

Constitutional Law – Practice Question and Answer

Session: Federalism

Topic: Distribution of Powers

Recommended time: 1 hour plus 10 minutes reading time

Score: 80 Marks

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QUESTION

In May 2021, Manitoba issued the Protocol for Telecommunication Towers. The Protocol recognises that final approval for all telecommunication towers remain with Industry Canada, but requests all concerned telecommunication companies (telecoms) to comply with the safety and health regulations of each municipality as promulgated in by-laws from time to time.

Pursuant to this Protocol, Brandon municipality in July 2021 promulgated a by-law in respect of the erection of cellphone towers within the municipality. The by-law categorizes communication towers into “Guyed Towers” and “Partially Guyed Towers”. The legislation describes Guyed towers as those freestanding communication masts, attached directly to the ground while Partially Guyed towers are those attached atop buildings and structures in the municipality.

The by-law provides in s. 3 that from the commencement date, all Partially Guyed towers atop buildings in residential zones within the municipality will be subject to a regime of special permit which must be renewed annually. This special permit will allow safety inspectors from the municipality to conduct regular inspections on towers in the municipality and certify them as safe and fit before the annual permit is issued. Where necessary, the municipality may demand that identified repairs or adjustments be made before the permit is issued. All these measures are inevitable in order to protect the lives and properties of residents who live close to these towers.

S. 4 of the by-law requires all owners of these Partially-Guyed towers to pay an annual levy which is needed to shore up the revenue of the municipality.

BSG Talk is a federally regulated telecom with 3 partially-guyed towers in Brandon. The company was served with a letter from Brandon municipality requesting it to obtain the special permit and pay the required levy in respect of the 3 partially-guyed towers within 14 days or incur penalties.

When BSG resisted this demand, the municipality asserted that it has the constitutional power to make the by-law because it was in relation to buildings and structures in residential zones within the municipality. The permit only applies to communication masts that are affixed to residential buildings, not otherwise. And that since the municipality derived its power from the province, the by-law falls under the property and civil rights power of the province. In relation to the levy, the municipality claimed to have derived the power to make the by-law from the taxation head of provincial legislative competence.

BSG has retained your services to challenge the validity of this by-law with respect to s. 3 on the special permit and s. 4 on the annual levy. The company wants you to apply for judicial review.

Prepare a draft of your argument.

Notes:

This is a question on judicial review. To properly answer this type of question, you must follow these two steps:-

- 1) The first step is to identify the “matter” (or pith and substance) of the law being challenged. The purpose behind this step is to determine whether the law was authorized by any head of power in the Constitution in the first place. This is also known as characterization of law.*
- 2) The second step is to assign the matter to one of the heads of legislative powers as listed in the Constitution in order to determine to which head the law belongs. This will help to also determine who has the legislative competence to make that legislation.*

HIGHLIGHTS OF ANSWER

There are two issues involved here, as follows:

- 1) Whether the request on BSG to obtain the special permit for the 3 partially-guyed towers is not ultra vires the municipality.
- 2) Whether the request on BSG to pay the annual levy is intra vires the municipality.