

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

AMENDED THIS 13 Apr. 16 PURSUANT TO  
MODIFIÉ CE A CONFORMÉMENT A  
 RULE/LA RÉGLE 26.02  
 THE ORDER OF L'ORDONNANCE DU  
DATED / FAIT LE  
Sopario  
REGISTRAR DE LOI / GREFIER  
SUPERIOR COURT OF JUSTICE / COUR SUPERIEURE DE JUSTICE

SHIREEN SONDHI

Plaintiff

-- and --

DELOITTE MANAGEMENT SERVICES LP, DELOITTE & TOUCHE LLP;  
PROCOM CONSULTANTS GROUP LIMITED

Defendants

**Proceedings commenced under the *Class Proceedings Act, 1992***

**FRESH AS AMENDED  
STATEMENT OF CLAIM**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$10,000 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for the costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

9 March 2015 (w) (w)  
Date: ~~April~~, 2016

u ALBERT u (w)  
Issued by: ALBERT  
Local Registrar

Address of Court Office:  
393 University Avenue  
Toronto, ON M5G 1E6

TO: **DELOITTE MANAGEMENT SERVICES LP,  
DELOITTE & TOUCHE LLP**  
Shelby Austin, Partner  
26 Soho Street, 4<sup>th</sup> Floor  
Toronto, Ontario M5T 1Z7

AND TO: **PROCOM CONSULTANTS GROUP, LIMITED**  
Simon Gray, Manager, Consulting Services  
2200 Yonge Street, Suite 700  
Toronto, Ontario M4S 2C6

## TABLE OF CONTENTS

<b>I – RELIEF CLAIMED</b>	<b>4</b>
<b>II – BACKGROUND</b>	<b>5</b>
<b>A – The Parties &amp; Class</b>	<b>5</b>
(i) The Defendants	5
(ii) The Class	5
(iii) The Proposed Representative Plaintiff	6
(iv) Document Review	6
<b>B – The Proposed Representative Plaintiff’s Employment with ATD and Deloitte</b>	<b>6</b>
<b>C – The Transition of the Class Members’ ATD Contracts to Deloitte and Procom</b>	<b>7</b>
<b>D – Subclass C</b>	<b>8</b>
<b>E – Deloitte and Procom’s Refusal to Honour the Initial Terms of the Contract</b>	<b>10</b>
<b>III – CAUSES OF ACTION</b>	<b>10</b>
<b>A – The Class Members were Misclassified as Independent Contractors</b>	<b>11</b>
(i) The Class Members were Employees of ATD/Deloitte	11
(ii) In the Alternative, the Class Members were Employees of Procom	13
(iii) Liability of the Employer	14
(a) Employee Benefits	14
(b) Statutory Deductions	16
<b>B – Breach of Contract during the Deloitte/ATD transfer</b>	<b>17</b>
<b>C – Procom’s Unjust Enrichment</b>	<b>18</b>
<b>D – Employer Payroll Taxes and Statutory Deductions</b>	<b>20</b>
<b>E – Punitive and Exemplary Damages</b>	<b>211</b>
(i) Breach of the Employment Standards Act, 2000	21
(ii) Duty of Good Faith and Honesty in Contractual Performance	21
<b>IV – LIABILITY</b>	<b>25</b>
<b>V – LOCATION</b>	<b>25</b>

## I – RELIEF CLAIMED

1. The Proposed Representative Plaintiff claims the following on her behalf, and on behalf of members of the Class:
  - a) an order certifying this action as a class proceeding and appointing Shireen Sondhi as Representative Plaintiff of the Class;
  - b) a declaration that the members of the Class were employees of the Defendant(s);
  - c) the sum of \$2,000,000.00 for unpaid overtime;
  - d) the sum of \$2,000,000.00 for unpaid Public Holiday pay;
  - e) the sum of \$2,000,000.00 for breach of contract and unjust enrichment;
  - f) the sum of \$1,000,000.00 for improperly removed statutory deductions;
  - g) the sum of \$12,000,000.00 for failure to remove statutory deductions and lost employment insurance benefits;
  - h) general and special damages in the amount of \$30,000,000.00 or such other amount as this Court deems appropriate;
  - i) punitive and exemplary damages based on the actions of the Defendants in the amount of \$75,000,000.00;
  - j) pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
  - k) post-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
  - l) any goods and services tax or harmonized sales tax which may be payable on any amounts pursuant to Bill C-62, the *Excise Tax Act*, R.S.C. 1985, as amended or any other legislation enacted by the Government of Canada or Ontario;
  - m) the costs of this action on a substantial indemnity basis; and
  - n) such further and other relief as counsel may advise and this Honourable Court permits.

## II – BACKGROUND

### A – The Parties & Class

#### *(i) The Defendants*

2. The Defendant Deloitte Management Services LP, Deloitte & Touche LLP (“Deloitte”) is an independent member firm of Deloitte Touche Tohmatsu Limited, a company based in the United Kingdom. Deloitte provides a range of services to clients, predominantly focused on audit, consulting, financial, advisory, risk management, and tax-related services. Since purchasing ATD Legal Services, Deloitte also provides e-discovery services to law firms.
3. ATD Legal Services (“ATD”) was a Toronto-based law firm founded by Shelby Austin (“Shelby”), which provided e-discovery services to law firms. ATD exclusively hired legal professionals for these services. ATD was purchased by Deloitte in or about January of 2014. Shelby and her ATD partner Andrea Taylor (“Andrea”) became partners of Deloitte following this purchase.
4. The Defendant, Procom Consultants Group Limited (“Procom”) is a temporary placement agency, specializing in the placement of computer and IT professionals. Procom is a third party company used by Deloitte to administer contracts.

