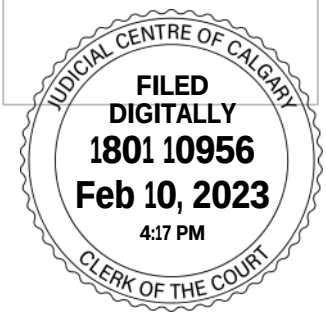
COURT FILE NUMBER	1801-10956
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF(S)	RENÉE DELORME as Representative Plaintiff
DEFENDANT(S)	HER MAJESTY THE QUEEN IN RIGHT OF CANADA, IBM CANADA LIMITED.
DOCUMENT	**SUPPLEMENTAL BRIEF OF THE PLAINTIFF IN SUPPORT OF SETTLEMENT APPROVAL AND FEE APPROVAL**

Clerk's Stamp



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	NAPOLI SHKOLNIK CANADA Attention: Clint Docken, K.C. 342 – 4 Avenue S.E. Calgary, Alberta T2G 1C9 Ph: (403) 457-7778 Fax: 1-877-517-6373 James H. Brown & Associates Attention: Rick Mallett 2400 Sun Life Place 10123-99 Street Edmonton, AB T5J 3H1 Phone: (780) 428-0088 Fax: (780) 428-7788

A Class Proceeding pursuant to the *Class Proceedings Act,* Chapter S.A. 2003 ch C-16.5

PART 1 – NATURE OF THE APPLICATION

1. In this Application, the plaintiff seeks an order:

    a. Approving the settlement agreement (the "Settlement Agreement") made between the Representative Plaintiff and the Class in this class action with the defendant, IBM Canada Limited ("IBM"); and

b. Approving the Class Counsel fees of 25% of the Settlement Amount, as defined below, plus applicable taxes and disbursements (including the cost of notice).

PART 2 – SUMMARY OF FACTS

Background

2. This is a proposed class action brought on behalf of employees of the Government of Canada against IBM and the Government of Canada in connection with the implementation of the Phoenix Pay System.

3. This action was originally commenced by Statement of Claim filed with the Court on August 2, 2018. The Statement of Claim was amended on March 21, 2019.

4. In brief, the Amended Statement of Claim alleges as follows:

    a. In or about 2014, IBM wrote a computer program, known as the Phoenix Pay System, for the Government of Canada. The Phoenix Pay System was intended to automate the payments of wages for all employees and contractors employed by the Government of Canada throughout the country. At the time that IBM implemented the system, it knew that the system contained numerous faults because they had experienced similar problems in Australia and other jurisdictions.

    b. IBM failed to take reasonable steps to ensure that the Phoenix Pay System would accurately and reliably remit the amounts due to various employees and contractors for their relevant pay periods.

    c. As a result, the Phoenix Pay System, when delivered to the Government of Canada was fraught with errors and would frequently either overpay, underpay or fail to pay at all.

    d. Upon receiving the faulty product and knowing of these faults, the Government, in breach of its duties in contract, tort and otherwise at law, implemented the Phoenix Pay System for all of its employees and contractors.

    e. At the time that the Phoenix Pay System was implemented, the Government of Canada knew or ought to have known that it contained faulty programming such that it would frequently overpay, underpay or not pay its employees or contractors at all.

    f. As a result of the systemic flaws of the Phoenix Pay System, the members of the class were repeatedly either overpaid, underpaid, or not paid at all during various pay periods over the course of the Class Period, resulting in significant financial hardship, and loss suffered by the members of the class.

    g. During the Class Period, both the Government of Canada and the Defendant IBM, failed to take reasonable steps to ensure that the errors being made by the Phoenix

system did not reoccur or to fix the problems with the code and further failed to replace the Phoenix Pay System with a system that did not result in repeated instances of being overpaid, underpaid, or not paid at all during a pay period.

h. When the class members were in situations where they were overpaid, the Government of Canada would demand return of amounts overpaid, including in some cases requiring the employee to reimburse for statutory withholdings, resulting in the employee repaying more than they mistakenly received. This often occurred in a situation where such amounts had already been spent and the class members were not in a position to easily repay the amounts.

i. The Plaintiff worked in various positions as a unionized worker, and as a non-unionized contract employee during the Class Period and in each case she experienced a number of instances of either overpayment, underpayment, misreporting in pay stubs or T4's or not being paid at all during a pay period. As results of these failures to pay the appropriate amounts due, the Plaintiff suffered significant financial hardship.

