Article 105 refers to "deprivation of property". "Deprivation" can take different forms. Dr. Gordon N Cruden in his book "Land Compensation and Valuation Law in Hong Kong" (2nd Edition 1999) states at page 553:

"Article 105 provides for compensation where a person is lawfully deprived of his property. The Fifth Amendment of the United States Constitution similarly provides that private property shall not be "taken for public use without just compensation".

"On the basis of the Fifth Amendment, the United States courts have developed the doctrine of inverse condemnation. The doctrine may be invoked where although land is not compulsorily taken, its value has been destroyed or diminished by regulation..... an application may be made for the grant of constitutionally based compensation. Alternatively, an application may be made under the doctrine for the court to strike down the offending regulatory conditions. The remedy arises where regulations so limit an owner's rights that an essential element of his property is lost."

³*R v Sin Yau Ming* (1991) 1 HKPLR 88 at 130, per Kempster JA; *R v Securities of Futures Commission, ex parte Lee Kwok-hung* (1993) 3 HKPLR 39 at 50, per Litton VP
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24. The Tunnel Companies have interests in property in that they are entitled under the relevant tunnel Ordinances and project agreements to control access to their tunnels and to determine fees for such access, including by utilities. The proposed amendments would clearly deprive the Tunnel Companies of these existing property interests and would in our view constitute loss of an essential element of their property.

25. As regards compensation, Article 105 of the Basic Law provides that it "shall correspond to the real value of the property at the time" Referring to this Article, Cruden states⁴:

"the measure of compensation is described as the "real value" of the property. This term contrasts with the common law principle that the general measure of compensation for land compulsorily acquired is the open market value..... However, the different terminological references to the measure of value for compensation are not necessarily contradictory. At least in relation to estates or interest in land they may be reconciled if the real value of land is that particularized in domestic legislation as the open market value. This approach is reinforced by the fact that the different statutory measure of value for disturbance and related compensation is the actual loss reasonably sustained. If the Basic Law employs real value as a neutral global expression then it may usefully cover both open market value and disturbance and other more subjective statutory loss criteria."

26. The provision that compensation shall correspond to real loss at the time should therefore be interpreted as providing for compensation over and above open market value based upon subjective criteria including the existing contractual and statutory rights of the Tunnel Companies. The proposed basis of compensation in the Bill, namely that which "is, in the opinion of the Authority, fair and reasonable in all the circumstances of the case" (Section 14(2)(ii)(A)) falls far short of this criterion.

27. **Free trade policy**

Article 115 of the Basic Law requires the HKSAR to

"pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital."

28. Under a free trade policy, commercial parties are at liberty to enter into negotiations and conclude contracts in whatever terms they like. Under this policy, if mobile phone operators wish to access private tunnels to place and maintain radiocommunications

⁴"Land Compensation and Valuation Law in Hong Kong" at page 552
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installations, the mobile phone operators and Tunnel Companies should be at liberty to negotiate the commercial terms under which this is done and any fees payable by the mobile phone operators to the Tunnel Companies.

29. Under the proposed Section 14(2) and 14(5), the power to determine the fee payable by the licensee to any person having a lawful interest in the land will vest with the TA if an agreement to this end cannot be reached between the parties. Giving such power to determine the fee and the terms and conditions according to which the fee is payable to the TA violates the free trade policy entrenched in Article 115 of the Basic Law.

30. **Encouraging investments**

Under Article 118 of the Basic Law, the HKSAR has an obligation to provide an economic and legal environment for encouraging investments.

31. There can be no question that the Tunnel Companies have made substantial investments in building and operating their respective tunnels. In a capitalist system, the primary encouragement for such investment is the profit motive, which the Tunnel Companies may legitimately expect under the rule of law to be protected by the HKSAR in accordance with the relevant project agreements and tunnel Ordinances.

32. On the contrary, the proposed provisions for access, fee determination and facility clearly provide an economic and legal environment that reduces profit and positively discourages such investment contrary to the HKSAR's obligation under Article 118.

33. **Continuity**

Article 160 of the Basic Law provides that contracts and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the HKSAR.

34. The contracts under which the Tunnel Companies are entitled to charge fees are embodied in the project agreements and related tunnel Ordinances. For example, the project agreement between the Government and Route 3 (CPS) Company Limited contains the following provisions:

"2(I) *The Franchisee ... shall have the right to obtain revenue from advertising and other activities conducted within the boundaries of Tai Lam Tunnel and Yuen Long Approach Road to the extent permitted by the terms of this Agreement and the Ordinance.*

74(C) *In the event of any conflict between the provisions of this Agreement and the Ordinance, the Ordinance shall prevail."*

35. Section 16 of the relevant Ordinance (Tai Lam Tunnel and Yuen Long Approach Road Ordinance) states:

"(1) *notwithstanding anything to the contrary in any other Ordinance -*

...

(b) any other person shall not install any utility within the toll area without the consent of the Company.

(2) *The Company shall not give consent for the purpose of subsection (1)(b) unless the Commissioner [for Transport] has previously approved the giving of consent and the terms and conditions (other than a term or condition relating to charges), if any, subject to which consent is to be given.*

36. Accordingly, under the agreement and the Ordinance, subject to the consent of the Commissioner for Transport to the installation of a mobile communication facility in the tunnel, the Tunnel Company is the person solely entitled to determine the charges payable for such installation.

37. The contractual rights and obligations, which are clearly set out in these documents, were in force on 1 July 1997. These rights were never previously affected by any provision of the Telecommunication Ordinance. However, in so far as the effect of the Bill purports to invalidate, or fails to recognize or protect these contractual rights and obligations, it will be in breach of Article 160 of the Basic Law.

38. Moreover, any implementation of the proposed powers by the TA would in our view constitute a breach of contract by the HKSAR Government. Damages or compensation for such breach would be payable measured by reference to the existing expectancy of the tunnel operators.

D OTHER ISSUES

39. With respect to compensation for deprivation of property, even if the access and facility sharing provisions were considered lawful, any compensation would have to be paid in accordance with clear, objective and binding criteria which are currently absent. Likewise, under the principles of natural justice, any fee determination should be carried out by a suitably independent body or specialist panel according to such criteria.

40. The Bill contains no provision for the tunnel companies to refer or appeal any disputes to the courts against any right of access or facility sharing granted, or any fee determination made. In contrast, the TA or an authorised licensee has the right to apply under proposed Section 14(4) to a magistrate for an order or under Section 14(6)(b) to the court for an injunction with respect to exercising the right of access conferred under the Section. This wholly inequitable provision runs contrary to the principle of natural justice and the right to a fair hearing.

41. The option of judicial review as a potential remedy with respect to matters referred to in the previous paragraph is not acceptable because the threshold for upsetting a decision by judicial review is high and the court is not empowered to interfere directly in such matters.

42. The proposed right of access and sharing of facilities raise issues of considerable constitutional importance. We are strongly of the view that for the reasons given the provisions of the Bill under consideration contravene the Basic Law and that both the passage of the Bill and any implementation of its provisions could be challenged in the courts on this and other grounds including breach of contract and judicial review with respect to loss of expectancy by the Tunnel Companies.

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