Federal Court of Appeal | Cour d'appel fédérale

Date: 20200519

Docket: A-348-18

Citation: 2020 FCA 90

CORAM: **STRATAS J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

LAWYERS' PROFESSIONAL INDEMNITY COMPANY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 17, 2019.

Judgment delivered at Ottawa, Ontario, on May 19, 2020.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: STRATAS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), paragraph 149(1)(*d.5*) (ITA) exempts from taxation income earned by certain corporations owned by "public bod[ies] performing a function of government in Canada". In a decision reported as 2018 TCC 194, the Tax Court of Canada found that while the Law Society of Ontario was a "public body", it did not perform "a

function of government in Canada". Consequently, the Court concluded that income earned by the Lawyers' Professional Indemnity Company, a subsidiary of the Law Society of Ontario, was not exempt from taxation for its 2013 and 2014 taxation years.

[2] The Lawyers' Professional Indemnity Company appeals from the Tax Court's judgment, asserting that the Court erred in law in concluding that the Law Society of Ontario was not a "public body performing a function of government in Canada".

[3] The Crown submits that, when read textually, contextually and purposively, the provision of the *Income Tax Act* at issue in this appeal limits the tax exemption to entities owned by municipalities, municipal bodies and other public bodies analogous to municipalities and municipal bodies, such as entities charged with governance over a localized geographical area, that govern the public. According to the Crown, self-regulating professional bodies such as the Law Society of Ontario and their for-profit subsidiaries do not fall within that provision.

[4] For the reasons that follow, I conclude that the statutory provision at issue in this case should be interpreted in the manner suggested by the Crown. Consequently, I would dismiss the appeal.

I. Background

[5] Lawyers and paralegals practicing in the Province of Ontario are regulated by the Law Society of Ontario (formerly the Law Society of Upper Canada). The Law Society was founded by an Act of the Legislative Assembly to serve the people of Ontario and to defend and maintain constitutional principles such as the cause of justice and the rule of law: *An act for the better regulating of the practice of law*, S.U.C. 1797 (37 George III), c. 13.

[6] In its current incarnation, the Law Society of Ontario is a corporation without share capital created by statute, whose functions, powers and duties are set out in the *Law Society Act*, R.S.O. 1990, c. L-8, in the regulations made thereunder, and in the by-laws of the Society itself.

[7] Section 4.1 of the *Law Society Act* grants the Law Society the authority to ensure that all persons who practise law or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services provided.

[8] Section 4.2 of the Act further provides that in carrying out its functions, duties and powers, the Law Society is to have regard to certain principles. These include “the duty to maintain and advance the cause of justice and the rule of law”, as well as the duty to act “so as to facilitate access to justice for the people of Ontario”. In addition, the Law Society is required to “protect the public interest” and to “act in a timely, open and efficient manner”.

[9] The Law Society is governed by a board of directors, whose members are referred to as "Benchers", with the president and chair of the board being known as the "Treasurer". Lawyer licensees elect 40 of the Benchers and paralegal licensees elect five. The Attorney General for Ontario appoints eight "Lay Benchers". In addition, certain individuals are Benchers by virtue of their office, if and while they are members of the Law Society. These include the Minister of Justice and the Attorney General for Canada, the Solicitor General for Canada, the Attorney General for Ontario and every person who held the office of Attorney General for Ontario at any time before January 1, 2010.

[10] The Law Society is not funded by taxpayers, but rather by fees paid by its licensee members. Accumulated fund balances have been used to mitigate fee increases for members of the Society.

[11] In accordance with its mandate to protect the public interest, the Law Society maintains three statutory funds to protect the public. These include a Compensation Fund, which is used to address financial losses resulting from the actions of dishonest licensees; an Errors and Omissions Insurance Fund, which consists of levies collected from lawyers to fund professional liability insurance; and an Unclaimed Trust Fund, into which unclaimed funds from lawyers' trust accounts are deposited.

[12] Subsection 5(4) of the *Law Society Act* authorizes the Society to "own shares of or hold a membership interest in an insurance corporation incorporated for the purpose of providing professional liability insurance to licensees and to persons qualified to practise law outside

Ontario in Canada". Paragraph 61(*a*) of the Act further authorizes the Society to make arrangements for licensees for indemnity for professional liability and for the payment and remission of premiums therefor. Paragraph 61(*b*) of the Act provides that the Law Society may require that licensees pay levies to the Society for such indemnity.