The Quebec Action

5. There is a parallel class action in Quebec in respect of these same issues (the "Quebec Action").

6. The Quebec Action was only commenced against the Government of Canada. IBM is not a defendant in the Quebec Action.

7. The Quebec Action was certified on April 3, 2018. However, the class that was certified was smaller than originally sought by the Plaintiff in the Quebec Action. The Plaintiff had sought to certify a class consisting of all persons who worked for the Government of Canada from 2016 onward. However, the Quebec Superior Court of Justice excluded from the scope of the class those persons who are subject to the grievance procedure under Part 2 (sections 206, 208, 209) under the *Federal Public Sector Labour Relations Act*.

8. The impact of the Quebec Superior Court's decision was to exclude a substantial percentage of the Government of Canada's employees from the scope of the proposed class. The Plaintiff appealed the certification decision as to the scope of the class size. The Quebec Court of Appeal dismissed the appeal.

9. The Plaintiff's application for leave to appeal that decision to the Supreme Court of Canada was dismissed on April 23, 2020.

10. The Quebec Action against the Government of Canada remains ongoing.

Investigation into IBM Canada Limited

11. IBM has consistently denied any liability for any problems with the Phoenix Pay System. While there have been numerous government investigations and reports into the problems

with the Phoenix Pay System, those reports point the finger at the Government of Canada, rather than IBM.

12. In March 2018, IBM executives stated publicly that the problems with the system were not the fault of the software developed by IBM, but rather the rollout by the Government. As reported in a March 28, 2018 Toronto Star article:

> Computer systems giant IBM says the company is not to blame for the disastrous rollout of the Phoenix pay system because it was not responsible for key elements of the scheme that has left tens of thousands of public servants shortchanged across Canada.
>
> Speaking publicly for the first time prior to Senate testimony Wednesday night, IBM executives say the company flagged concerns nearly three years ago to top federal bureaucrats and urged Ottawa to delay the launch of Phoenix.
>
> In interviews with the Toronto Star and Global News, IBM said the company's warnings were communicated verbally and in writing to senior officials within the public services department from July and August 2015, and continued until January 2016, a period that spanned the federal election that saw the Conservative government replaced by the Liberals.
>
> IBM said it told senior federal project managers the Conservative decision to start rolling out a new pay system in October 2015, which was slated to be fully in place in December 2015, was "not realistic." The company says it advised the federal government should delay the 2015 launch for at least six to eight months, until July or August 2016.
>
> But IBM's advice was rejected, senior executives said.
>
> Federal officials told IBM the project start could be delayed only until February 2016, and the second phase that would see all departments using the new software had to "go live" by April 2016 because the government had already sent out notifications to the hundreds of clerks who processed paycheques in the federal government that their jobs were being eliminated by April. IBM dealt with senior officials at the assistant deputy minister level, and did not directly deal with ministers, the company said.
>
> […]
>
> IBM warned the government that not all the requested software changes could be made on time for the 2016 rollout, and asked the government to prioritize the changes it wanted.
>
> By the time the system went "live," many functions, such as how to account for and process retroactive pay, were not in place, the Senate committee has heard. Since then, backlogs have grown and compounded what IBM said are human errors. IBM said responsibility for training — originally part of its contract — was removed in 2014 when the federal project managers said the government would take over that aspect of the transformation in-house.

13. The Auditor General prepared two reports regarding the implementation of the Phoenix Pay System:

a. The first report was from fall 2017 and was entitled "Report 1—Phoenix Pay Problems".

b. The second report was from spring 2018 and was entitled "Report 1—Building and Implementing the Phoenix Pay System".

14. Both Auditor General reports identified deficiencies by the Government of Canada in respect of the implementation of the Phoenix Pay System. Neither report criticized IBM's conduct in any way.

