general position in *Information Circular* 82-6R8 ("Clearance Certificate," December 10, 2010) is that an auditor, director, officer, or other person may, depending on the particular facts and circumstances, be a legal representative in a voluntary dissolution, but the IC provides no guidance on what those facts and circumstances might be. A determination based on a facts-and-circumstances test seems to suggest that more is required than that the person simply hold or exercise the rights of a corporate office or share ownership. Whether the determination is based on the level of authority, activity, or other factors is unclear. On the basis of the approach in the earlier TIs dealing with law firms, arguably a director, officer, or shareholder is generally not considered to "stand in the place of," "succeed" to property of, or "represent" the interests of the dissolving corporation in the same capacity as a trustee or liquidator. However, there appears to be no CRA published position on point. Some case law seems to support the position that a corporate officer is not a legal representative. Published tax commentary is mixed on when a clearance certificate is required in a voluntary dissolution, based either on differing technical analyses or on practical discussions of risk and indemnity.

The recent internal TI only increases the uncertainty. CRA document no. 2011-0399191I7 (August 10, 2011) deals with whether a parentco can be assessed as a legal representative for its subco's taxes after a dissolution pursuant to paragraph 159(1)(b) without any requirement to revive and assess the subco. The CRA took the position that if a subco is wound up into its parentco, the latter can be considered the subco's legal representative, at least for the purposes of subsection 159(1). The TI did not provide any underlying analysis, and the CRA did not set out the detailed facts and circumstances on which it bases its conclusion, except for a statement that the parentco had authorized the dissolution and received the subco assets. The TI's only cited reference was to the 1997 technical notes to section 159, including a parenthetical aside from those notes that gave as an example of a legal representative a parentco that had wound up its subsidiary and acquired its assets. The 1997 technical notes predate both the earlier law firm TIs and IC 82-6R8.

It appears that the TI's position was intended to avoid certain procedural issues involved in the assessment of a dissolved corporation. In the CRA's view, subsection 159(1) can be used as a substitute for section 160 to assess a parentco, as agent, in cases where a section 160 assessment would otherwise require the revival of the subco. However, the technical basis for including a parentco as a legal representative is perhaps questionable; the approach seems to extend beyond the more restrictive approaches in the earlier law firm TIs and the IC, and raises questions about the limits of the term. Any definition of "legal representative" for the purposes of paragraph 159(1)(b) should apply for all purposes of section 159. If a parentco can generally be considered its subco's legal representative, it becomes difficult to establish the facts-and-circumstances parameters that might exclude from the definition every director, officer, or other person who has a role in administering the dissolution. Broadening the definition of "legal representative" on a voluntary dissolution may be appropriate for a purpose under section 159, but greater certainty about the CRA's position would be welcome.

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Professionals' Regulators and Paragraph 149(1)(c)

Lately some practitioners have been concerned that the CRA may be taking a more aggressive position on the non-profit organization (NPO) status of organizations that have some profit-generating activities, on the ground that they are not "operated exclusively . . . [for a] purpose except profit" as required by paragraph 149(1)(l). It is apparently common practice for the regulator of a profession—such as a provincial law society, an institute of chartered accountants, or a regulatory college of a health profession—to claim a tax exemption under paragraph 149(1)(l) as an NPO. However, some regulators run their own insurance programs, have sizable reserves, and earn profits on their investments, and consequently their advisers may now be concerned about their clients' status under paragraph 149(1)(l). Policy concerns may make it unlikely that the CRA will attack the regulators' NPO status, but in any event a paragraph 149(1)(c) tax exemption may provide a refuge for regulators.

Paragraph 149(1)(c) provides an exemption from tax on the taxable income of "a municipality in Canada, or a municipal or public body performing a function of government in Canada." Unlike the exemption under paragraph 149(1)(l), paragraph 149(1)(c) contains no profit test. Thus, if a regulator is eligible for the paragraph 149(1)(c) exemption, the tax exemption is not jeopardized if the regulator insures its members and has large reserves that it invests profitably. If the regulator operates an insurer or other business through a separate corporation, proposed changes to paragraph 149(1)(d.5) exempt the subsidiary's income, regardless of its profitability (provided that at least 90 percent of its activities are carried on inside the geographical boundaries of the parent entity).

In contrast, an NPO exempt under paragraph 149(1)(l) must report its subsidiary's profits as taxable income.