[13] The Lawyers' Professional Indemnity Company is a Canadian-controlled private corporation for the purposes of the ITA. It is an insurance company, licensed to operate in Ontario, carrying on under the trade name "LawPRO". While LawPRO is licensed to operate in other jurisdictions in Canada, its income from activities carried on outside of Ontario did not exceed 10% of its total annual income for the relevant years. LawPRO was incorporated by the Law Society in 1990, and the Society owns at least 90% of LawPRO's capital.

[14] LawPRO provides mandatory professional liability insurance for lawyers and paralegals licensed by the Law Society who engage in the practice of law in Ontario. It also insures law firms in Ontario, and provides comprehensive title insurance to real property owners and lenders in all jurisdictions in Canada, including Ontario. LawPRO realized revenues of approximately $124 million in 2013 and $143 million in 2014.

[15] The Law Society requires that all lawyers and paralegals engaged in the practice of law in Ontario pay levies for professional liability insurance provided by the Society through LawPRO. The levies are collected by the Law Society, which then pays the monies collected to LawPRO as insurance premiums.

[16] The Law Society has in the past claimed an exemption from income tax as a qualifying non-profit organization, which exemption the Tax Court assumed was pursuant to paragraph 149(1)(*l*) of the ITA. LawPRO filed tax returns for its 2013 and 2014 taxation years asserting that it qualified for the exemption provided for in paragraph 149(1)(*d.5*) of the ITA, on the basis that its parent—the Law Society—was "a public body performing a function of government in Canada".

[17] LawPRO was initially assessed as filed for its 2013 and 2014 taxation years. However, in October of 2015, the Minister of National Revenue reassessed LawPRO for these taxation years, denying it the paragraph 149(1)(*d.5*) exemption. The Minister confirmed the reassessments in January of 2016. LawPRO appealed from these reassessments.

II. The Legislative Regime

[18] Section 149 of the ITA governs "Miscellaneous Exemptions", providing that no tax will be payable under Part I of the Act on certain persons' taxable income for a period in a taxation year during which the person is a person listed in the section. The relevant portions of subsection 149(1) governing LawPRO's 2013 and 2014 taxation years state that.

149. (1) No tax is payable under this Part on the taxable income of a person for a period when that person was	**149.** (1) Aucun impôt n'est payable en vertu de la présente partie, sur le revenu imposable d'une personne, pour la période où cette personne était :
[…]	[…]
(*d.5*) subject to subsections (1.2) and (1.3), a corporation, commission or	*d.5*) sous réserve des paragraphes (1.2) et (1.3), une société, commission ou

association not less than 90% of the capital of which was owned by one or more entities each of which is a municipality in Canada, or a municipal or public body performing a function of government in Canada, if the income for the period of the corporation, commission or association from activities carried on outside the geographical boundaries of the entities does not exceed 10% of its income for the period …	association dont au moins 90 % du capital appartenait à une ou plusieurs entités dont chacune est une municipalité du Canada ou un organisme municipal ou public remplissant une fonction gouvernementale au Canada, pourvu que le revenu de la société, commission ou association pour la période provenant d'activités exercées en dehors des limites géographiques des entités ne dépasse pas 10 % de son revenu pour la période …
[emphasis added]	[je souligne]

Subsections 149(1.2) and (1.3) do not apply in this case.

III. The Tax Court's Decision

[19] The issue before the Tax Court was whether, during the 2013 and 2014 taxation years, LawPRO was exempt from taxation pursuant to paragraph 149(1)(*d.5*) of the ITA. This required the Tax Court to determine whether the Law Society, as LawPRO's parent, was "a public body performing a function of government in Canada".

[20] The parties agreed before the Tax Court that LawPRO satisfied all but one of the requirements of paragraph 149(1)(*d.5*). That is, at least 90% of LawPRO's shares were owned by the Law Society, and LawPRO's income from its activities carried on outside Ontario did not exceed 10% of its total income for the taxation years in question. The parties disagreed on whether the Law Society was "a public body performing a function of government in Canada".