#### *(ii) The Class*

5. This action is brought on behalf of a class of persons, defined as:

All persons having performed or currently performing Document Review and/or e-discovery services at ATD and/or Deloitte, who have been classified as “independent contractors” (the “Class”).

6. Within this Class, there are three subclasses of persons:

- A. All persons who performed Document Review and/or e-discovery services at ATD from the time of its foundation, until its purchase by Deloitte, and were classified as “independent contractors”;
- B. All persons performing Document Review and/or e-discovery services at Deloitte from the time of its purchase of ATD until present, and were or are classified as “independent contractors”;
- C. All persons who performed Document Review and/or e-discovery services at Deloitte and accepted Deloitte’s offer to work at a rate of \$47.00 per hour, and were subsequently remunerated at a lower rate.

***(iii) The Proposed Representative Plaintiff***

7. The proposed Representative Plaintiff is Shireen Sondhi (“Shireen”). Shireen resides in the City of Toronto, in the Province of Ontario, and is a lawyer licensed by the Law Society of Upper Canada (“LSUC”). Shireen worked for both ATD and Deloitte as a Document Reviewer. Shireen also accepted Deloitte’s offer of work at a rate of \$47.00 per hour, sent via email on January 14, 2015.
8. Shireen is representative of all individuals who worked while classified as independent contractors at ATD, Deloitte, or both, providing documentary review services. Shireen seeks an order that she be authorized by the Court to seek damages on behalf or for the benefit of all individuals described in paragraph 5 above (herein collectively referred to as “the Class”, “Class Members” and “Members of the Class”). Shireen further seeks an order authorizing her to represent each of the three subclasses as described in paragraph 6 above, herself being a member of each of them.

***(iv) Document Review***

9. “E-discovery services” or “Document Review” in this claim refers to work outsourced by law firms to ATD and/or Deloitte. In particular, it involves the review and analysis of documents relevant to a legal case. Document Reviewers are briefed on the issues, and then review source documents for privilege, confidentiality, and relevance to the legal issue. They use software to tag documents to specifications pre-determined by ATD and/or Deloitte’s client.

**B – The Proposed Representative Plaintiff’s Employment with ATD and Deloitte**

10. Shireen was hired by ATD on October 29, 2013. Shireen contacted ATD directly, after which she was called into the office for an interview with Andrea, a managing partner. Shireen was told that the position entailed providing Document Review or E-discovery services, and that she would be considered an independent contractor by ATD.
11. Shireen was informed that she would be paid \$50.00 per hour for time worked on projects, and would be added to ATD’s “roster” of lawyers. Although it was not discussed at the time, Shireen learned later that she would earn no vacation pay, receive no paid breaks, and would not be eligible for an overtime rate. In addition, Shireen learned that she would not have any statutory deductions removed from her salary. Andrea informed Shireen that when work became available for her on a project, she would be offered work on a contract per contract basis. Each new project would necessitate a new contract.
12. Andrea also informed Shireen that the position was conditional on her being a lawyer. Shireen was required to maintain her good standing with LSUC, and was to continue to maintain insurance with LawPRO for the duration of each project she worked on while at ATD.

13. In November 2013, Shireen and a number of her co-workers were offered work on one of two complementary projects, Project Bread and Project Butter. Project Butter was the first of multiple projects on which Shireen eventually worked with ATD and Deloitte. Shireen accepted the offer, and attended at ATD's offices. There she was instructed to log in to an ATD managed timesheet in order to track her hours, of which she was to log out for any break, including attending the washroom. She was then provided with a contract setting out the terms of her tenure with ATD. Shireen was also asked to sign an affidavit confirming that she was a licensed lawyer in good standing with LSUC. Shireen signed both of these documents.
14. Shireen was then briefed on the legal matter underlying Project Butter, and trained on the use of software for e-discovery. During her training, ATD set out a number of very clear rules for Shireen and her co-workers. Shireen was only permitted to do her work at ATD's offices, and only on the computer and software provided to her by ATD. Shireen was also not permitted to remove any documentation with respect to the case from the office, including any of her personal notes.
15. Shireen was introduced to the supervisor of the site where she was working, Greg Sullivan ("Greg"), who informed her that the hours for this project were 9:00 A.M. to 5:00 P.M., although the office was open from 7:00 A.M. to 6:00 P.M. daily and Class Members were encouraged to work additional hours. Greg assigned Shireen a computer and a login for the computer and software. Shireen was then directed to the individual who would provide her with a batch of documents to review. She was to complete her batch and then request that her supervisor assign her with a new batch to review. There was an approximate "quota" of batches that Class Members were expected to meet each day and they were informed at varying points that their pace was being monitored. Once her batch was completed, she was told that it would be re-reviewed by a member of the Quality Control Team ("QC"), assessing for the accuracy with which the documents had been tagged.
16. The above hiring, training, and working process was the standard procedure, and generally describes the experience for all Class Members and projects, both at ATD and Deloitte. Document Reviewers were required to sign in to a monitored time sheet, and use provided login information for access to ATD/Deloitte computers. Work was only to be done at ATD/Deloitte offices with ATD/Deloitte tools and software, and no materials relating to the project in any way could be removed from the premises. Hours were pre-determined, and a failure to meet them often led to removal of the Document Reviewer from the project, or from consideration for subsequent projects. Work was assigned, speed and quality were monitored, and Document Reviewers were always supervised.

#### **C – The Transition of the Class Members' ATD Contracts to Deloitte and Procom**

17. On January 14, 2014, Shireen and the other members of Subclass C were sent an email from "careers@atdlegal.com", an email account administered by Andrea. This email was an offer to join ATD's newest project, later named "Project Genesis" and that Document

Reviewers would not require LawPRO insurance and as such would receive at a rate of pay of \$47 per hour.