On October 3, 2011, the government introduced a notice of ways and means motion to implement the 2011 budget proposal to extend the power to issue charitable donation receipts to "public bodies performing a function of government in Canada." The CRA says that "public bodies" in this context may "include certain provincial corporations, First Nations and Aboriginal self governments, school boards and public transit authorities." Although not specifically named by the CRA, provincial regulatory bodies seem to fit naturally in that list.

A 2009 internal interpretation (2009-030628117, May 12, 2009) commented on the meaning of "public bodies performing a function of government in Canada" in the context of paragraph 149(1)(c). The interpretation cited a definition of "public body" that includes "(ii) . . . [an] agency of a government . . . (iv) a body elected or appointed under an act: (a) to develop, administer or regulate schools, hospitals, health facilities, libraries, water utilities, drainage and irrigation works, sewage works, local improvements or public utilities; or (b) to levy and collect taxes." The CRA said that it "generally takes the view that, to be a public body, a corporation must either be created by a special statute or be created as a result of implementing a statute with specific duties assigned to [it] by that statute. In addition, the federal government or a provincial or territorial government, or the 'public' that the corporation is serving or representing should have some specific control over the actions and operation of the corporation and the corporation should be accountable to either that government or that public." These comments seem equally applicable to a provincial regulator. For example, each college of a regulated health profession in Ontario is required "in carrying out its objects . . . to serve and protect the public interest." Further, each such body is strictly controlled by provincial laws, including laws that constitute the bodies as corporations.

In summarizing its own tests on the meaning of "function of government," the CRA interpretation says that "providing a key service traditionally offered by the provinces or territories such as social services, overseeing the environment, health services, and education is generally considered to constitute performing a function of government." Arguably, the regulator of a profession also provides a service of government—the control of the profession in the public interest. The CRA interpretation said that "historically the CRA has required that to be performing a function of government an organization must have the ability and powers to govern its members, tax its members, pass by-laws or provide municipal- or provincial-type services to its members." Clearly, a provincial regulator has the power to govern its members. Taxing authority does not seem to be critical in the equation, but the function may be satisfied by the regulator's ability to impose membership fees on a profession's members in order to fund the regulator's operations and public insurance and thus support the public service of professional regulation.

A preliminary review of the case law seems to support a paragraph 149(1)(l) exemption for a provincial regulator. For example, in *Cooper v. Hobart* (2001 SCC 79), which dealt with the civil liability of statutory financial regulators, the SCC said:

> The regulatory scheme governing mortgage brokers provides a general framework to ensure the efficient operation of the mortgage marketplace. The Registrar must balance a myriad of competing interests, ensuring that the public has access to capital through mortgage financing while at the same time instilling public confidence in the system by determining who is "suitable" and whose proposed registration as a broker is "not objectionable." All of the powers or tools conferred by the [provincial Mortgage Brokers] Act on the Registrar are necessary to undertake this delicate balancing. . . . [T]he overall scheme of the Act mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole.
>
> . . . The decision of whether to suspend a broker involves both policy and quasi-judicial elements. The decision requires the Registrar to balance the public and private interests. The Registrar is not simply carrying out a predetermined government policy, but deciding, as an agent of the executive branch of government, what that policy should be. Moreover, the decision is quasi-judicial. The Registrar must act fairly or judicially in removing a broker's licence. . . . [T]he Registrar must make difficult discretionary decisions in the area of public policy, decisions which command deference. . . . [T]he decisions made by the Registrar were made within the limits of the powers conferred upon him in the public interest.

The companion case of *Edwards v. Law Society of Upper Canada* (2001 SCC 80) dealt with an allegation that the law society had failed to adequately monitor the use of a member's trust account. The SCC referred to an earlier decision that concluded that the law society's "quasi-judicial function immunized it from [tort] liability" and that its discipline committee was an "adjudicative body" and went on to say:

> With reference to the [Law Society] Act, it is apparent that the Law Society regulates the legal profession. Specifically, its responsibilities include the admission standards of the profession . . . , the continuing education of its members . . . and the formulation and enforcement of a code of professional ethics . . . [and] investigative and disciplinary powers over its members. . . . The . . . Act is

> geared for the protection of clients and thereby the public as a whole. . . . Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve a myriad of objectives consistent with public rather than private law duties.
>
> Safeguards, in addition to a private law duty of care, exist to ensure the protection and compensation of clients as members of the public. These safeguards are expressly provided by the Legislature as a means to compensate for economic loss. Examples include a public insurance and/or compensation scheme funded by the profession itself. In this case, the Law Society maintains a Compensation Fund . . . to compensate for losses sustained as a result of dishonesty by lawyers. The Lawyers' Professional Indemnity Company provides insurance for claims by clients against their lawyers for negligence.