15. The Senate Standing Committee on National Finance also conducted an investigation into the causes of the failure of the Phoenix Pay System. The Committee prepared a report entitled "The Phoenix Pay Problem: Working Toward a Solution", which was released in July 2018. Again, that report identified deficiencies by the Government of Canada in respect of the implementation of the Phoenix Pay System, but it did not criticize IBM's conduct in any way. That report repeatedly referenced testimony that IBM had warned the Government of Canada that the Phoenix Pay System was not ready to launch on the timeline that had been set by the Government of Canada, but that the Government of Canada ignored IBM's warnings. That report also summarized testimony from a third-party evaluator of the Phoenix Pay System that confirmed that IBM did precisely as expected:

> Representatives from Goss Gilroy, who evaluated the pay transformation initiative for the government, concluded that the initiative had not taken into account the vast scope of the transformation, which was not simply a software replacement or a relocation of employees but was a complete reworking of a complex pay system. Many witnesses, including labour organizations, pointed out that the government did not understand what pay advisors did on a daily basis.
>
> When asked about the performance of IBM, Jim Alexander, an associate at Goss Gilroy, said that after looking at the various documents and talking to stakeholders, it was clear that the government had spent many years developing extremely detailed requirements that specified exactly what a private sector company should do if it won the contract. In his view, IBM did precisely what the government specified, responding to multiple requests for changes throughout the length of the contract. [emphasis added]

16. IBM was added as a defendant in this case because, as was publicly reported: a) they had been involved in the rollout of the Phoenix Pay System; and b) there was a public report of difficulties in the rollout of a similar pay system in Australia. Given IBM's involvement in the Phoenix Pay System, and the possibility that new evidence might emerge, Plaintiffs' counsel felt that it was prudent to include IBM as a defendant.

17. Since the Statement of Claim was issued, Plaintiff's counsel has not obtained any evidence that IBM's conduct in the rollout of the Phoenix Pay System was inappropriate. There have not been any new third-party reports or evaluations that have criticized IBM's conduct in relation to the Phoenix Pay System in any way.

18. Other than this proceeding, there has been no other litigation brought by anyone else against IBM in respect of the implementation of the Phoenix Pay System by the Government of Canada.

Other Settlements with Class Members

19. Independent of this class action or the Quebec Action, all Government of Canada employees have the ability to submit claims for various expenses they have incurred due to the Phoenix Pay System. The Government of Canada first made this available in October 2016.

20. The nature of that reimbursement process has evolved over time. At present, the Government of Canada makes the following categories of compensation available to all Government of Canada Employees:

    a. Claims for out-of-pocket expenses—all employees who experienced problems with the Phoenix Pay System can submit a claim for compensation for out of pocket expenses.

    b. Claims for impacts to income taxes and government benefits—Employees who were supposed to receive their salary in one year but only received it in a following year may have paid a higher rate of income tax or received reduced government benefits and credits. The Government of Canada allows individuals to submit claims for these losses.

    c. Reimbursement for tax advice—Employees who sought tax advice to understand tax implications caused by errors in their pay could receive up to $200 per year for various tax years.

    d. Advances on government benefits—Employees who received a reduction in government benefits due to an overpayment could receive an advance until all Phoenix issues were resolved.

21. All of the aforementioned programs are available to all Government of Canada employees, irrespective of whether they are covered by particular collective agreements.

22. In addition, the Government of Canada has also entered into agreements to provide additional compensation to members of various public sector unions. In June 2019, the Government of Canada reached an agreement with several public sector unions to provide them with compensation. In 2020, the Government of Canada and the Public Service Alliance of Canada (PSAC) reached a joint agreement to compensate current and former employees who may have been impacted by the Phoenix Pay System. PSAC is the largest public sector union representing employees working for the Government of Canada. The vast majority of members of the proposed class in this case are members of various public sectors therefore benefit from one of these agreements.

23. In general terms, under those agreements, current and former government of Canada employees who are covered by those agreements have the ability to receive various forms of compensation, including:

    a. Lump sum general damages for stress, aggravation, pain and suffering; and

    b. Additional compensation, evaluated on a case-by-case basis, for those who have suffered severe personal or financial impacts or financial costs and lost investment income.

24. These amounts are in addition to the amounts that all government employees can claim, as described above.

25. While the Government of Canada's program to reimburse claims for various expenses pre-dated the issuance of the Statement of Claim in this action, the settlements with the public sector unions post-date the issuance of the Statement of Claim.

IBM's Application to Strike the Claim

26. On March 25, 2021, IBM delivered an application to strike the Plaintiff's Amended Statement of Claim.

27. The basis of IBM's application was that the Amended Statement of Claim did not disclose a cause action. IBM's application contended that there were no facts pleaded in the Amended Statement of Claim that, if true, would establish a relationship of proximity between any member of the proposed Class and IBM.

The Settlement Agreement

28. After IBM delivered its application to strike the Amended Statement of Claim, Plaintiff's counsel began having settlement discussions with counsel to IBM.

