

## MNR v. KPMG: Professional Duty Overruled

In *Canada (National Revenue) v. KPMG LLP* ([2016 FC 1322](#)), KPMG sought unsuccessfully to quash an order to disclose confidential information relating to its unnamed clients on the basis of CPA Ontario's Code of Professional Conduct ("the code").

Subsection 231.2(3) provides that a judge of the FC may, on application by the minister, authorize the minister to impose on a third party a requirement to provide documents or information relating to unnamed persons if the person or group of persons is ascertainable and the requirement is made to verify the person or group's compliance with any duty or obligation under the Act. The authorization is also subject to any conditions that the judge considers appropriate.

KPMG submitted that the requirement to disclose confidential information should be quashed because rule 208 of the code (and similar provisions in other provinces) provides that "[a] member or firm shall not disclose any confidential information concerning the affairs of any client." KPMG also noted that the commentary to the code states that "ultimately, it is for the court to determine 'whether the confidentiality of the information should be maintained.'" In the circumstances, the court was not persuaded that this was an appropriate case to grant relief.

In *Greater Montréal Real Estate Board* ([2007 FCA 346](#)), the court held that there is no prerequisite to a judicial authorization of a "genuine and serious inquiry." In *KPMG*, the judge specifically stated that "the language of s. 231.2(3) of the Act is clear and overrides the general confidentiality rule imposed by Rule 208 of the Code." In other words, a confidentiality clause in the profession's code of ethics is not enough to warrant the exercise of the court's discretion to set aside an order granted under subsection 231.2(3).

Although this case involved the accounting profession, the decision can also affect communications with other professions that have a confidentiality clause in their codes of conduct, such as chartered business valuers and chartered financial analysts. It even affects confidential but non-privileged communications with lawyers. Therefore, when a court order authorizes the minister to obtain third-party information, these professions will also have to comply with the demand, unless it is possible to find something in the particular facts of the case that warrants an exception.

This may not be the end of the story. The judgment notes that some KPMG clients may want to make a claim of solicitor-client privilege at the time of KPMG's compliance with the order. That claim could even block the release of a client's name (*Welton Parent*, [2006 FC 67](#); *Thompson*, [2016 SCC 21](#)).

For information on practical steps that accountants can take to use solicitor-client privilege to protect client information, see Brian R. Carr, "Solicitor-Client Privilege," in the Canadian Tax Foundation's 2010 Conference Report, 7:1-36.

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