18. Shireen emailed back the following day, January 15, 2014, accepting the offer for work. This was standard procedure for signing onto a new project at ATD. She followed up later that day with an email asking for confirmation that her email had been received. Shireen was contracted to work on the upcoming project at a rate of \$47.00 per hour, as indicated in the offer.
19. On January 16, 2014, every individual who had accepted Andrea's offer for work received an email from careers@atdlegal.com signed by both Shelby and Andrea. The email informed the Members of Subclass C that the project for which they were contracted to work was due to begin the next day, Friday, January 17, 2014.
20. This email also informed them that ATD was being acquired by Deloitte that day, and Friday would be the first day operating as Deloitte. Shelby and Andrea advised that the Reviewers would no longer be providing legal services, and so there would be no requirement to maintain their LawPRO insurance. Finally, the email advised Shireen and her co-workers that Deloitte uses a third party called ProCom to administer contracts.
21. Much of what was being referenced in the Information Sheet was new information, entirely unprecedented in work with ATD. Specifically, there had never before been a discussion of base rates versus hourly rates or statutory deductions, and Subclass C Members had never heard previous mention of a contract with Procom.

#### **D – Subclass C**

22. Subclass C members began work the following day, Friday, January 17, 2014. Subclass C Members were briefed on the new project. The nature of the work they were performing was fundamentally unchanged from the work they had done under ATD. While at ADT, Subclass C Members had been told that Document Review work was legal in nature, requiring the maintenance of LawPRO and an active status with LSUC. Deloitte did not require Document Reviewers to carry LawPRO insurance, yet Document Reviewers were asked by Deloitte to sign an affidavit confirming they were lawyers in good standing with LSUC – an impossibility if lawyers are not paying insurance premiums when required to do so.
23. On Saturday, January 18, 2014 an email was sent to Subclass C from Kendra Holly (“Kendra”) of Procom, asking for proof that the Document Reviewers were operating a formal business. It also indicated that a Procom contract for the period of January 17, 2014 to December 31, 2015 would follow once this information was received. This contract was to be for an hourly pay rate of \$47.00 minus 7.792% Employer EI/CPP burden, and Kendra added that the Document Reviewers would not receive the information to process payment until the contract was signed.



24. This new post-deduction hourly rate was at varying points expressed by Procom as being either \$43.60 per hour, or \$43.34 per hour. The actual rate paid out to Subclass C Members was ultimately \$43.34 per hour, less employee statutory deductions (“new post-deduction hourly rate”).
25. Shireen and Subclass C entered into a contract directly with ATD/Deloitte via email on January 14 and 15, 2014, and subsequently Subclass C was informed that they were to sign a contract for these services with Procom. While Procom had been described as a “payroll administrator”, it was actually a placement agency. Procom was being paid to “place” Shireen with a company for which she already worked.
26. The fees to pay Procom were improperly deducted from Subclass C’s wages.
27. Subclass C were advised by Procom that LawPRO insurance was not required but Subclass C members were still required to pay LawPRO premiums.
28. In or about January 2014, Procom sent Shireen and Subclass C Members a new contract.
29. Along with this contract, Kendra advised Subclass C Members that they would only be sent login and access information to Procom’s invoicing system once the signed contracts had been received and approved by Procom’s accounting department. In other words, Subclass C Members would not be paid for the work they were currently doing until they signed this new contract, which had fundamentally different terms than that which had previously been agreed.
30. On Thursday, January 23, 2014, Procom held a conference call in order to answer questions that the Subclass C Members had about the contract. This call was held during the work day, and so the call was broadcast via speakerphone throughout Deloitte offices, though members could also phone in should they be away that day. Shelby was present in the Deloitte offices for this call. Present via telephone were Andrea, Sean Ford of Deloitte, and Simon Gray (“Simon”), Manager Consulting Services at Procom.
31. During this conference call, a significant amount of misinformation was passed on to the Subclass C Members by Procom and Deloitte. For instance, Subclass C Members were told:
  - a) that employee statutory deductions and employer payroll deductions had to be removed from their rate because “an individual is an employee of their sole proprietorship”;
  - b) that they could fill out an “exemption form” with the Canada Revenue Agency (“CRA”) which would exempt them from the removal of statutory deductions, when in fact the “exemption form” Document Reviewers were being directed to was an application for a ruling on their employment status through the CRA; and

- c) that they did not require LawPRO as they were not providing legal services, when in actuality LawPRO had (at the time) been informing Document Reviewers that the opposite was true.
- 32. The following Tuesday, January 28, 2014, Kendra sent out a new email to the Subclass C Members. Kendra sought to explain the employer payroll deductions to the Document Reviewers by attaching the Employer's Guide to Deductions and specifically referencing the "Placement Agency" obligations. At this point, Subclass C Members had already been working for nearly two weeks.
- 33. On February 8, 2014, Subclass C Members were sent an email from Simon who further sought to explain the rationale behind the removal of the statutory deductions by Procom. The email acknowledged that there had been many questions received from Subclass C Members that alluded to the fact that "some consultants may even be questioning our ethics", and sought to defend Procom.

#### **E – Deloitte and Procom's Refusal to Honour the Initial Terms of the Contract**

- 34. A newly amended contract was sent to Subclass C Members and Shireen. Shireen received the amended contract on February 11, 2014.
- 35. Shireen replied via email the following day to a number of Procom and Deloitte representatives, indicating that she was not comfortable signing the contract as it was written. Many members of Subclass C also refused to sign the new contract.
- 36. In or about February 2014, Subclass C Members who had refused to sign the contract were sent login information for Procom's invoicing system. It had been approximately one month since Project Genesis had begun, and Subclass C Members who had refused to sign the new contract with Procom had not been remunerated for their services at all during this time.
- 37. Shireen and many Subclass C Members were not paid for several months of work following the end of the contract. Subclass C Members were only remunerated at the new post-deduction hourly rate rather than the agreed upon contractual rate of \$47.00 per hour.
- 38. Shireen and her fellow Subclass C Members were never provided with full remuneration in accordance with their agreement of January 14 and January 15, 2014.