29. IBM felt confident about its chances of success on both its application to strike and, even if that was unsuccessful, in defending the case on the merits. IBM's counsel was initially sceptical about the value of any settlement discussions at all. IBM's counsel initially advised that their client was not willing to pay any settlement whatsoever.

30. However, after an extended period of negotiation, Plaintiff's counsel and IBM's counsel ultimately agreed on June 28, 2021 in a non-binding term sheet to resolve the matter in exchange for a payment by IBM of $100,000.

31. It then took nearly a year to formalize that non-binding term sheet into a formal settlement agreement. Even after that non-binding term sheet was signed, it took several months for IBM's counsel to secure sign-off from IBM to a fulsome settlement agreement that included any payment whatsoever, given IBM's views on liability.

32. The Settlement Agreement was ultimately agreed to effective April 21, 2022. Pursuant to the Settlement Agreement:

a. IBM will make a payment of $100,000 in resolution of this matter. That amount would be used in part to pay Plaintiff's counsel's fees and disbursements, and the balance would be provided to Food Banks Canada.

b. Upon approval by the Court, the class will receive notice informing them of the principal elements of the Settlement Agreement, the certification of the Action as a class proceeding, and the right to opt-out of the Action.

c. The Settlement Agreement contemplates that the opt-out period will run after Settlement Approval is granted. In particular, the Settlement Agreement contemplates that, after Settlement Approval is granted, Class Members will be able to opt out for 60 days after the date on which the Notice of Certification and Settlement Approval is publicized. The only caveat is that if more than 10% of the total number of Class Members opt out, IBM has the right to terminate the Settlement Agreement. If that occurs and IBM decides to terminate the Settlement Agreement, the Settlement Agreement will come to an end, and all orders made in furtherance of settlement will automatically be set aside, and the litigation will resume.

Notice of the Settlement Agreement

33. The form of notice of hearing the impending settlement approval motion was approved by the Court.

34. Consistent with the Court's approval, a Notice of Hearing was published in the Globe & Mail on August 12, 2022.

35. Plaintiff's counsel also prepared the website www.phoenixibmsettlement.com as another means of notifying class members about the settlement with IBM Canada. The Settlement Agreement and Notice of Hearing have been posted on that website since August 24, 2022.

36. Since that time, no class member has contacted Plaintiff's counsel to object to or raise any concerns about the proposed settlement.

PART 3 – ISSUES AND THE LAW

37. There are two issues on this application:

a. Should the settlement agreement between the plaintiff and IBM be approved? The answer is yes. The proposed Settlement Agreement is fair, reasonable and in the best interest of the Settlement Classes and ought to be approved.

b. Should the counsel fee sought be approved? The answer is yes.

Factors to be Considered on Settlement Approval

38. In *Jeffery v Nortel Networks Corp*., the Supreme Court of British Columbia distilled the relevant factors on settlement approval into four broad questions for consideration:

    a. Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the Court that the settlement is based on a proper analysis of the claim?

    b. Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?

    c. On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation?

    d. Has sufficient information been provided to the members of the class represented by the representative plaintiff, and, if so, are they generally favourably disposed to the settlement?[1]

39. The principles to be applied on a motion for settlement approval have been summarizing as follows:

    a. to approve a settlement, the Court must find that it is fair, reasonable, and in the best interests of the class;

    b. the resolution of complex litigation through the compromise of claims is encouraged by the Courts and favoured by public policy;

    c. there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for Court approval;

    d. to reject the terms of a settlement and require the litigation to continue, a Court must conclude that the settlement does not fall within a zone of reasonableness;

    e. a Court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the Court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests

[1] Jeffery v Nortel Networks Corp., 2007 BCSC 69 at paras 18 and 28 [Book of Authorities ("BA") at Tab 1].

of those affected by it when considered in light of the risks and obligations associated with continued litigation;

f. it is not the Court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the Court's function to litigate the merits of the action or simply rubber-stamp a proposed settlement; and

g. the burden of satisfying the Court that a settlement should be approved is on the party seeking approval.[2]

40. In determining whether to approve a settlement, the Court may consider the following factors:

a. the likelihood of recovery or likelihood of success;

b. the amount and nature of discovery, evidence or investigation;

c. the proposed settlement terms and conditions;

d. the recommendations and experience of counsel;

e. the future expense and likely duration of litigation;

f. the recommendation of neutral parties, if any;

g. the number of objectors and nature of objections;

h. the presence of arm's-length bargaining and the absence of collusion;

i. information conveying to the Court the dynamics of, and the positions taken by the parties during, the negotiations; and

j. the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.[3]

