



**CANADIANS FOR TAX FAIRNESS**  
CANADIENS POUR UNE FISCALITÉ ÉQUITABLE



June 15, 2016

The Honorable Wayne Easter, PC, MP  
Chair, Standing Committee on Finance  
House of Commons  
Ottawa, ON K1A 0A6

Dear Mr. Easter,

Thank you for the opportunity to appear before the Standing Committee on Finance on June 7, 2016, to testify at the hearings regarding CRA's efforts to combat tax avoidance and evasion.

Canadians for Tax Fairness is very encouraged by, and supportive of, the Government's genuine and multifaceted efforts to address tax avoidance and evasion. We trust that we were able to provide some assistive evidence and recommendations during our appearance.

Respectfully, however, we are disappointed by the Committee's choice to apply the *Sub Judice* convention; We are writing in order to provide you with our submissions with regards to the authority of the Standing Committee, the applicability of the confidentiality concerns raised by legal counsel for KPMG and to provide our submission as to why the *Sub Judice* convention should not have been applied.

### **Canadians believe there are two sets of rules**

An Ipsos Global survey released on June 2, 2016, looked at the attitudes of the public in more than two dozen countries following the Panama Papers scandal. Its findings revealed that 88% of Canadians agree that the Panama Papers reveal that there are two sets of rules in the world – one for rich people and one for everybody else.

The vast majority of Canadians are in strongly in favour of a tax system that does not permit offshore tax haven use and are looking to the Government of Canada demonstrate decisive leadership to and to act swiftly to determine if KPMG's Isle of Man tax product is illegal and, if not, to change the *Income Tax Act* so that it is.

We believe it's incumbent on this committee to ensure its work is as complete and thorough as possible and we have serious concerns about the arguments that have been put forward in an attempt to limit that work. As such, we are providing our own submissions on these arguments and precedents for your consideration.

## Legal authority of Parliamentary committees

In her 1994 paper (attached) “The powers of Parliamentary Committees” former House of Commons general counsel Diane Davidson succinctly outlined the powers and privileges of Committees of the House of Commons.

Standing Order 108(1) of the House of Commons includes the power to “send for persons, papers and records.”

Provided a committee's inquiry is constitutionally within Parliament's jurisdiction and is also within the committee's own orders of reference, Committees have virtually unlimited powers to compel the attendance of witnesses and to order the production of documents.

Witness before committees must answer all questions put by members and produce documents as required by the committee.

There are legally no grounds upon which a witness can refuse to answer a question and **the rules of evidence do not apply**. This is particularly important to note in relation to the accountant-client privilege and settlement privilege cited by prior witnesses to the hearing.

Witnesses cannot refuse to answer questions on the grounds that in doing so he or she risk legal action or because an oath has been taken not to disclose the matter under consideration or because the matter was a privileged communication such as that between solicitor and a client or because of the risk of self-incrimination in other proceedings.

A witness before a parliamentary committee enjoys the same privilege of freedom of speech that a member enjoys in the Chamber itself or in committee. This protection acts as an immunity against legal action being taken against the witness for libel and slander. Also, section 9 of the Bill of Rights of 1689 would prevent courts from inquiring into the proceedings of the House or its committees. This too is particularly important in relation to claims made before this committee as submissions have been made alleging that providing some responses might somehow be used against earlier witnesses with respect to ongoing civil and professional proceedings.

## The *Sub Judice* Convention

***Sub Judice*** is a convention, not a rule, and therefore is not mandatory. The Standing Committee on Finance clearly has the absolute discretion to determine whether to defer to the convention or to prioritize the public interest in combatting tax avoidance and evasion.

There are recent examples where parliamentary committees or government commissions have heard testimony simultaneously while related court cases proceeded. In particular,

- The Gomery Commission heard testimony from numerous witnesses amid ongoing

criminal investigations into the sponsorship scandal.

- The Oliphant Commission inquired into alleged secret cash payments between former prime minister Brian Mulroney and Karlheinz Schreiber and continued amid ongoing lawsuits and extradition proceedings. The House of Commons ethics committee also probed the same topic.

With regards to the KPMG Isle of Man Tax Product there is a significant public interest in addressing tax avoidance and evasion. As a matter of procedural fairness the *Sub Judice* convention should not be applied in this circumstance as a party to the legal proceeding was already provided with an opportunity to use the forum to make submissions directly about the court proceedings and defend its actions.

In this case the party seeking the protection of the *Sub Judice* convention only did so after its representative Gary Wiebe testified at length before this committee and defended KPMG's actions in relation to the Isle of Man Tax Product. KPMG legal counsel reiterated this defense in its letter of May 17, 2016, wherein it ironically asked for the application of the *Sub Judice* convention.

Choosing to defer to the convention only after providing a KPMG witness and legal counsel with the high profile public platform to specifically defend its actions raises a reasonable apprehension of bias in favour of KPMG and raises legitimate concerns that they are thereby unfairly shielded from fair criticism by other expert witnesses called to testify.

By deferring to the *Sub Judice* convention in this way the purpose of the convention is not only defeated it is subverted so as to serve as a tool to provide a party to the court proceedings a significant public forum while shielding it from fair comment and denying this committee balanced testimony from multiple experts.