#### **III – CAUSES OF ACTION**

- 39. The causes of action in the Statement of Claim can be broken down into the following categories:
  - A. The Class was misclassified as Independent Contractors;

- B. Breach of Contract with Subclass C Members;
- C. Procom's Unjust Enrichment;
- D. Employer Payroll Taxes and Statutory Deductions; and
- E. Punitive and/or Exemplary Damages.

**A – The Class Members were Misclassified as Independent Contractors**

***(i) The Class Members were Employees of ATD/Deloitte***

- 40. Shireen, as Proposed Representative Plaintiff, pleads that Class Members were independent contractors in name only, and are properly classified as employees of the Defendant(s) ATD and/or Deloitte. Shireen pleads that notwithstanding any contracts signed between the parties, it is the character of her employment, rather than its classification, which ought to determine whether she is an employee or an independent contractor.
- 41. Shireen pleads and relies upon the *Employment Standards Act, 2000* (the “ESA”) – specifically Section 5 – which states that employees are not able to contract out of their statutory entitlements. Shireen pleads that any contract limiting entitlements or purporting to classify her or the Class as independent contractors are void as per the *ESA* and that therefore only the implied terms of her true employment contract ought to be enforced.
- 42. The contracts signed by Class Members to perform Document Review services were, in their form and function, contracts *of* service, rather than contracts *for* service. The actual conduct of the parties indicates the true nature of the relationship between Class Members and the Defendants. During the course of their work for ATD and Deloitte, Class Members:
  - (a) were not permitted to work from home or their own offices, but required to work on ATD/Deloitte premises at all times;
  - (b) were not permitted to determine their own hours freely, but informed what the next day's hours were to be based on the number of batches of documents available, and were unable to work beyond the time chosen by an ATD/Deloitte appointed supervisor;
  - (c) were not permitted to use their own tools or software to complete work, instead being assigned a specific computer and provided with an access code to software purchased and licensed by ATD/Deloitte;

- (d) were not permitted to have mobile devices, smart phones, or personal laptops at their work station for any purpose, and specifically the purpose of conducting any business outside of their document review duties for ATD/Deloitte;
- (e) were not permitted to determine the manner in which the work was performed;
- (f) were not permitted to remove any materials from ATD/Deloitte's offices that were related to the case, including any documents, training manuals, contracts, or even their own hand-written notes;
- (g) were not permitted to hire any assistants, associates, or other employees to assist with the completion of the work;
- (h) were not permitted to outsource work to any third parties;
- (i) were not permitted to work unless they were supervised by an ATD/Deloitte appointed supervisor at all times;
- (j) were required to review documents under strict guidelines established by ATD/Deloitte that allowed for minimal discretion;
- (k) were to seek guidance and assistance from ATD/Deloitte appointed supervisors in connection with the work being performed;
- (l) were specifically required in their contracts to "...report directly to Shelby Austin or any other party designated...";
- (m) were unable to negotiate their hourly rate, which was unilaterally decided upon by ATD/Deloitte without consultation with Members of the Class;
- (n) had no chance of profit or risk of loss associated with the work done or projects of ATD/Deloitte;
- (o) were subject to monitoring of both their work speed and their work accuracy;
- (p) were required to login to an ATD/Deloitte managed timesheet;
- (q) were subject to a seniority system, in which more senior reviewers were given priority over those with less seniority;
- (r) were subject to ATD/Deloitte's dress code when required (for instance, business attire was required during client meetings); and
- (s) were subject to policies in the workplace, including a "scent-free" policy and a "nut-free" policy.

43. Shireen further pleads that Class Members were at all times employees of ATD and/or Deloitte, rather than independent contractors placed by Procom, for the following reasons:
- (a) Class Members applied to join ATD/Deloitte's roster of lawyers directly;
  - (b) Class Members were vetted and hired to ATD and Deloitte's roster of lawyers by ATD/Deloitte Partners and Associates directly;
  - (c) Class Members were transitioned to Deloitte's roster of lawyers when Deloitte acquired ATD;
  - (d) Class Members were trained directly by ATD/Deloitte's staff and attended staff meetings with ATD/Deloitte;
  - (e) Class Members continue to be advised of new projects and work opportunities by Deloitte partners and employees directly;
  - (f) Class Members continue to accept these temporary employment offers by communicating their agreement directly to a Deloitte partner or employee;
  - (g) Procom is a placement agency for computer professionals, to which none of the Class Members applied for placement;
  - (h) Procom was introduced to the Class by Deloitte, rather than vice versa;
  - (i) Procom was represented to Class Members as a contract administrator, rather than an intermediary or agency;
  - (j) Procom had no involvement in the recruiting, vetting, or hiring of Class Members; and,
  - (k) Class Members have never attended Procom's offices, or personally met with Procom representatives.
44. Shireen submits that Deloitte would therefore be liable for employee benefits pursuant to the *ESA*, and compensation for improper remittances.

***(ii) In the Alternative, the Class Members were Employees of Procom***

45. In the alternative, if the Class Members are found not to be employees of ATD/Deloitte, Shireen pleads that Subclass B Members should be found to be employees of Procom.
46. Shireen submits that, as outlined above, the Class Members were employed in terms of a contract *of* service. This is evident when considering the level of control, the provision of equipment, the inability to subcontract and hire assistants, the lack of opportunity for

profit, the low degree of financial risk of loss, and the low degree of responsibility for investment and management and other factors.