[21] In coming to the conclusion that the Law Society was indeed a "public body", the Tax Court relied on the decision in *Registrar of Trade Marks v. Canadian Olympic Association*, 139 D.L.R. (3d) 190, [1983] 1 F.C. 692 (C.A.). The issue in that case was whether the Canadian Olympic Association was a "public authority" that was entitled to have its trademarks given public notice in accordance with subparagraph 9(1)(*n*)(iii) of the *Trade Marks Act*, R.S.C. 1970, c. T-10.

[22] In addressing this question, this Court adopted a three-part test to determine whether the Canadian Olympic Association was a "public authority". The factors to be considered under this test are the following.

a) there must be a duty to the public,

b) there must be a significant degree of governmental control; and

c) any profit earned must be for the benefit of the public and not for private benefit.

After considering the extent to which the Association benefitted the public and the degree to which it was subject to governmental control, this Court concluded that the Canadian Olympic Association was indeed a "public authority" for the purposes of the *Trade Marks Act*.

[23] In the case at bar, the Tax Court found that the term "public authority" was synonymous with "public body". The Court further found that, in carrying out its functions, duties and powers in accordance with section 4.2 of the *Law Society Act*, the Society had a duty to protect the public interest. The Court was also satisfied that the Law Society was subject to a significant

degree of control by the Government of Ontario. In support of this finding, the Court noted that, amongst other things, the Attorney General for Ontario (who serves as the guardian of the public interest in all matters within the scope of the *Law Society Act*) appoints the eight Lay Benchers, and the government has to approve the appointment of lay members to the Law Society Tribunal.

[24] Finally, the Tax Court found that the evidence before it demonstrated that any profit realized by the Law Society was used to fund its operations and that none of it was returned to licensees. Consequently, the Tax Court was satisfied that the Law Society was indeed a "public body". The Court was not, however, persuaded that the Law Society performed "a function of government in Canada".

[25] In coming to this conclusion, the Tax Court accepted LawPRO's contention that determining whether an entity was a "public body performing a function of government in Canada" required the application of a two-part test. That is, the entity in question had to be a "public body" and it had to "perform a function of government in Canada". The Tax Court concluded, however, that a public body only performs a function of government in its specific geographical area if it performs the function in question as part of the governance of the public located in that specific area.

[26] The Tax Court further found that the Law Society of Ontario does not govern the public in Ontario, and that the functions that it performs do not constitute "functions of government". As a result, the Court concluded that LawPRO was not entitled to the paragraph 149(1)(*d.5*) exemption. LawPRO's appeal of its reassessments for its 2013 and 2014 tax years was allowed,

however, to the extent that the Tax Court was satisfied that its taxable income for those years should be reduced by the amounts that LawPRO was entitled to deduct as charitable gifts.

[27] LawPRO now appeals to this Court.

IV. The Standard of Review

[28] I do not understand there to be any material disagreement between the parties as to the facts of this case. This appeal concerns the proper interpretation of paragraph 149(1)(*d.5*) of the ITA. I agree with the parties that this issue is a question of law, with the result that the Tax Court's finding on this issue is reviewable on the standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

V. Principles of Statutory Interpretation

[29] Before considering whether the Tax Court erred in its interpretation of paragraph 149(1)(*d.5*) of the ITA, it is first necessary to address the principles of statutory interpretation to be applied in discerning the proper meaning of the statutory provision at issue in this case.

[30] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, the Supreme Court of Canada identified the approach to be used in interpreting statutory provisions such as the one at issue here. There, the Court stated that the words of a statute "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of

the Act, the object of the Act, and the intention of Parliament": at para. 10, citing *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, 179 D.L.R. (4th) 577 at para. 50.

[31] While language in a statutory provision is not to be interpreted independently of its context and legislative purpose, the Court nevertheless went on in *Canada Trustco* to observe that where the words of a statutory provision are precise and unequivocal, the ordinary meaning of the words will play a dominant role in the interpretive process: above at para. 10. Where, however, the words are capable of supporting more than one reasonable meaning, the ordinary meaning of the words will play a lesser role. Although the relative effects of ordinary meaning, context and purpose on the interpretive process may vary from case to case, courts must seek to read the provisions as a harmonious whole in every case: *Canada Trustco*, above at para. 10.

[32] With these principles in mind, I turn now to consider the submissions of the parties as to how paragraph 149(1)(*d.5*) of the ITA should be interpreted.