41. The Court must be assured that a settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants.[4]

---

[2] *Nunes v Air Transat AT Inc*, [2005] OJ no 2527 (SCJ) at para 7 [BA Tab 2] and *Sparvier v Canada (Attorney General)*, 2006 SKQB 533 at para 6 [BA Tab 3].
[3] *Nunes v Air Transat AT Inc*, [2005] OJ no 2527 (SCJ) at para 7 [BA Tab 2].
Dabbs v Sun Life, Assurance Company of Canada, [1998] OJ No 1598 (Gen Div) at para 13, aff'd (1998), 41 OR (3d) 97 (CA), leave to appeal to SCC denied [1998] SCCA No 372 [BA Tab 4].
McKay v Air Canada, 2015 BCSC 1874 at paras 8-9 [BA Tab 5].
Adrian v Canada (Minister of Health), 2007 ABQB 376 at paras 12-14 [BA Tab 6].
[4] *Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd,* [2005] OJ no 1118 (SCJ) at para 115 [BA Tab 7].

42. In assessing the reasonableness of a settlement agreement, the Court is entitled to consider the non-monetary benefits, including the provision of cooperation.[5]

Application of the Factors to be Considered

Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the Court that the settlement is based on a proper analysis of the claim?

43. Experienced class action counsel acting on this matter have concluded that the case against IBM faces significant risks (described below) and is unlikely to succeed.

44. Plaintiff's counsel has considered the information described above, including:

    a. The fact that several Government of Canada reports have not blamed IBM for the issues with the Phoenix Pay System;

    b. The fact that IBM has publicly denied any responsibility for the difficulties with the Phoenix Pay System;

    c. The fact that there is no publicly available information indicating that there were any failures by IBM in connection with the Phoenix Pay System, despite the fact that more than six years have passed since problems with the Phoenix Pay System were firstly publicly reported;

    d. The fact that the Government of Canada has made various forms of compensation available to class members;

    e. The fact that IBM has not been named as a Defendant in any other litigation relating to the Phoenix Pay System; and

    f. The challenges in establishing that IBM owed a duty of care to class members.

45. Plaintiff's counsel are experienced class actions counsel. Napoli Shkolnik Canada is working with the law firm of James H. Brown and Associates in the prosecution of the within Action:

    a. Clint Docken, Q.C., is the lead counsel in this action. He was called to the bar in 1974, and he has since had extensive experience in litigation, including class proceedings. Mr. Docken has acted as counsel in a number of major mass tort actions including the Provincial Training School (Sterilization) and Indian Residential School cases, Hepatitis C (tainted blood), and the Bre-X litigation. He has also participated in a number of significant class actions including Menu Foods, Maple Leaf Foods, and XL Foods.

[5] *Nutech Brands Inc v Air Canada*, [2009] OJ No 709 (SCJ) at paras 29-30, 36-37 [BA Tab 8].

b. In addition to Mr. Docken, Rick Mallett at James H. Brown and Associates, and other lawyers at that firm, have acted along with Mr. Docken. Mr. Mallett is the head of the class actions team at James H. Brown and Associates and an experienced class actions lawyer. James H. Brown and Associates has been counsel on a number of significant class actions, including long-term care class actions, the XL Foods class action, the Robin Hood Flour class action, and the Onion Salmonella outbreak class action.

46. Based on all of the above, experienced Plaintiffs' counsel has sufficient information to be able to conclude that the claim against IBM is unlikely to succeed.

Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?

47. The Settlement Agreement was negotiated at arm's length, on an adversarial basis, over an extended period of time. It was reached by experienced counsel on both sides.

On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation?

48. The settlement amount admittedly involves a modest payment by IBM that will not see any direct compensation provided to class members. Despite that, the plaintiffs are well served by accepting the settlement rather than proceeding with the litigation.

49. There are significant risks to continuing with litigation against IBM that, in the aggregate, make it very unlikely that a better outcome would be achieved through ongoing litigation.

50. First, if this matter is not resolved with IBM, IBM intends to proceed with its application to strike. The basis of IBM's application is that the Amended Statement of Claim did not disclose a cause action and that there were no facts pleaded in the Amended Statement of Claim that, if true, would establish a relationship of proximity between any member of the proposed Class and IBM.