47. In the alternative, Shireen relies upon Sections 74.3 (a) & (b), and 74.4 of the *ESA* that as a temporary help agency Procom is, by statute, the employer of any person that they place with Deloitte.
48. Procom would therefore be liable for unpaid vacation pay and unpaid overtime as described below.
49. In the further alternative, since all three companies worked together to oversee the employment relationship, all three of the Defendants should be found to be joint employers of the Class.

***(iii) Liability of the Employer***

50. Shireen pleads that she and her fellow Class Members are owed:
  - (a) Employee benefits pursuant to the *ESA*, including unpaid vacation pay, and Public Holiday pay; and
  - (b) Compensation for improper remittances.

***(a) Employee Benefits***

51. The Class, as employees, are entitled to statutory benefits despite being lawyers.
52. Shireen pleads that the work done by the Class does not constitute legal services, and therefore does not fall under the exemptions enumerated under O. Reg. 285/01 to the *ESA*.
53. O. Reg. 285/01 to the *Employment Standards Act, 2000* states:

Exemptions from Parts VII to XI of Act

2(1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed,

  - (a) as a duly qualified practitioner of,
  - (ii) law...
54. Parts VII, VIII, IX, X and XI refer to the following sections of the *ESA*:

Part VII: Hours of Work and Eating periods  
Part VIII: Overtime Pay  
Part IX: Minimum Wage

Part X: Public Holidays

Part XI: Vacation with Pay

55. As employees, not providing legal services, Class Members do not fall under the exception O. Reg. 285/01 s. 2 (1)(a)(ii).
56. Pursuant to the By-Laws of the Law Society, lawyers who do not practice or provide legal services are required to change their status, are eligible for reduced Law Society fees, and may apply for an exemption from the LawPRO requirement. These changes are permitted because an individual who is not providing legal services or working in a legal role is not considered a practitioner of law.
57. Shireen pleads that since Class Members were not providing legal services or working in a legal role, Class Members did not qualify as practitioners of law in their roles at Deloitte and ATD.
58. The Members of the Class were not provided with the benefits outlined in Parts VIII, X, and XI of the *ESA*.

*Part VIII - Overtime Pay*

59. As the work done by the Class does not constitute legal services, Class Members would not be exempt from the overtime provision of the *ESA*. For every hour worked in excess of 44 hours per week, Class Members are owed 1.5 times their hourly wage, per both the *ESA* and the principle of *Quantum Meruit*.
60. Since both the Defendant(s) and the Class kept meticulous, to-the-minute records of time spent by Class Members on each project, it would be a simple calculation to determine how much overtime would be owed to any particular Class Member.

*Part X - Public Holidays*

61. Part X of the *ESA* mandates that employers must pay their employees Public Holiday pay. Class Members were not paid wages for Public Holidays.
62. As employees, each Class Member ought to be compensated for unpaid Public Holiday pay, as per the *ESA* and related regulations. As irregular working employees, Class Members would be eligible for an averaged wage on each Public Holiday, as per s. 24 (1)(a) of the *ESA*.
63. There are nine (9) Public Holidays in Ontario each year. The Proposed Representative Plaintiff pleads that every Class Member is entitled to remuneration for Public Holidays which occurred during their tenure with ATD, Deloitte, and/or Procom.

64. Since both the Defendants and Members of the Class tracked their employment, it should be simple to determine which Public Holidays passed during each individual Class Members' tenure, and how much is therefore owed.

*Part XI - Vacation with Pay*

65. Part XI of the *ESA* provides that employees are entitled to vacation time and pay. The Proposed Representative Plaintiff pleads that the Defendant(s) denied the Class Members their Vacation Pay, properly owed under Section 35.2.
66. The amount of vacation pay is set at 4% of wages for the time worked as per Section 35.2. Therefore, each Class Member is entitled to be compensated an additional 4% for each hour that they worked, as compensation for their denied Vacation Pay.
67. Shireen pleads that each Class Member is entitled to an additional \$2.00 per hour worked while they were being compensated at a rate of \$50.00 per hour. Calculated at the other rates in dispute, Class Members are entitled to an additional \$1.88 per hour worked at the hourly rate of \$47.00, or an additional \$1.73 per hour worked at the hourly rate of \$43.34.
68. Since the Defendant(s) kept meticulous records of the hours and minutes worked by each individual Member of the Class, it would be easy to determine how much is owed to each Class Member for Vacation Pay.

**(b) Statutory Deductions**

69. Since the Class Members were incorrectly classified as independent contractors rather than employees, their statutory deductions were dealt with incorrectly.

*Prior to the Purchase of ATD by Deloitte (Sub-Class A)*

70. Prior to the purchase of ATD by Deloitte, ATD failed to make any statutory deductions or remittances on behalf of Class Members.
71. As a result, the time worked at ATD did not qualify Subclass Members for Employment Insurance ("EI"), or the Canadian Pension Plan ("CPP").
72. ATD benefitted enormously from this scheme in a number of ways. ATD saved substantial amounts of money by escaping statutorily required employer remittances for these programs. In addition, ATD was able to deduct the Harmonized Sales Tax (HST) paid to the Subclass A Members from the HST that they were required to remit to the government.
73. Because of their misclassification, Members of the Subclass A were not qualified to receive benefits related to EI, and could not gain the hours worked towards their CPP for when they retire.



74. A particularly vulnerable group, given the sporadic and often unpredictable nature of Document Review work, EI would have provided a major benefit to many Subclass Members when they were dealing with on again/off again work from ATD.
75. Shireen pleads that ATD should be obliged to pay to the government both the employer and employee portion of the remittances that were neglected during the period in question.
76. Because of their self-serving misclassification of their employees, ATD also has a legal obligation to make the Subclass Members whole. Shireen pleads that ATD ought to provide Members of Subclass A with EI benefits lost due to their misclassification, or the value thereof.