VI. How Should Paragraph 149(1)(*d.5*) of the ITA be Interpreted?

a) LawPRO's Submissions

[33] LawPRO contends that the phrase "public body performing a function of government in Canada" contains two separate components. First, the entity must be a "public body", and, second, it must perform "a function of government in Canada".

[34] According to LawPRO, the Tax Court correctly found that the Law Society is a "public body". This is because it owes a duty to the public in carrying out its functions, it is subject to a significant degree of control by the Government of Ontario under the *Law Society Act*, and it does not use any of its profit for the personal benefit of its members.

[35] However, LawPRO says that the Tax Court erred insofar as the second component of paragraph 149(1)(*d.5*) is concerned: that is, whether the Law Society "perform[s] a function of government in Canada". According to LawPRO, the Court erred in framing the applicable legal test by asking itself the wrong question. In so doing, LawPRO says that the Court created an extra element that is not found in paragraph 149(1)(*d.5*) by finding that an entity is not "performing a function of government" unless that function applies to the population as a whole. That is, the Court substituted the broader statutory test of "performing a function of government" with its own narrower test of "governing the public". In the alternative, LawPRO submits that the Law Society does, in any event, "govern the public".

[36] In support of this latter contention, LawPRO submits that in regulating the legal profession in the public interest, the Law Society performs regulatory functions that have been delegated to it by the Ontario Legislature: *Re Klein and Law Society of Upper Canada, Re Dvorak and Law Society of Upper Canada* (1985), 50 O.R. (2d) 118, 16 D.L.R. (4th) 489 (Ont. Div. Ct.) at para. 82.

[37] LawPRO also points out that the Supreme Court has held that the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*

1982 (U.K.), 1982, c. 11, applies to entities that are essentially governmental in nature. In coming to this conclusion, the Court held that the application of the Charter is not restricted to those entities that are formally part of the federal or provincial governments: *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, 152 D.L.R. (4th) 577 at paras. 47-48. The Charter has, moreover, been found to apply to the Law Society in the context of disciplinary matters: *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772 at paras. 111-112.

[38] LawPRO further submits that the Law Society performs legislative functions in making regulations and by-laws under powers that have been delegated to it by the Legislature in accordance with the *Law Society Act*.

[39] LawPRO also says that the Law Society performs judicial functions when it adjudicates cases of alleged professional misconduct on the part of lawyers and paralegals: *Edwards v. Law Society of Upper Canada (No. 2)* (2000), 48 O.R. (3d) 329, 188 D.L.R. (4th) 613 (Ont. C.A.), aff'd 2001 SCC 80, [2001] 3 S.C.R. 562 at para. 20.

[40] In addition, LawPRO argues that the Law Society performs executive or administrative functions of government by engaging in discretionary policy development and implementation, an example of which was the decision of the Benchers to deny accreditation to Trinity Western University's proposed law school.

[41] According to LawPRO, the Law Society also performs ministerial functions of government by performing mandatory statutory or public duties under the *Law Society Act*, such

as the issuance of licences to practice law to those who meet all of the statutory requirements to qualify as licensees.

[42] LawPRO further observes that the Canada Revenue Agency itself treats law societies as "public bodies" for purposes of section 67.6 of the ITA, which provides that a fine or penalty imposed by a "public body" is not tax deductible. According to LawPRO, consistency within the same statute requires that the Law Society should similarly be a "public body" for the purposes of paragraph 149(1)(*d.5*) of the Act.

[43] Finally, LawPRO argues that the phrase "public body" must relate to bodies other than municipal-type bodies: otherwise, the phrase "public body" in paragraph 149(1)(*d.5*) of the ITA would be redundant.

b) The Crown's Arguments

[44] The Crown does not take issue with the Tax Court's finding that the Law Society is a "public body", accepting that the Society has been referred to as a "public body" or "public actor" in decisions relating to other legislation: see, for example, *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, [2018] 2 S.C.R. 453 at para. 21. Nor does the Crown dispute the fact that the Society has in some contexts been found to perform functions that have been described as regulatory or governmental in nature.

[45] The Crown submits, however, that the decisions relied on by LawPRO in support of its claim that the Law Society is a "public body" that performs "functions of government" were made in different legislative contexts and are not determinative of this case. Moreover, the fact that the Law Society may operate in the public interest does not equate to it "performing a function of government".