51. In two relatively recent Supreme Court of Canada decisions—*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 and *1688782 Ontario Inc. v. Maple Leaf Foods Inc*., 2020 SCC 35—the Supreme Court held that "[i]n cases of negligent misrepresentation or performance of a service, two factors are determinative of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance."

52. The Amended Statement of Claim does not plead either that IBM made any specific undertaking to class members, nor does it plead that the Plaintiff or any other class members relied on that undertaking. In addition, Plaintiffs' counsel are not aware of any material facts that they could plead as to any express undertaking provided by IBM or any reliance on such an undertaking by me or other class members.

53. There is a significant risk that IBM would be successful on its application to strike, as described above. If IBM is successful on that application, that would end the proceedings as against IBM.

54. Second, there is the risk that the Plaintiff would not be successful in an application to certify this case as a class action as against IBM. The Plaintiff has not yet delivered her certification application, and accordingly the defendants have not yet responded to the certification application. Moreover, given that no settlement has been reached with the Government of Canada, the Plaintiff does not want to include any information that might prejudice our position on a certification application. However, it suffices to say that certification is never a foregone conclusion.

55. While the Quebec class action was authorized, the bar for authorization in Quebec is lower than the bar for certification in other provinces. Moreover, IBM is not a defendant in the Quebec Action. Consequently, the successful authorization in Quebec is no guarantee that this proceeding would be certified as against IBM.

56. Third, even if the action were to be certified as against IBM, there is a risk that the class would be unsuccessful on the merits against IBM and that this action would be dismissed either at a summary judgment motion or at a common issues trial. As described above, there is a significant body of evidence that points away from IBM's responsibility for the problems with the Phoenix Pay System, and the Plaintiffs do not presently have any evidence to the contrary.

57. Fourth, even if the class were successful on the merits of their claims as against IBM, there is significant uncertainty as to the quantum of damages to which class members would be entitled. As described above, the Government of Canada has made several different types of compensation available to class members, and IBM will no doubt argue that all of those forms of compensation would have to be taken into account in considering the amount of damages award that class members would receive. As a result, there is a risk that the class as a whole might receive only modest compensation, even if the class were to be successful in establishing IBM's liability.

58. Fifth, leaving aside the risks described above, there was a risk of prolonged and expensive litigation, if the litigation were to continue. Continued pursuit of this action would involve the expense of arguing a contested certification application, holding oral discoveries, obtaining documentary discovery and reviewing the materials produced pursuant to those processes, attending a trial of the common issues, and finally, if necessary, holding trials to make determinations regarding any individual issues. As noted above, IBM has consistently denied any liability, and there is no reason to believe that they would be prepared to pay a larger settlement at any later stage.

59. Even if the Plaintiff were successful at each and every one of these stages of the proceeding, and even without taking into account the likelihood of further appeals, the action would have taken a number of additional years to come to a resolution, and cause this matter to remain outstanding for several additional years.

60. Finally, this Settlement will not disadvantage Class Members because the claim against the main actor of harms caused, the Government of Canada, still exists.

61. The Settlement Agreement provides that the settlement amount will be donated to the Food Banks Canada. This is a sensible approach considering the large size of the Class relative to the small amount of the award. Further, students constitute a large part of the Class and it is known that post-secondary students experience widespread food insecurity within their demographic.[6] It is also possible that other Class Members had to resort to using food banks or other similar services during the period of time in which the failed implementation of the Phoenix Pay System resulted in a disruption to their expected income.

62. The application of these factors to the facts discussed above demonstrates that the Settlement Agreement is fair, reasonable, and in the best interests of the class. The Settlement Agreement should be approved.

Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

63. A notice has been provided to Class Members:

    a. A Notice of Hearing was published in the Globe & Mail on August 12, 2022.

    b. The Settlement Agreement and Notice of Hearing have been posted on the website www.phoenixibmsettlement.com since August 24, 2022.

64. Since that time, no class member has contacted them to object to or raise any concerns about the proposed settlement.

Factors to be Considered on Approval of Fees and Disbursements

65. The purpose of the fee approval requirement is to ensure that the fee charged to the class is fair and reasonable, and that Class Counsel are appropriately compensated. Class action litigation is challenging and risky. The fee "must be fair and reasonable. It should not only reward counsel for meritorious efforts, it should encourage counsel to take on difficult and risky class action litigation. The risk undertaken by the lawyer, and the success achieved, are important considerations in determining the fee."[7]

66. The real risk of failure, with financial consequences to counsel, cannot be ignored.

67. In assessing the fairness and reasonableness of requested fees, the Courts have recognized that the objectives of Class Proceedings—judicial economy, access to justice and behaviour modification—which are dependent, in part, upon counsel's willingness to take on class proceedings.