*After the Purchase of ATD by Deloitte (Sub-Class B)*

77. Although statutory deductions and remittances were made following Deloitte's purchase of ATD, Shireen pleads that these deductions were made improperly.
78. The issue of the manner in which statutory deductions were removed and remitted will be discussed in greater detail below, under issue "D – Employer Payroll Taxes and Statutory Deductions".

**B – Breach of Contract during the Deloitte/ATD transfer**

79. Deloitte breached the terms of the contract it formed with Subclass C Members on January 14 and 15, 2014.
80. As indicated above, on January 14, 2014, Andrea sent an email to Subclass C Members which stated the hourly rate going forward would be \$47 per hour.
81. Shireen pleads that this email constitutes an offer to contract, which she and her fellow Subclass C Members subsequently accepted.
82. Shireen pleads that this information sheet did not properly convey that it was Deloitte's intention to remove the corporate EI/ CPP payroll taxes from the offered \$47.00 per hour rate. Rather, this information sheet indicated that employer payroll deductions were to be removed from a "base rate, leaving a net hourly rate". As the initial January 14, 2014 offer was referred to as an "hourly rate", and the information sheet specifically stated "We will advise you of the hourly rate before you commence a new project", Subclass C Members had no reason to believe that their compensation would be anything other than \$47.00 per hour when they began working on January 17, 2014. Shireen pleads that the commencement of work by Subclass C Members on January 17, 2014 represents good consideration for the contractual term of a \$47.00 hourly rate.
83. Even were this not the case, Shireen pleads that the terms "base rate" and "hourly rate" were ambiguous and undefined, and that Subclass C Members could not be expected to

understand Deloitte's unusual intention from this informational attachment. Shireen pleads where a contract is vague and ambiguous, it should be interpreted against the interests of the drafting party, pursuant to the principle of *contra proferentem*.

84. However, even if the information sheet had clearly communicated that Deloitte and Procom intended the \$47.00 per hour to be a base rate from which corporate EI/CPP payroll deductions were removed, rather than an hourly rate, Shireen pleads that this was not the term accepted by Subclass C Members in the initial contract. Rather, this information sheet, sent after Subclass C Members had accepted the offer made by Andrea on January 14, 2014, represents an attempt to unilaterally alter the terms of the contract, which Members of the Subclass did not accept.
85. In only remunerating Subclass C Members at the new post-deduction hourly rate (\$40.38 after employee statutory deductions), Deloitte has breached the terms of the contract formed between it and the Members of the Subclass.
86. In the alternative, should the Court find that Procom was the proper employer of Subclasses B and C, Shireen pleads that Procom is responsible for these amounts.

#### **C – Procom's Unjust Enrichment**

87. Procom was unjustly enriched at the expense of Subclass C Members, and therefore has an obligation to make restitution to the Subclass.
88. No contract was ever properly formed between Procom and Subclass C Members. Following the introduction of Procom to the Subclass C, its Subclass C Members, may broadly be divided into two groups: those who refused to ever sign a contract with Procom, and those who signed a contract with Procom under duress.
89. Shireen pleads that Subclass C Members who, like her, refused to sign the contract proposed by Procom were never party to any agreement with Procom. Furthermore, Shireen pleads that the email sent to her by Simon on April 1, 2014 indicates that Procom also did not consider itself to be a party to that contract.
90. Those Subclass C Members who did sign a contract with Procom did so under economic duress, and these contracts are not enforceable.
91. Even prior to informing Class Members of their actual hourly rate, or providing them with the contract, Deloitte and Procom began indicating that Subclass C Members would not receive any payment for the work they did without executing a full set of contracts. On multiple occasions following the commencement of work for Deloitte, the Class Members were sent emails indicating that without a full set of executed contracts, Subclass C Members would not be provided the login access information which would allow them to access the timesheet – the only invoicing method which Procom would accept. This point was reinforced as Procom did not provide login access information to

those who did not sign the contract for approximately a month following the commencement of work.

92. Although login information was eventually provided to Subclass C Members who had refused to sign the contract, Members who opposed the new contract worked for a month without remuneration, and were unsure whether they would ever receive the pay they had been promised. For the duration of that month, many Subclass C Members held the legitimate belief that individuals who refused to sign the contract sent by Procom would not receive pay for the work they had performed unless they chose to pursue legal action. More importantly, they believed that refusing to sign the contract or choosing to pursue a legal remedy would cost them their place on Deloitte's roster of Document Reviewers – a fear which subsequently proved well-founded.
93. Shireen pleads that there was an existing duty for Subclass Members to be paid for the work they were performing pursuant to the earlier contract formed with Deloitte at a rate of \$47.00 per hour. No good consideration was subsequently exchanged between Procom and Subclass C Members that would render the proposed contracts that followed binding.
94. Although no contract was ever formed between Procom and Subclass C Members, Procom was nonetheless paid a placement fee at a rate of \$3.00 per hour.
95. While both Deloitte and Procom have represented that Deloitte was “absorbing” Procom's fees, Shireen pleads that this is not the case. Rather, Class Members received a reduction in their remuneration at a rate of \$3.00 per hour, which was in turn paid to Procom as a placement agency fee.
96. Shireen pleads that Deloitte and Procom represented to Subclass C Members that the new rate of \$47.00 per hour was being offered because LawPRO was no longer required, when in fact Class Members were being forced to pay for the services of a placement company which provided no benefit to them, and with whom no proper contract was ever formed.
97. Procom was unjustly enriched at the expense of Subclass C Members, individuals with whom they never formed an enforceable contract, and who stood to gain no benefit from Procom that they were not already entitled to receive pursuant to their existing contract with Deloitte.
98. Accordingly the Class is entitled to damages for unjust enrichment because:
  - (i) Procom has been unjustly enriched;
  - (ii) the Proposed Representative Plaintiff and Class Members have suffered a corresponding deprivation; and
  - (iii) there is no juristic reason for this enrichment.