[46] In addition, the Crown contends that LawPRO's proposed two-step approach to the interpretation and application of paragraph 149(1)(*d.5*) of the ITA leads to an incorrect result as it segregates chosen words in the provision from their legislative context, and overlooks the purpose of the provision. The approach proposed by LawPRO also ignores key words in the provision and renders meaningless the reference by the legislator to municipalities and municipal bodies.

[47] According to the Crown, paragraph 149(1)(*d.5*) of the ITA is not broad enough to include any "public body performing a function of government in Canada". Read in its entire context, the Crown says that the exemption provided for in paragraph 149(1)(*d.5*) is limited to entities whose parents are similar to, or in the same class as municipalities and municipal bodies that perform functions that are similar to those performed by municipalities.

c) Analysis

[48] Provincial law societies unquestionably fulfill an important role in Canadian society. An independent and self-regulating Bar is important to our legal system, facilitating access to

justice, the advancement of the cause of justice and the preservation of the rule of law. It also plays a key role in the protection of the public by ensuring standards of professionalism and competence among lawyers: *Trinity Western*, above at paras. 16-18. That said, it does not necessarily follow that the Law Society is a "public body performing a function of government in Canada" for the purposes of paragraph 149(1)(*d.5*) of the ITA.

[49] Indeed, as will be explained below, a consideration of the text, context and purpose of paragraph 149(1)(*d.5*) leads to the conclusion that the Law Society is not "a public body performing a function of government in Canada". As a subsidiary of the Law Society, LawPRO is thus not entitled to the benefit of paragraph 149(1)*(d.5)* of the ITA.

i) The Textual Analysis of Paragraph 149(1)(d.5) of the ITA

[50] Insofar as the text of paragraph 149(1)(*d.5*) is concerned, as mentioned above, where the words of a statutory provision are precise and unequivocal, the ordinary meaning of the words will play a dominant role in the interpretive process: *Canada Trustco*, above at para. 10. However, the words of a statutory provision are not precise and unequivocal where those words are reasonably capable of more than one meaning: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 29, citing *Westminster Bank Ltd. v. Zang* (1965), [1966] A.C. 182, [1966] 1 All E.R. 114 (H.L. Eng.), at 222, *per* Reid LJ.

[51] The terms "municipality", "municipal body […] performing a function of government" or "public body performing a function of government" are not defined in the ITA. I agree with the

parties that the meaning of these expressions is not clear and unequivocal. In particular, the phrase "public body performing a function of government in Canada" can support more than one reasonable meaning. Indeed, in the *Canadian Olympic Association* decision relied upon by LawPRO, this Court expressly noted that the meaning of the analogous term "public authority" may vary according to its statutory context (at 197).

[52] Before moving on to consider the legislative context in which paragraph 149(1)(*d.5*) finds itself, however, I would note that legislatures generally avoid the use of unnecessary or superfluous words in legislation, and that every word in a statute is presumed to have a specific role to play in advancing the legislative purpose: *Hill v. William Hill (Park Lane) Ltd.*, [1949] A.C. 530 at 546, [1949] 2 All E.R. 452 (H.L. Eng.); *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 at para. 28. If the scope of the phrase "public body performing a function of government in Canada" in paragraph 149(1)(*d.5*) were as broad as LawPRO says it is, it would not have been necessary for Parliament to have included the words "a municipal or" in the phrase "a municipal or public body performing a function of government in Canada". This is because entities owned by municipal bodies would already be entitled to the exemption provided for in paragraph 149(1)(*d.5*) as subsidiaries of "public bod[ies] performing a function of government in Canada".

ii) The Contextual Analysis

[53] Insofar as the context in which paragraph 149(1)(*d.5*) finds itself is concerned, there is guidance elsewhere in subsection 149(1) that sheds light on the meaning of this provision, specifically in the marginal note that accompanies paragraph 149(1)*(c)*.

[54] I recognize that in accordance with section 14 of the *Interpretation Act*, R.S.C., 1985, c. I-21, marginal notes do not form part of a statute, and are only inserted for ease of reference. It is nevertheless permissible to consider them as part of the interpretative process, although they may be accorded lesser weight than other interpretive aids: *Brill v. R.*, [1997] 1 F.C. 386 (F.C.A.), [1997] 1 C.T.C. 2 at para. 13.

