

HONG KONG-ZHUHAI-MACAU BRIDGE JUDICIAL REVIEW: DOCUMENT 1

SUMMARY OF THE CASE



May 2011
Dennis Kwok

PREFACE

The Hong Kong-Zhuhai-Macau Bridge Judicial Review is probably one of Hong Kong's most important legal cases relating to the environment. As such, it spurred us to dedicate time and effort to understand the case and its ramifications so that Civic Exchange can provide thoughtful reflections for the public. Legal judgments are often complex and not easy for the layman to understand and we hope our effort will produce a series of reports to inform people.

This is the first in a series of papers on this landmark case, which has implications for a number of issues including the administration of Hong Kong's EIA Ordinance, the challenge to achieving sustainable development, the judicial review process, and the ongoing planning, consultation and development of cross-border infrastructure in the Pearl River Delta. We are grateful to Dennis Kwok for providing a quick summary about the judicial review decision. The case was heard on 22-24 February 2011, and the judgment was handed down on 18 April 2011.

This project would not have been possible without the assistance of several key people – the author, Peter J Thompson for providing funding for a Chinese translation to be produced and for the paper to be published, and also ADM Capital Foundation for supporting our ongoing air quality work on a general basis. I am grateful to Mike Kilburn for working closely with the author to bring this report to publication, Michelle Wong for design and layout, and Vera Poon for the excellent translation.

Christine Loh
Chief Executive Officer

May 2011

Civic Exchange is an independent public policy think tank that helps improve policy and decision-making through research and analysis. It is a company with limited liability and a registered charity in Hong Kong.

The opinions expressed in this report represent those of the author and do not necessarily represent those of Civic Exchange.

HONG KONG-ZHUHAI-MACAU BRIDGE JUDICIAL REVIEW: DOCUMENT 1

SUMMARY OF THE CASE

This is the first of a series of papers on this landmark case, which has implications for a number of issues including the administration of Hong Kong's EIA Ordinance, the challenge to achieving sustainable development, the judicial review process, and the ongoing planning, consultation and development of cross-border infrastructure.

Case Summary:

This paper, written by Dennis W.H. Kwok, one of the counsels for the Applicant in the judicial review, provides a short introduction to the outcome of the judicial review regarding the environmental impact assessment of the Hong Kong Zhuhai Macau Bridge. The case was heard on 22-24 February 2011, and the judgment was handed down on 18 April 2011.

HCAL 9 of 2010

Chu Yee Wah v. Director of Environmental Protection¹

Facts:

The Applicant, Madam Chu, is a resident of a public housing estate in Tung Chung, a known air pollution blackspot in Hong Kong. The construction project under review is the Hong Kong Zhuhai Macau Bridge (Hong Kong section) (the **HZMB projects**) which will be located within the vicinity of Madam Chu's residence. The HZMB projects fall within the definition of a "designated project" pursuant to the Environmental Impact Assessment Ordinance (Cap. 499)² (EIAO) therefore the project proponent (i.e. the Highways Department) was legally required to conduct an Environmental Impact Assessment Report³ in order to obtain the necessary permits from the Director before the commencement of construction.

The Applicant was concerned about the air quality impact that the HZMB projects would have on her surrounding environment and her health, in particular, given the already worsening air quality in Tung Chung and in Hong Kong in general.

In these judicial review proceedings, the Applicant sought to challenge the validity of the Director's decisions to (i) approve the EIA reports under s. 8 of the EIAO and (ii) issue the permits for the construction of the HZMB projects. The relief sought was an order for *certiorari* to quash the decisions in question.

The present proceedings were promptly brought by the Applicant within 3 months from the date of the issuance of the permits by the Director. Application for leave to judicial review was granted by the Court on paper without the need to hear oral arguments.

