

Cleaning Up Class Actions with ADR

Introduction

Plaintiffs and defendants alike should readily embrace the use of mediators and arbitrators to resolve the claims of prospective class members to a putative class action or the claims of class members to an action that has been certified as a class proceeding as a means of resolving such claims in a much more expeditious and efficient manner than would otherwise be the case in the prototypical litigation scenario rife with delays, escalating legal costs and a prolonged commitment of time and energy.

Alison Corless v. KPMG LLP

The national class action commenced by former KPMG employee Alison Corless (“Corless”) in August, 2007, against her former employer, KPMG LLP (“KPMG”) in respect of KPMG’s alleged breach of the employment standards legislation across Canada, which garnered wide publicity across the country, serves as a model example of how the services of experienced roster mediators and arbitrators can be effectively utilized to resolve the claims of prospective class members or class members.

KPMG’s Overtime Redress Plan

In the *Corless* case, KPMG with its external counsel, faced with the prospect of de-

In August 2007, KPMG LLP was sued by former employee Alison Corless in a proposed national class action alleging on her own behalf and on behalf of other former employees that KPMG did not pay overtime in accordance with the applicable employment standards legislation. KPMG, in consultation with its external counsel Fraser Milner Casgrain LLP, developed the KPMG Overtime Redress Plan (“ORP”) and initiated it on February 19, 2008 as a voluntary plan to apply to both current and former employees. The matter settled on March 19, 2008 subject to Court approval. The essential term of the settlement was that the ORP would be rolled into the putative class action as the mechanism by which the claims of the prospec-



Norman J. Emblem

solved. One of the key selling points of the ORP was that KPMG would pay for the services of experienced mediators and arbitrators to mediate and arbitrate the claims of any employees who rejected their initial Determination Letter and subsequent Reconsidered Determination Letter. The ADR Institute of Canada was retained to administer the mediations and arbitrations across Canada. Justice Perell of the Ontario Superior Court of Justice pre-approved the settlement on June 26, 2008 and later certified the action for settlement purposes and approved the settlement on August 7, 2008. The use of ADR as part of KPMG’s ORP enabled KPMG to resolve issues in an unprecedented time frame that would otherwise have taken years to resolve in protracted litigation.

fending a national class action on behalf of former employees across Canada, determined to implement a comprehensive overtime redress plan (“ORP”), well prior to the scheduling of any certification motion, to provide compensation to both current and former employees¹ who worked overtime who were not paid what they were entitled to be paid pursuant to the applicable employment standards legislation in the provinces where they worked.

KPMG’s ORP included three levels of review of KPMG’s initial assessment as to whether an employee was eligible for overtime in accordance with the applicable legislation and, if so, the extent of the employee’s entitlement all of which were funded by KPMG without any cost to any

former or current em-
ployee.²

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KPMG’s Initial Assessment of Eligibility and Entitlement

In the first instance, KPMG assessed whether an employee was eligible for overtime and, if so, KPMG went on to determine the extent of the employee’s entitlement to overtime pay. This review was based upon the applicable *Employment Standards Act* in the province where the employee was employed³ or was formerly employed and the time and billing records maintained by KPMG. KPMG’s initial assess-

ment was subsequently conveyed to the former or current employee in a “Determination Letter” sent by Crawford Class Action Services Limited (“Crawford”), an experienced independent third party class action claims administrator retained by KPMG.

In the event an employee accepted the proposal set out in his/her Determination Letter, a Full and Final Release and Acceptance Form were completed, the employee was paid⁴, and the matter was then finally resolved.

In the event the employee rejected the proposal in his/her Determination Letter, he/she would send a Rejection Form to Crawford who would then independently

investigate whether the Determination Letter should be affirmed or revised after reviewing all of the relevant “HR data” pertaining to the employee in addition to any employee supplied information and determine, on a balance of probabilities, whether the Determination Letter should be affirmed or revised and send a Reconsidered Determination Letter to the employee.

In the event the employee accepted the proposal set out in his/her Reconsidered Determination Letter, a Full and Final Release and Acceptance Form would be signed.

Mediation

In the event the employee rejected the proposal in his/her Reconsidered Determination Letter, he/she would send a Rejection Form to Crawford and the employee’s claim would proceed to mediation before an independent mediator chosen by the employee selected from a roster of ten experienced mediators affiliated with the ADR Institute of Canada (“ADR Institute”) whose services would be paid for by KPMG. The mediation would take place in the province of the former or current employee’s place of employment⁵.