### **The truth about confidentiality**

In its letter dated May 17, 2016, KPMG legal counsel relies on a number of submissions regarding confidentiality, many of which were relied upon by KPMG's representative in declining to answer questions during his testimony on May 3, 2016. These include settlement privilege, accountant-client privilege, section 241 of the *Income Tax Act* and finally the KPMG Privacy Policy.

Respectfully, none of these are grounds that bar the Standing Committee on Finance from obtaining answers to their direct questions and from calling for all the relevant documentation by virtue of the operation of Standing Order 108(1).

The legal authority of the Standing Committee on Finance is a constitutional legal authority and takes precedence over conventions, the rule of professional conduct, the *Income Tax Act* and

rules of evidence such as privilege. Witnesses to committee hearings enjoy parliamentary privilege and protection against legal actions for statements made in the course of appearing.

### **Settlement privilege**

Simply put settlement privilege is a rule of evidence that does not apply to the Standing Committee on Finance and is not a ground upon which a witness before the committee can refuse to answer a question or provide a document.

Additionally, as yet unidentified KPMG clients are not parties to the Tax Court proceedings and by definition have not reached a settlement.

### **Supposed accountant-client privilege**

Even if accountant-client privilege existed at law, which it does not in Canada, it would be a rule of evidence with no application as previously indicated.

Even solicitor-client privilege is not available, which KPMG interestingly did not claim in relation to the Fraser Milner legal opinion dated October 25, 1999, it provided to the Committee.

### **Rules of professional conduct**

Rule 208 of the CPA Rule of Professional Conduct provides:

“A member or firm shall not disclose any confidential information concerning the affairs of any client, former client, employer or former employer **except when ... (c) such information is required to be disclosed by order of lawful authority** or, in the proper exercise of its duties, by CPA Ontario;

As previously discussed the Standing Committee on Finance clearly has the constitutional legal authority to request all documentation and call all person without limitation and falls within the permitted disclosures recognized under rule 208.

In any event it is well settled law that witnesses enjoy both parliamentary privilege while testifying before the committee and cannot refuse to answer questions on the grounds that in doing so he or she risk legal action or because an oath has been taken not to disclose the matter under consideration

### **Section 241 *Income Tax Act***

This section does not apply to KPMG or Members of the House of Commons by definition. Neither are “officials” or “representatives of a government entity” by virtue of subsection 241 (10).

Furthermore taxpayer information is explicitly defined as information collected under the *Income*

*Tax Act* which would not include information KPMG has in its possession by reason of professional services rendered to its clients.

**241 (1)** Except as authorized by this section, no **official** or other representative of a **government entity** shall

**(a)** knowingly provide, or knowingly allow to be provided, to any person any **taxpayer information**;

**(b)** knowingly allow any person to have access to any taxpayer information; or

**(c)** knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act*, or for the purpose for which it was provided under this section.

### **KPMG Privacy Policy**

The KPMG Privacy Policy has no force of law and is clearly not grounds to displace this committee's constitutional legal authority to require unaltered documents and records.

### **Canadians For Tax Fairness submissions**

Canadians for Tax Fairness representatives prepared detailed written and verbal introductory remarks in both official languages and included several attachments referred to in those statements that we have confirmed were not distributed to the members of the Committee.

When asked immediately following the session the Clerk of the Committee advised Scott Chamberlain:

- That the written introductory remarks were not shared as they mentioned the KPMG case in particular.
- That the attachments, which do not refer to the KPMG case, were not distributed either because they were part of a singular package that included the aforementioned introductory remarks or that some of the documents were not provided in both official languages.

We understand that the decision to defer to the *Sub Judice* convention was made moments before the documentation was submitted and there was not adequate time for the Clerk or yourself to review the documents and for this reason we have included both as attachments to this letter.

We respectfully request a reconsideration of both the choice to defer to the *Sub Judice* Convention and the refusal to accept our written submissions. With respect to the attachments 3 and on they are provided in the language in which they were written and we understand that KPMG's letter and untranslated attachments dated May 17, 2016 were accepted on that basis and we would ask for the same exception.

The attachments are as follows:

1. Written introductory remarks and recommendations
2. *What is Wrong with the CRA? And How to Fix It*. December 2015
3. *The Powers of Parliamentary Committees*, Diane Davidson, November 1994
4. *U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals*, Report Prepared By The Minority Staff Of The Permanent Subcommittee On Investigations Of The Committee On Governmental Affairs United States Senate Released In Conjunction With The Permanent Subcommittee On Investigations' Hearings On November 18 & 20, 2003
5. *Smoke And Mirrors: Corporate Social Responsibility And Tax Avoidance*, April 2010, Prem Sikka University Of Essex, Uk

We are at a crossroads on the issue of tax avoidance. Public skepticism and anger is at an all-time high. This Committee has the opportunity to restore public faith in the tax system, either through the ultimate absolution of key players in the Canadian tax system or by making recommendations to strengthen that system as warranted.

In order to seize that opportunity, though, this Committee can't allow itself to be hamstrung by biased interpretations of precedent and the unreasonable application of restrictions both real and imagined. We hope our submissions and this letter will be received in the spirit they are intended – not as accusatory missives but rather as appeals for openness and fairness in the Committee's attempts to get to the bottom of the issue at hand.

Respectfully,



Dennis Howlett, Executive Director  
Canadians for Tax Fairness.

Scott Chamberlain  
Canadians for Tax Fairness

cc. Members of the Standing Committee on Finance  
Suzie Cadieux, Clerk of the Committee