[55] Paragraph 149(1)(*c*) of the ITA uses similar language to paragraph 149(1)(*d.5*), providing that no tax will be payable under Part I of the Act on the taxable income of a person for a period during which that person was "a municipality in Canada, or a municipal or public body performing a function of government in Canada". While paragraph 149(1)(*d.5*) exempts the subsidiaries of municipalities in Canada, or municipal or public bodies performing a function of government in Canada, paragraph 149(1)(*c*) exempts the parents of such entities, provided that they are themselves "a municipality in Canada, or a municipal or public body performing a function of government in Canada".

[56] The marginal note that accompanies paragraph 149(1)(*c*) refers to the provision as relating to "[m]unicipal authorities", suggesting that in using the phrase "a municipality in Canada, or a municipal or public body performing a function of government in Canada", Parliament intended to exempt municipalities and "municipal-type" authorities. While the marginal note accompanying paragraph 149(1)(*d.5*) refers to "[i]ncome within boundaries of entities", rather than "municipal authorities", it is nevertheless a basic principle of statutory interpretation that where the same words appear in different parts of a statute, the presumption is

that they are to be given the same meaning: *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, 61 D.L.R. (4th) 725 at para. 19.

[57] A second contextual consideration relates to the architecture of the ITA. The parties agree that the rationale underlying the original enactment of paragraph 149(1)(*d.5*) of the ITA was to give effect to the constitutional principle prohibiting inter-governmental taxation. That is found in section 125 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5, which provides that "No Lands or Property belonging to Canada or any Province shall be liable to Taxation". As the Supreme Court recently observed in *Canada (Attorney General) v. British Columbia Investment Management Corp*., 2019 SCC 63, 441 D.L.R. (4th) 197, "[s]ection 125 exists 'to prevent one level of government from appropriating to its own use the property of the other, or the fruits of that property'": at para. 67, citing *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004 at 1078, 136 D.L.R. (3d) 385.

[58] How Parliament chose to implement this purpose in the *Income Tax Act* is significant in this case. Section 125 of the *Constitution Act, 1867* is implemented in the ITA through a series of detailed, carefully drawn provisions that use particular language exempting specific types of entities from paying tax, rather than through one broad, general exempting section. Put another way, the overall structure of the *Income Tax Act* points to specific, carefully drawn pockets of exemptions rather than to broad, open-ended categories that exempt all kinds of entities from taxation, as LawPRO would have us believe.

[59] An example of this relates to Crown corporations. Section 17 of the *Interpretation Act*, R.S.C. 1985, c. I-21 generally provides that "[n]o enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment". Federal Crown corporations are brought within the purview of the ITA through section 27 of the Act, which specifically states that Part I of the *Income Tax Act* applies to federal Crown corporations, thus displacing section 17 of the *Interpretation Act* as it relates to such corporations.

[60] Subsection 27(2) of the ITA then qualifies this, providing that notwithstanding any other provision of the ITA, "a prescribed federal Crown corporation and any corporation controlled by such a corporation are each deemed not to be a private corporation and paragraphs 149(1)(d) to (d.4) do not apply to those corporations". Given that Crown corporations are unquestionably bodies owned by a "public body performing a function of government", the scheme in section 27 of the ITA would be redundant if LawPRO's broad interpretation of 149(1)(*d.5*) were to be accepted.

[61] From this it is clear that while the enactment of paragraph 149(1)(*d.5*) of the ITA was to give effect to the constitutional principle prohibiting inter-governmental taxation, it is just one of several provisions in the ITA that serve this purpose. To be consistent with the architecture of the Act, paragraph 149(1)(*d.5*) should not be interpreted in the broad manner urged on us by LawPRO.

[62] I do accept that some of the functions performed by the Law Society (such as the issuing of licences) may be performed by governments. I further accept that, in another context, the scope of the phrase "public body performing a function of government in Canada" might be broad enough to include entities such as the Law Society. However, I find that, when read in its particular legislative context, the meaning of the phrase as it appears in paragraph 149(1)(*d.5*) does not extend to include self-regulating professional bodies such as the Law Society of Ontario.

iii) The Purposive Analysis

[63] As will be explained below, my conclusion as to the proper interpretation of paragraph 149(1)(*d.5*) of the ITA is strengthened when regard is had to the purpose of the provision. This is especially so given the circumstances that led up to the 2013 amendment to paragraph 149(1)(*d.5*) that added the phrase "municipal or public body performing a function of government in Canada".