In the event the employee’s claim was satisfactorily resolved at mediation, a Full and Final Release would be executed⁶.

Arbitration

In the event the employee’s claim was not satisfactorily resolved through mediation, the employee’s claim would proceed to binding arbitration before an experienced independent arbitrator selected by the employee from a roster of ten arbitrators affiliated with the ADR Institute whose services would be paid for by KPMG. The arbitration would take place in the province of the former or current employee’s place of employment.

Scorecard

In the *Corless* case approximately thirty claims proceeded to mediation. Over 90% of those claims were satisfactorily resolved at mediation or shortly thereafter. Three claims proceeded to arbitration which were all conducted in an expeditious and effi-

cient manner and the last arbitration will be held shortly⁷.

Justice Paul Perell touched upon KPMG’s use of ADR in his *Reasons for Decision* when reviewing the elements of KPMG’s ORP.⁸

19. The Overtime Redress Plan provides for an elaborate administrative process to determine claims for overtime pay. The plan has 11 stages or steps, as follows:

- (1) The employee is sent a determination letter setting out eligibility and or entitlement to compensation, if any.
- (2) The employee accepts or rejects the proposal set out in the determination letter.
- (3) The employee notifies Crawford via regular mail, fax, or e-mail of his or her decision.
- (4) Crawford reviews acceptance forms to ensure that they have been properly completed and directs acceptances to KPMG’s payroll department for payment in accordance with the employee’s election.
- (5) Crawford reviews rejection forms to ensure that they have been properly completed and independently reconsiders the information upon which the determination letter was based along with any additional documentation provided by the employee.
- (6) If an employee fails to accept or reject the proposal set out in the determination letter, the employee is deemed to have rejected the determination letter. The employee is notified that he or she has 60 calendar days to accept or reject failing which any amount of overtime pay will be placed in an escrow account to be held for 180 days and thereafter sent to the United Way of Greater Toronto.
- (7) Once Crawford’s investigation is completed, it decides if the determination letter should be affirmed or revised. Crawford sends a reconsidered determination letter.

Both the employee and KPMG have 25 days to respond to the reconsidered determination letter.

- (8) If both the employee and KPMG accept the proposal set out in the reconsidered determination letter, the employee’s claim is resolved and the claim for payment processed in accordance with the employee’s election. If the proposal set out in the reconsidered determination letter does not include any entitlement to overtime pay, the claim is closed and no further letter is sent to the employee or KPMG.
 - (9) If either the employee or KPMG rejects the proposal set out in the reconsidered determination letter, the claim proceeds to mediation.
 - (10) If the claim is not resolved at mediation, the claim proceeds to binding arbitration.
 - (11) As a result of a reconsidered determination letter being sent to KPMG, it discovers additional information, this information is provided to Crawford, which may issue an amended reconsidered determination letter.
20. Without intending to be exhaustive, in my opinion, the following features of the proposed settlement are particular noteworthy:
- (i) The proposed settlement incorporating the ORP does not compromise the dollar value of the claims of class members. The determination of the employee’s (former or current) claim is based on a legal and factual analysis of his or her genuine entitlement.
 - (ii) The determination is made by a claims administrator hired but independent of KPMG. If an employee is not satisfied with the determination, he or she is entitled to a reconsideration, mediation, and ultimately binding arbitration.
 - (iii) There is no cap on KPMG’s liability.
 - (iv) KPMG is waiving any limitation period defences it might have had.
 - (v) KPMG is paying the entire costs



- of the ORP, including the plaintiff's lawyer's counsel fee.
- (vi) The administration of the ORP is similar to a court ordered class action claims administration program by a third party administrator.
 - (vii) KPMG will reimburse any employee up to a maximum of \$500 inclusive of GST for the cost of obtaining independent legal advice concerning his or her claim to overtime pay.
 - (viii) The settlement provides for multiple levels of review and provides for mediation and arbitration.