For public policy reasons, it seems unlikely that the CRA would deny a paragraph 149(1)(l) exemption to a provincial regulator of a profession. However, those same reasons—the public interest that these bodies serve in regulating professions—also suggest that a professionals' regulator established under provincial legislation may seek exemption under paragraph 149(1)(c). If a professionals' regulator can make a case that it is a public body performing a function of government, then the exemption available to it under paragraph 149(1)(c) does not carry the exclusively-for-profit test that haunts the paragraph 149(1)(l) exemption.

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Owner-Manager Year-End Tips, Part 1

At this time of year, owner-managers should start to focus on year-end planning and remuneration strategies.

■ Determine the optimal salary-dividend mix for the owner-manager and family members in order to minimize overall taxes. Consider the owner-manager's marginal tax rate, the corporation's tax rate, provincial health and/or payroll taxes, RRSP contribution room ($127,611 of earned income in 2011 is required to maximize the 2012 RRSP contribution), CPP contributions, and other deductions and credits (such as for child-care expenses and donations).

■ To be deductible, salaries and bonuses must be accrued before the business's year-end and paid within 179 days thereof. It may be beneficial to pay a reasonable salary to a spouse or child who provides services to the business and is in a lower tax bracket.

■ Instead of paying a bonus, an owner-manager may set up an employees' profit-sharing plan or retirement compensation arrangement or (to enhance retirement income) set up an individual pension plan (IPP). Note that a 2011 federal budget proposal intended to level the playing field with other retirement savings vehicles eliminates certain IPP advantages: for example, a minimum withdrawal requirement will apply to IPP members over 71 starting in 2012.

■ Consider dividend distributions in the following order: (1) eligible dividends that trigger an RDTOH refund; (2) non-eligible dividends that trigger an RDTOH refund; (3) eligible dividends that do not trigger an RDTOH refund; and (4) non-eligible dividends that do not trigger an RDTOH refund. Depending on the jurisdiction of residence, paying non-taxable capital dividends is the second or third preference.

■ To qualify as an eligible dividend, a dividend must be designated as such at the time of or before its payment. If an eligible dividend is inadvertently paid and will attract part III.1 tax on the excess eligible dividend designations, consider an election to treat all or part of the excess eligible dividend designation as a separate non-eligible dividend.

■ Ensure that owner-manager remuneration strategies consider the 2012 increases in personal taxes on eligible dividends. In all jurisdictions (except Nova Scotia if, as discussed below, the province tables a budget surplus in its 2012-13 fiscal year and the individual's 2011 taxable income exceeds $150,000), a corporation may wish to accelerate to 2011 the distribution of discretionary eligible dividends to take advantage of that year's lower eligible dividend tax rates. Be aware, however, that eligible dividends may increase an owner-manager's alternative minimum tax exposure and that accelerated dividend payments hasten the payment of tax on the dividend. (For changes to eligible dividend tax rates, see "Eligible Dividend Rates Update," *Canadian Tax Highlights*, August 2011.)

■ A corporation in Saskatchewan may wish to accelerate to 2011 the distribution of discretionary non-eligible dividends to take advantage of that year's lower non-eligible dividend tax rates. (For changes to non-eligible dividend tax rates, see "Non-Eligible Dividend Rates," *Canadian Tax Highlights*, September 2011.)

■ If Nova Scotia tables a budget surplus in its 2012-13 fiscal year, the province will eliminate for 2012 the top $150,000 personal tax bracket and 21 percent rate and reinstate the 10 percent personal income tax surtax on provincial income tax exceeding $10,000. In that case, an owner-manager should take into account the potential for personal tax rate changes in 2012 and adjust the corporate strategy for the payment of salary and/or dividends.

■ Forgoing bonus payments and/or dividend distributions out of excess cash may place in doubt whether substantially all of a CCPC's assets are used in an active