[64] As the Supreme Court stated in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, although Courts must be alive to the frailties associated with its use, it is nevertheless appropriate to use the legislative history of a statutory provision as a tool for determining the intention of the legislature: at paras. 31 and 35.

[65] Section 125 of the *Constitution Act, 1867* does not extend the constitutional immunity from inter-governmental taxation to governments at the municipal level. However, the

predecessor to paragraph 149(1)(*c*) of the ITA was added to the Act in 1948, extending the exemption to a "municipality or municipal or public body performing a function of government": S.C. 1948, c. 52, s. 57(1)(*c*).

[66] Earlier versions of what ultimately became paragraph 149(1)(*d.5*) further extended the inter-governmental tax exemption to entities "owned by Her Majesty in right of Canada or a province or by a Canadian Municipality, or a wholly-owned corporation subsidiary to such a corporation, commission or association...". The income, ownership and geographical requirements were added with the enactment of paragraph 149(1)(*d.5*) in 1998, thereby extending the immunity from federal tax to subsidiaries of "municipalities in Canada": *Income Tax Amendments Act*, 1997, S.C. 1998, c.19.

[67] That is, prior to the 2013 amendments, paragraph 149(1)(*d.5*) of the ITA only exempted entities from taxation where the shares of the entity in question were owned by "one or more municipalities in Canada". No exemption was granted to subsidiaries of "municipal or public bodies performing a function of government in Canada".

[68] That said, the jurisprudence nevertheless provided that an exemption from income tax was available to subsidiary entities owned by self-governing Indian Bands, where the Bands in question provided municipal-type services to their members. This included services such as education, health care, social services (including child and family services), employment and training services, alcohol and drug abuse counselling, and economic development: *Otineka Development Corporation Ltd. v. R.* (1994), 94 D.T.C. 1234, [1994] 1 C.T.C. 2424 (T.C.C.).

[69] Indeed, in *Otineka*, the Tax Court found that the Band in that case operated along essentially the same lines as any other municipality, providing substantially the same services to its members living on its reserve as would be provided by any other municipality in Canada of comparable size: at 1235.

[70] However, the Court of Appeal of Quebec came to the opposite conclusion in *Tawich Development Corporation v. Quebec (Deputy Minister of Revenue)* (2000), 98 A.C.W.S. (3d) 1134, [2000] 3 C.N.L.R. 383. Although leave to appeal this decision to the Supreme Court of Canada was granted (270 N.R. 194 (note)), it appears that the appeal did not proceed.

[71] *Tawich* involved statutory provisions that were similar to paragraphs 149(1)(*c*) and 149(1)(*d.5*) of the ITA. That is, section 984 of the *Taxation Act*, R.S.Q., c. I-3 provided a tax exemption for "municipalit[ies]" or "public bod[ies] performing a function of government in Canada". Section 985 of the Quebec *Taxation Act* further provided a tax exemption for corporations if at least 90% of the shares of the corporation were owned by "Her Majesty in right of Canada", "Her Majesty in right of Quebec" or a "Canadian municipality".

[72] The Court of Appeal held in *Tawich* that a subsidiary of an Indian Band was not entitled to a tax exemption merely because its parent Band was similar in nature to a "municipality", and possessed powers that were similar to those exercised by municipalities.

[73] In coming to this conclusion, the Court held that an entity could not attain the status of a "municipality" merely by exercising functions that would ordinarily be performed by a

municipality. Rather, the status of a "municipality" could only be conferred on an entity by a statute or other constituting document that vested it with those functions. In the absence of any such constituting document, the Court held in *Tawich* that the Band could not be characterized as a "municipality" for the purpose of the Quebec tax legislation, with the result that its subsidiary was not entitled to the tax exemption.

[74] It is clear from the legislative history that the 2013 amendment to paragraph 149(1)(*d.5*) adding the reference to "a municipal or public body performing a function of government in Canada" was triggered by the decision of the Court of Appeal of Quebec in *Tawich*.