Grounds of Challenge:

In the original application for judicial review, numerous grounds were raised by the Applicant. The arguments and issues raised were all in relation to the air quality assessment and the likely impact of the HZMB projects on public health. In short, the Applicant argued that the EIA reports were not in compliance with the detailed requirements of the EIAO, the Technical Memorandum⁴ (TM) and Study

¹ The full text of the judgment can be downloaded from the website of the Environmental Protection Department at http://www.epd.gov.hk/eia/english/content/files/HCAL_9_2010.pdf

² Environmental Protection Department: *Environmental Impact Assessment Ordinance: Legislation*, last revised 18 April 2011, <http://www.epd.gov.hk/eia/english/legis/index1.html>, accessed 13 May 2011

³ Following this judgment the EIA Report for this project is no longer displayed on the Environmental Impact Assessment Ordinance section of the EPD's website. The Project Profile and Study Brief can be found at: http://www.epd.gov.hk/eia/english/alpha/aspd_420.html

⁴ Environmental Protection Department *Environmental Impact Assessment Ordinance: Judgments*, last revised 21 April 2011,

Brief (SB) applicable to the EIA study for the HZMB projects. The Applicant relied on the leading authority in this area of law in Hong Kong; the Court of Final Appeal's decision in *Shiu Wing Steel v. Director of Environmental Protection and another (No. 2)* 2006 9 HKCFAR 478⁵ where it was held by a unanimous Court that if the EIA report in question is shown to be non-compliant with the requirements of the TM and/or the SB, the Director has no power to approve it and any decision by the Director may be quashed by the Court on the grounds of illegality.

At trial, the central arguments advanced by the Applicant were narrowed down into the following 7 heads of challenge:⁶

- (i) the lack of the presentation of a baseline assessment predicting the future air quality without the HZMB projects in place;
- (ii) the PATH Model used by the project proponent to predict future regional air quality was incomprehensible to the Applicant and her experts. It was incapable of independent verification by a third party.
- (iii) the assessment year of 2031 chosen by the project proponent does not represent the worst case scenario as required by the SB.
- (iv) the failure to assess ozone as a key pollutant in the EIA study;
- (v) the failure to assess SO₂ as a key pollutant in the EIA study;
- (vi) the failure to conduct a public health assessment or hazard assessment to determine the extent the HZMB projects would impact on public health;
- (vii) the failure to include known harmful pollutants such as Toxic Air Pollutants (TAPs) and PM_{2.5} in the EIA study.

In summary, the Applicant's case is that grounds (i) to (v) were essentially complaints regarding non-compliance with the TM and/or SB. Grounds (vi) to (vii) relate to the Director's failure to exercise her statutory duty under s. 10(2)(c) of the EIAO to consider the effects on public health before issuing the environmental permits.

Decision of the CFI and Reasoning

Ground (i)

The learned Judge ruled in favour of the Applicant's main argument. The provisions of the TM and SB (when construed in the light of the purpose of the EIAO "to protect the environment") do require the project proponent to quantify and present in the EIA reports what the environmental baseline projection would be *without* the projects in place. In the absence of the presentation of this information in the EIA report, one would not be able to tell what the "environmental footprint" of a given project would be. The learned Judge did not accept the argument of the Director that so long as the methodology used by the project proponent is capable of addressing the "without scenario" that was sufficient, and there was no separate requirement to present the results of the baseline project without the projects in place.

The learned Judge accepted the Applicant's argument that the environment cannot be treated like a "bucket" into which pollutants may be poured so long as it does not overflow. This was a wrong approach and would not further the aim of environmental protection. The learned Judge endorsed a

<http://www.epd.gov.hk/eia/english/legis/index3.html>, accessed 13 May 2010.

⁵ Environmental Protection Department *Environmental Impact Assessment Ordinance: Judgments*, last revised 21 April 2011, http://www.epd.gov.hk/eia/english/content/files/FACV000028A_2005.pdf, accessed 13 May 2011.

⁶ *Chu Yee Wah v. Director of Environmental Protection* HCAL 9/2010 paragraphs 32 to 40

United Kingdom House of Lords authority in this area of law and the practice guideline as set out in an EU Directive on environmental protection. His Lordship was of the view that the broad principles used in the UK and EU concerning environmental protection could also be found in the EIAO, TM and SB under the Hong Kong regime.

It was held that under the proper construction of the EIAO/TM/SB the correct approach which ought to have been adopted by the Director is that firstly, every impact caused by a given project, once identified, must be quantified and measured by the project proponent in the EIA report, and secondly, the Director and the project proponent must endeavor to minimise any adverse impact of a proposed project.⁷

The environmental footprint of a given project must be measured and presented in the EIA report.⁸

On this ground alone, the learned Judge ruled in favour of the Applicant and it was sufficient to quash the decisions of the Director to approve the EIA reports and to issue the permits. Before the construction of the HZMB projects may proceed further, the project proponent must first produce a fresh compliant EIA report for consultation and the Director's approval.