23. On June 26, 2008, the parties appeared before me at a case conference to seek pre-approval of the ORP and for approval of a notice to the class members of the motions for certification and for approval of the settlement of the class action. At that time, I received an affidavit from Mr. Peter B. Sahagian, who is General Counsel for KPMG, sworn on June 25, 2008. I also received a report from Crawford dated June 23, 2008. I was provided with detailed disclosure of the ORP and of the steps that had taken place up to that time. I made the following endorsement:

This is a case conference to consider the form of notice for the certification and settlement approval motion in this action. Subject to hearing from any objectors, I am satisfied based on the material I have reviewed that the form and substance is fair and reasonable and in the best interests of the class. I am further satisfied that without prejudice to the approval of counsel fees as required by the *Class Proceedings Act*, the defendant may make an advance payment of \$300,000 plus GST. I approve the forms of notice.

26. As appears from the above recitation of the background facts, implementation of the Overtime Redress Plan carried on during the time leading up to this certification motion for settlement purposes. I have reviewed the statistical record to date and, in my opinion, without intending to be exhaustive, the

following facts about the current state of administration are pertinent to the motions now before the court.

- (i) Crawford sent out 11,333 determination letters.
- (ii) Of the determination letters, 1,192 letters recognized entitlements for overtime pay totalling \$3,647,210.93. The balance of the letters, 10,135 indicated that the employee was (a) not eligible or (b) eligible but not entitled to overtime pay.
- (iii) In response to the determination letter, 3,019 current employees and former employees accepted the determinations. Subsequently, 156 employees, accepted reconsidered determination letters and 17 employees indicated that they did not wish overtime pay. Thus, while the administration of the plan continues, it appears that 3,192 employees have accepted the determination of the ORP.
- (iv) In response to the determination letter and or a reconsidered determination, there are currently 151 rejected determinations that have not been resolved.
- (v) It appears that 7,988 current employees neither accepted nor rejected the determination letter, of which all but 249 persons were determined not to have any eligibility or entitlement.
- (vi) KPMG with the approval of Crawford determined that current employees who had neither accepted or rejected should be au-

tomatically sent a cheque for their overtime entitlement, which if not cashed would be forfeited and the sum donated to the United Way pursuant to the ORP.

- (vii) As of August 6, 2008, \$3,264,277.87 or 90% of the proposed payment of \$3,647,210.93 inclusive of interest has been paid to former and current employees of KPMG.

39. Again without intending to be exhaustive, the following features of the ORP are worthy of note and they are favourable for class members:

- (a) KPMG does not rely on any limitation period defences;
- (b) There is no limit to the amount an employee may be entitled to for unpaid overtime. The amount owing is based on the application of the provincial employment standards legislation. KPMG's time and payroll records, and any employee supplied information;
- (c) The plan encourages all employees to seek independent legal advice, at the expense of KPMG to a maximum of \$500 per individual;
- (d) The plan facilitates immediate payment to class members upon completion of the required acceptance form, and full and final release, with interest, and provides a variety of payment options to both current and former employees;
- (e) The plan does not discount any amount owing to an employee,

ADR Institute of Canada, Inc.

Annual Conference

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including any deduction for administering the ORP or the legal costs and fees of plaintiff's counsel; and

- (f) The plan provides a resolution process for the claim of any employee who disputes their overtime entitlement as calculated by KPMG or Crawford.

On the preliminary approval motion in the *Corless* case held on June 26, 2008, KPMG filed, *inter alia*, the Affidavit of Peter B. Sahagian, General Counsel of KPMG, which touched upon the proposed use of ADR as part of the ORP. Mr. Sahagian stated as follows:

To date, 56 Reconsidered Determination Letters have been rejected by employees.⁹ Crawford is in the process of attempting to resolve the claims of the 56 employees who have rejected their Reconsidered Determination Letters. In the event these claims cannot be satisfactorily resolved, they will proceed to mediation in accordance with the ORP. At the present time, no claims have been scheduled to be mediated as every effort will be made by Crawford to attempt to resolve the claims of employees prior to scheduling any mediations. In the event any claims do proceed to mediation and cannot be satisfactorily resolved at the mediation, the claims

will proceed to arbitration before an independent arbitrator affiliated with the ADR Institute of Canada, Inc. subject to the terms and conditions of the ORP. Attached as **Exhibit "D"** is a copy of the *Proposal By The ADR Institute of Canada, Inc. To Provide Mediation and Arbitration Services to Resolve Overtime Disputes Between KPMG and KPMG Current and Former Employees Pursuant to KPMG's Overtime Redress Plan*. As no claims have been scheduled to proceed to mediation, no arbitrations have been scheduled.