[75] That is, the *Explanatory Notes* published by the Minister of Finance in relation to the 2013 amendment state that paragraph 149(1)(*d.5*) of the ITA was being amended to resolve the uncertainty that had resulted from the conflict between the *Otineka* and *Tawich* decisions: Canada, Department of Finance, *Explanatory Notes Relating to the Income Tax Act, the Excise Tax Act and Related Legislation* (Ottawa: October 2012) at "Part 5: Other Amendments to the Income Tax Act and Related Legislation and Regulations".

[76] This purpose is further reflected by the fact that while the amendment to paragraph 149(1)(*d.5*) of the ITA was made in 2013, it nevertheless applied to taxation years commencing after May 8, 2000 – that being the date of the decision of the Court of Appeal of Quebec in the *Tawich* case.

[77] The *Explanatory Notes* further state that it was desirable "from a tax policy perspective" that entities that had previously been entitled to the tax exemption based on the *Otineka* decision "continue to have access to the exemption" from Part I tax. LawPRO is not one such entity.

[78] The wording of the *Explanatory Notes* further supports the conclusion that the phrase "municipal or public body performing a function of government in Canada" was added to paragraph 149(1)(*d.5*) of the ITA to continue to exempt income earned by corporate entities owned by local governing bodies (such as Indian Bands). That is, entities that while not legally municipalities, nevertheless possess attributes of, and provide services similar to those provided by municipalities. Once again, LawPRO is not one such corporate entity.

[79] There is, moreover, no suggestion in the legislative history relating to paragraph 149(1)(*d.5*) of the ITA that the 2013 amendment was meant to be so broad as to create an entirely new tax exemption for corporations owned by professional regulators, let alone to make that exemption retroactive for some 13 years.

[80] LawPRO points out that the phrase "Aboriginal government" appears some nine times in the ITA, submitting that if all Parliament intended to do in the wake of the *Tawich* decision was to make it clear that subsidiaries of Band governments were exempt from taxation, it knew what language to use to accomplish that purpose. However, Parliament chose not to extend the paragraph 149(1)(*d.5*) exemption to the subsidiaries of "Aboriginal governments": it elected instead to track the more general language that appears in paragraph 149(1)(*c*) of the ITA.

[81] From this, LawPRO says, it follows that Parliament's use of the more general term of "public body performing a function of government in Canada" was intentional, and that it did not intend to limit the paragraph 149(1)(*d.5*) exemption to Aboriginal governments that provide municipal-type services.

[82] I do not accept this submission.

[83] It is clear from the inclusion of the term "public body performing a function of government" in paragraph 149(1)(*d.5*) that Parliament did not intend to strictly limit the availability of the tax exemption to entities owned by municipalities, or municipal or Aboriginal governments performing a function of government in Canada. It does not necessarily follow, however, that the amendment was intended to exempt entities owned by any type of public body whose mandate includes a public interest component, where that entity may perform a function that, in some cases, may be carried out by a government in this country.

[84] Rather, the 2013 amendment to paragraph 149(1)(*d.5*) of the ITA simply recognizes that there may be other bodies of a local nature (apart from municipalities, municipal bodies and Aboriginal governments) that perform the type of function typically performed by municipalities and provide the type of services that are usually provided by municipalities.

[85] Unlike municipalities and municipal bodies, the Law Society of Ontario receives no taxpayer funding, but is instead largely funded by the fees paid by its licensee members. Its directors are not democratically elected by members of the general public, nor does it report to

the government. The primary focus of the Law Society is on the regulation of the legal profession in Ontario, and it does not provide the type of services that are typically provided by municipalities or municipal bodies in a localized geographical area. It is not, therefore a "public body performing a function of government in Canada" for the purposes of paragraph 149(1)(*d.5*) of the ITA.

[86] Allowing income earned by LawPRO to be subject to federal income tax does not offend the principle of tax immunity extended to provincial governments, municipalities, municipal bodies and public bodies that perform similar functions through the collection and use of public funds.

VII. Conclusion

[87] For the foregoing reasons, I find that LawPRO is not entitled to the exemption set out in paragraph 149(1)(*d.5*) of the ITA.

[88] Consequently, I would dismiss the appeal, with costs.

"Anne L. Mactavish"
J.A.

"I agree.
David Stratas J.A."

"I agree.
J. B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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