Ground (ii)

The Applicant's case under this ground was that the PATH Model (a regional air quality assessment computer model) used by the project proponent to predict future air quality in the Pearl River Delta Region was incapable of being understood by the Applicant's experts. In particular, the input data and the output results generated by the PATH Model were not presented in the EIA reports. It is common sense that the results generated by a given computer model would be highly influenced by the data that were fed into it. Without knowing how the input data were selected, and what the results of the model were, the Applicant described the use of the model as an impenetrable 'black-box'.

Having considered the relevant provisions of the SB, the learned Judge ruled against the Applicant on this ground and held that this type information was not required to be presented in the EIA reports; instead they could have been requested from the Director during the statutory consultation period.⁹

This case serves as a useful reminder for all consultees and members of the public about the importance of utilizing the consultation period to request important and relevant information from the Director. This would enable members of the public to fully understand the methodology used and the true environmental implications arising from a proposed project.

Grounds (iii) to (v)

These grounds turn on the specific interpretation and construction of the relevant provisions in the SB. The Applicant argued that the provisions of the SB and their true meaning must be construed by the Court, and it is not open to the project proponent or the Director to determine, within their own discretion, whether an impact or a pollutant ought to be assessed and what the proper method should be. These are matters which are strictly governed by the TM and SB and their proper meaning is strictly a matter for the Court to determine (applying *Shiu Wing Steel* (CFA)). It is a cardinal principle in any EIA process that it is not for the project proponent to conduct the assessment, rather it is his or her duty to present the full picture to the Director so as to facilitate the Director (and the public) to make the necessary assessment.

The learned Judge rejected the Applicant's argument and held that the provisions of the SB (when it comes to deciding e.g. what pollutants should be assessed) do allow the project proponent to decide

⁷ *Chu Yee Wah v. Director of Environmental Protection* HCAL9/2010 paragraphs 72-75

⁸ *ibid* paragraph 80

⁹ *ibid* para. 104

which pollutants are to be regarded as a 'key pollutant' so long as a reasonable explanation was given with regards to its choice of selection which was acceptable to the Director. Once this explanation is accepted by the Director, the Applicant could only succeed in challenging this decision if *Wednesbury* unreasonableness¹⁰ could be shown. The learned Judge was satisfied that in not assessing ozone and SO₂, the Director had not acted irrationally or was completely unreasonable.

Grounds (vi) to (vii)

Section 10(2)(c) of the EIAO requires the Director to consider "*whether the environmental impact caused or experienced by the designated project is or is likely to be prejudicial to the health or well-being of people...*" before issuing a permit. This is separate and distinct from the decision to approve the EIA reports.

The Applicant argued that, apart from the reliance on the present air quality objectives¹¹ (AQOs) (which are extremely outdated and exclude PM_{2.5} – a known harmful pollutant), the Director did not consider any other evidence in relation to public health. The Applicant's expert Professor Anthony Hedley filed evidence to demonstrate the results of a public health impact assessment based on the air pollution that would be generated by the HZMB projects. The purpose of this exercise was to demonstrate that an assessment of this kind could be done scientifically.

This was accepted by the learned Judge at para. 162 of His Lordship's judgment: "*There is no evidence that the Director had regard to whether the environmental impact caused by the project is or is likely to be prejudicial to public health beyond the conclusion that the projected air quality would not breach any of the AQOs.*"

However, the Court and the Applicant are bound by the present AQOs which are a matter of policy falling squarely within the executive domain of the HKSAR Government. So long as the present AQOs remain unchanged, and that compliance with them was shown, the Applicant cannot challenge the decision of the Director.¹²

**An appeal by the Director is pending.*

Dennis W.H. Kwok, Counsel for the Applicant
13 May 2011

¹⁰ *Wednesbury* unreasonableness is the standard of unreasonableness under which public body decisions are liable to be quashed on judicial review. It refers to a decision that is so unreasonable that no reasonable authority that had applied its mind to the question to be decided would ever consider imposing it.

¹¹ Environmental Protection Department, *API and Air Monitoring Background Information: Air Quality Objectives* <http://www.epd-asg.gov.hk/english/backgd/hkaqo.html> last revised 5 December 2006, accessed 13 May 2011.

¹² *Chu Yee Wah v. Director of Environmental Protection* HCAL9/2010 paras 170- 171



Room 701, Hoseinee House,
69 Wyndham Street
Central
Hong Kong

www.civic-exchange.org