Conclusion

When KPMG launched its ORP, it did so without any prior notice to plaintiff class counsel or the Court, and was mindful that it had but one opportunity to design and implement a first class redress plan which would have to stand up to very close scrutiny from not only the Court but plaintiff class counsel who, some would argue¹⁰, may be expected to be sceptical about any redress plan promulgated by the defendant who their clients were driven to sue. As a consequence, KPMG, in consultation with FMC, strove to build into the ORP three levels of review of KPMG's initial decision with respect to an employee's eligibility and entitlement including both the opportunity for an employee to mediate his/her claim and to proceed to binding arbitra-

tion before seasoned experienced mediators and arbitrators whose services would be paid for entirely by KPMG. Having the mediations and arbitrations administered by the ADR Institute ensured that the process was run in a uniform, consistent and transparent manner across Canada.

I highly commend the ADR Institute as a first rate resource and service provider whose ADR services and experience proved to be invaluable to KPMG in the *Corless* matter whose assistance has helped forge a litigation management template for settlement that could be easily tailored to any class action. ❁

Norm has a very broad-ranging commercial litigation and advocacy practice which involves class action defence, securities, auditor's negligence, CCAA, banking and insolvency litigation, professional negligence, high-end disability income claims, insurance defence litigation, shareholders' disputes, Coroners' inquests and human rights litigation. Norm has extensive trial and appellate experience in the civil courts and experience before numerous regulatory and administrative tribunals throughout the Province of Ontario, such as the Ontario Securities Commission, the Institute of Chartered Accountants of Ontario, the Royal College of Physicians and Surgeons, The Alcohol and Gaming Commission, the Workers Compensation Appeal Tribunal and the Ontario Pension Board.

¹ The action was commenced on behalf of former employees of KPMG. The Statement of Claim was later amended in June, 2008 following the settlement to include current employees of KPMG.

² Not all employees are eligible under applicable employment standards legislation to receive overtime pay. As Justice Perell noted in paragraph 8 of his *Reasons for Decision* "[c]ompensation for overtime is a complicated legal and factual matter. Under the various employment standards statutes across the country not all employees are eligible for compensation for overtime pay, and if an employee is eligible, it is a factual matter whether the employee is entitled to the overtime pay."

³ Fraser Milner Casgrain LLP, KPMG's external legal counsel, provided legal advice to KPMG as to which employees of KPMG were eligible to receive compensation based upon the applicable provincial employment standards legislation. FMC's legal advice was reviewed by the law firm Lang Michener LLP who were retained independently by Crawford Class Action Services Limited, an independent third party claims administrator retained by KPMG. Lang Michener concurred with FMC's legal advice.

⁴ Full and Final Releases were only sent to employees in respect of which the proposal in the Determination Letter included payment of a sum of money. Certain Determination Letters indicated that an employee was not eligible to receive overtime and, as a consequence, was not entitled to overtime pay. Other Determination Letters indicated that an employee was eligible to receive overtime pay but was not entitled to any overtime pay as the employee was either paid the overtime he/she was entitled to or was provided with

time in lieu.

⁵ Some mediations were held via long distance conference call.

⁶ Not all claims satisfactorily resolved at mediation involved the payment of money.

⁷ In the *Corless* case, while the ORP was initiated prior to the date upon which the action was certified for settlement purposes, all of the mediations and arbitrations that have taken place to date post-dated the certification of the class action for settlement purposes on August 7, 2008.

⁸ The *Judgment for Certification and Settlement Approval* dated August 7, 2008 and Justice Perell's *Reasons for Decision* dated August 8, 2008 in the *Corless* case are available from the author who can be contacted via e-mail at norm.emblem@fmc-law.com.

⁹ 32 former employees had rejected their Reconsidered Determination Letter as of the date of Mr. Sahagian's Affidavit. 24 current employees had rejected their Reconsidered Determination Letter as of the date of Mr. Sahagian's Affidavit.

¹⁰ See Garry D. Watson and Derek McKay's paper "*Why the Defendant's Own Alternative Dispute Resolution Process Cannot Be A Preferable Procedure*", (2005) 2:1 Can. Class Action Rev.114 ("Watson & McKay") and the response to Watson & McKay of my partners John Lorn McDougall and Timothy Banks in their paper "*Why A Defendant-Proposed Alternative Dispute Resolution Process Can Be And Sometimes Should Be The Preferable Procedure*" which is available from the authors jorn.lorn.mcdougall@fmc-law.com or timothy.banks@fmc-law.com.