## D – Employer Payroll Taxes and Statutory Deductions

99. Shireen pleads that after the transition from ATD to Deloitte, Procom improperly deducted the employer side statutory remittances and corporate EI and CPP contributions from the wages of Subclass B Members.
100. Following Deloitte’s purchase of ATD, Deloitte recognized that the true nature of the relationship between Class Members and ATD was one of employer-employee. Recognizing the potential liability of such a relationship, Deloitte sought to minimize their own liability to Class Members by unilaterally introducing Procom as a third party between themselves and the Class Members to “administer contracts”.
101. In actuality, Procom considered itself to be a computer professional placement agency, and conducted itself in this manner.
102. The basis on which Procom claimed to be properly removing statutory deductions from Class Members was pursuant to the CRA produced *Employers’ Guide Payroll Deductions and Remittances* (“*Employers’ Guide*”). Procom informed the Class in the email of January 28, 2014 sent by Kendra that the CRA defined their engagement as one of a contract *of service*, and that placement agencies placing individuals into such a role are responsible for the removal and remittance of statutory deductions.
103. Shireen pleads that as no binding agreements were made between Procom and the Class, and because Procom’s role was that of a contract administrator rather than a placement agency, that Procom was not responsible for the removal of statutory deductions from those wages. Instead, Deloitte, as the employer of the Members of Subclass B, was responsible for the remittances to the CRA.
104. Similarly, Procom’s removal of employer deductions from the agreed upon wage of the Class Members was improper in this instance. Corporate taxes are not levied on either employees or independent contractors. Rather, where a contract is found to be a contract *of service*, corporate taxes are levied against the employer or placement agency. The unilateral removal of a tax or remittance owed by Deloitte and/or Procom from the \$47.00 hourly wage accepted by Subclass C Members was in clear breach of the terms of the contract.
105. Shireen pleads that as Subclass B and C Members are employees of Deloitte, corporate remittances ought not to have been removed from their wages, and should be returned to the Class.
106. In the alternative, Shireen pleads that should the Court find that the Class are properly classified as independent contractors, that the Class therefore had no contract with Procom as a placement agency. As such, the removal of any statutory deductions and corporate taxes was improper, and should be returned to the Class.

## **E – Punitive and Exemplary Damages**

### ***(i) Breach of the Employment Standards Act, 2000***

107. The Defendant(s) attempted to structure their company in order to circumvent their obligations under the *ESA*.
108. The Defendant(s)' reason for circumventing the statutory legislation protecting employees was self-serving and intended to enrich themselves. This unfair and unjust enrichment resulted in major losses for the vulnerable Class including the loss of EI, CPP, and income.
109. In addition, the Class Members were greatly disadvantaged by the Defendant(s)' misclassification of their employment status, losing other non-financial benefits, which employers are legally required to provide to their employees.
110. For instance, ATD failed to establish a recurring pay period as required by Part V of the *ESA* at Section 11(1). Thus Class Members were required to wait, often the duration of the entire project, in order to be paid for their work, which would not be acceptable for employees. Similarly, Class Members were deprived of the protections set out in Part VII of the *ESA*, specifying hours of work and eating periods for employees, and Part VI, specifying record keeping requirements.
111. The Class ought to be compensated, and the Defendants properly punished, by an award of punitive and/or exemplary damages for the blatant violation and deprivation of statutory rights and high-handed, egregious conduct.

### ***(ii) Duty of Good Faith and Honesty in Contractual Performance***

112. Shireen pleads that the Defendants in this case had a duty to act in good faith in the performance of their contractual obligations. This duty required the Defendants to behave honestly and reasonably in their contractual performance so as to give appropriate consideration to the legitimate interests of the Class, their contracting partners.
113. Shireen pleads that in the performance of their contractual obligations, the Defendants did not have appropriate regard for the Class, and instead actively sought to undermine the interest of Class Members where it was beneficial to ATD/Deloitte and Procom.
114. Additionally, and in the alternative, Shireen pleads that at a minimum the Defendants have a duty of honest performance, requiring that they not lie or mislead Class Members about their contractual performance. Class Members ought to have been able to rely on a minimum standard of honesty from Deloitte, ATD, and Procom in relation to their contracts. Instead, the Defendants deliberately and knowingly misled the Class on a repeated and ongoing basis.

115. Shireen pleads that the Defendants breached their duty of good faith and honest contractual performance, constituting an actionable wrong for which punitive damages would be properly awarded.
116. ATD/Deloitte:
- (a) Was dishonest about the reason that the remuneration of Class Members was reduced from \$50.00 per hour, alleging it was related to the LawPRO requirement, rather than fees levied by Procom;
  - (b) Was dishonest about Procom's role, indicating that they had been contracted by Deloitte to administer contracts, when they were being used as a placement agency to create the impression of an arm's length relationship between Deloitte and Class Members in their attempt to limit their liability as an employer;
  - (c) Unilaterally forced Class Members to form a contract with Procom, withholding wages from Class Members who refused to enter into a contract with Procom;
  - (d) Claimed to have "absorbed" Procom's fees, when they were actually removed from the wage of Class Members;
  - (e) Authoritatively told Class Members that LawPRO was not required for document review work, although at the time LawPRO had released official announcements to the contrary;
  - (f) Formed a contract with Subclass C Members for a rate of \$47.00 per hour, which they subsequently refused to honour;
  - (g) Refused to engage in any meaningful communication with Subclass C Members about the breach of contract, always directing Class Members to Procom representatives;
  - (h) Advised Class Members to either (i) apply for a ruling from the CRA for a determination of independent contractor status, or (ii) incorporate a business, as a means of obtaining the \$47.00 hourly rate agreed to, though both options were solely in Deloitte's and Procom's interest; and
  - (i) Intimidated Class Members into silence by terminating Shireen for voicing objections to Deloitte's actions.

117. Similarly, Procom:
- (a) Charged placement fees for Class Members with whom they had no binding agreement;
  - (b) Removed employer payroll deductions from Class Members' wages;
  - (c) Participated in the coercive imposition of their contract on Class Members, by withholding timesheet login access and wages from Class Members who refused to sign a contract;
  - (d) Advised Class Members to act in opposition to their own interests, in either (i) apply for a ruling from the CRA for a determination of independent contractor status, or (ii) incorporate a business, as a means of obtaining the \$47.00 hourly rate agreed to; and
  - (j) Intimidated Class Members into silence by terminating Shireen for voicing objections to Deloitte's actions.
118. Shireen submits that this conduct was particularly egregious given the vulnerability of the Class and the blameworthiness of the Defendant's actions.
119. The Class Members in this case are particularly vulnerable in relation to the Defendants.
120. The vast majority of Class Members in this case are new and recent calls to the bar. The combination of a stumbling economy and ever-increasing numbers of new graduates from Canadian law schools has flooded the market with young lawyers, competing for fewer and fewer positions in their field. The failure of large and reputable law firms in Canada has only served to worsen their prospects, as more experienced and established counsel enter the marketplace to compete for these jobs.
121. This issue has been further compounded by the rise of document review companies like Deloitte, which has led to the outsourcing of legal work, and decrease in available positions for new calls. While LSUC has made attempts to introduce programs to compensate for the reduction in articling positions, there are few options available to newly called lawyers.
122. For many young lawyers, saddled with staggering student debt and desperate not to leave the field of law, document review is a last resort. Deloitte is one of only a few document review companies in Ontario, and for many Class Members, represents their sole source of income. There are limited alternatives available to Class Members, and as such, Procom and Deloitte are in great positions of power over the Class.
123. ATD/Deloitte exercised this power imbalance to its fullest. Knowing how desperate many young lawyers were for work in the legal field, and the ready availability of replacements, ATD/Deloitte used the constant threat of termination and removal from

their roster to exploit Class Members, making examples of vocal individuals like Shireen. ATD/Deloitte would regularly remove Class Members from projects arbitrarily and without warning and openly depicted favoritism by recalling some, but not other Document Reviewers to subsequent projects.

124. ATD/Deloitte used this power imbalance to use Class Members solely for their own benefit. Class Members were expected to honour the terms of any agreement they made to work on projects, but to accept early or sudden ends to the agreement where terminated by Deloitte. They were often expected to work an unreasonable number of hours well over a standard work week – often taking a full lunch break or requesting days off was frowned on, and Document Reviewers who did so were often not invited back to work on subsequent projects.
125. ATD/Deloitte exploited this power imbalance, forcing Class Members to silently accept their misclassification as independent contractors, deprivation of employee protections, breaches of contract, unexpected wage cuts, and even the unilateral imposition of a contract with a third party placement agency.
126. Similarly, Procom took advantage of the power imbalance that ATD/Deloitte had over its independent contractors to forcibly impose a placement contract on Class Members. Individuals who had no desire to contract with Procom, and stood to gain nothing from the agreement, were given no option but to sign Procom's agreement.
127. Moreover, when individuals objected to the unilateral imposition of these contracts, Procom used their management of timesheets and invoices to withhold wages from those Class Members who would not sign contracts, or terminate their agreements with Deloitte.
128. Shireen pleads that this behaviour is particularly egregious given that:
  - (a) The actions of the Defendants were planned and deliberate;
  - (b) The intent of the Defendants was to enrich themselves, at the expense of the Class;
  - (c) The Defendants have persisted in their conduct for a significant length of time;
  - (d) The Defendants are aware of the impact of their conduct on the Class;
  - (e) The Defendants profited and continue to profit from their misconduct.
129. The conduct engaged in by the Defendants in this matter is dishonest, exploitative, and in bad faith. Shireen pleads that such behaviour should be strongly denounced by the Courts to deter other employers from engaging in similar practices.
130. Shireen pleads that punitive and exemplary damages would be rightfully awarded in the circumstances.



#### **IV – LIABILITY**

131. It is the position of the Proposed Representative Plaintiff that Deloitte is a successor employer of ATD Legal Services, and that Deloitte ought therefore to have shared liability for all actions of ATD regarding this action. Separately, and in addition, the Plaintiff relies upon Section 4 of the *ESA*, referring to relation to associated or related business, and pleads that the Defendant(s) ought to be treated as one employer. Further, also separately and in addition, the Plaintiff relies upon the common law principles in her submission that the Defendant(s) ought to be treated as one employer. Deloitte is at law liable for damages suffered by the Class for the acts and omissions of ATD Legal Services.

#### **V – LOCATION**

132. Shireen proposes this action be tried at the City of Toronto, in the Province of Ontario.

Date of Issue: April , 2016

**MONKHOUSE LAW**  
357 Bay Street, Suite 804  
Toronto, ON M5H 2T7

**Andrew H. Monkhouse** (64529L)  
Tel: 1-416-907-9249  
Fax: 1-888-501-7235

**LANDY MARR KATS LLP**  
Suite 900 - 2 Sheppard Avenue East  
Toronto, ON M2N 5Y7

**David Fogel** (58572A)  
**Samuel S. Marr** (28544M)  
Tel: (416) 221-9343  
Fax: (416) 221-8948

Lawyers for the Plaintiff