68. Contingency fees help promote access to justice in that they allow counsel, not the client, to finance the litigation. Percentage contingency fees also promote judicial economy in

---

[6] Nathan Sing, "The Fight to End Hunger on Canadian University Campuses" (October 7, 2021), online: *Macleans* https://www.macleans.ca/education/the-fight-to-end-hunger-on-canadian-university-campuses/

[7] *Boulanger v Johnson & Johnson Corp*, 2010 ONSC 2359 at para 3 [BA TAB 12].

that they encourage efficiency in the litigation and discourage unnecessary work that might otherwise be done simply to increase the lawyer's base fee. Percentage contingency fees properly emphasize the quality of the representation and the results achieved, and ensure that counsel are not penalized for efficiency.[8]

69. This, in turn, depends on the incentives available to counsel to assume the risks and accept the financial burden of carrying class proceedings. In most cases, a premium on fees is provided to reward class counsel for accepting this risk and taking on meritorious but difficult matters. Effective class actions would therefore not be possible without contingency and percentage-based fees.[9]

70. The amount payable pursuant to the retainer agreement is the starting point for the analysis of the proposed fee. As noted by Madam Justice Dickson in Bodnar, supra, "the issue for determination is whether the agreement operates reasonably in the context, given the fee proposed." Madam Justice Dickson also noted that, "...if the proposed fee is to be reduced, a principled basis for the reduction must be identified".

71. The Courts have reviewed the range of contingency fees awarded to class counsel under class proceedings legislation. Approved percentage contingency fees have generally ranged from 15% to 33%.

72. The Courts have preferred percentage contingency fees over other fee arrangements, such as the lodestar or multiplier approach, which rewards counsel based on a multiplier of their base fee. The multiplier approach has been criticized for encouraging inefficient use of time and duplicative and unjustified work, discouraging early settlement, and failing to reward efficient time-management.

73. The following factors are relevant in assessing the reasonableness of Class Counsel fees:

    a. the time expended by the solicitor;

    b. the legal complexity of the matters to be dealt with;

    c. the degree of responsibility assumed by the solicitor;

    d. the monetary value of the matters in issue;

    e. the importance of the matter to the client;

    f. the degree of skill and competence demonstrated by the solicitor;

    g. the results achieved;

    h. the ability of the client to pay;

---

[8] *Abdulrahim v Air France*, 2011 ONSC 512 at para 10 [BA Tab 13].
[9] *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, [2005] OJ no 1118 (SCJ) at paras 58-62 [BA Tab 7].

i. the client's expectations as to the amount of the fee;

j. the risk undertaken by counsel, including the risk that the action might not be certified; and

k. the position of any objectors.[10]

74. Payment of an interim fee award on a partial settlement is "a salutary measure that will help to promote early settlement".[11]

75. Courts have approved fee awards prior to distribution of funds to settlement class members.[12]

Application of the Factors to be Considered

Risks Undertaken

76. In prosecuting this case, Class Counsel accepted the risk that the action could carry on for years, exposing Class Counsel to significant time and cost expenditures that might not be recovered. Class Counsel's experience is that multidefendant cases often carry on for an extended period of time against one or more defendants. The resolution of the case against one defendant does not mean a resolution against the other defendant.

77. From the outset, Class Counsel agreed to pursue this action on a contingent fee basis, accepting responsibility for all costs and seeking Court approval for a fee if successful.

78. Applying the Factors, the Fee is Reasonable.

The Time Spent By Counsel and Complexity of the Matter

79. The legal issues associated with the litigation of a case of this type on the merits are also complex and without established precedent. There are complex, open questions about duty of care.

Time Spent and Fees Sought

The time docketed by Napoli Shkolnik PLLC/Guardian Law Group LLP from 2018 until August 31, 2022 are as follows:

Lawyer/Paralegal	**Hours**	**Hourly Rate**
Clint Docken Q.C. Called to the bar in 1974	40.0	650.00
Mathew Farrell	19	550.00

[10] *McKay v Air Canada*, 2015 BCSC 1874 at para 16 [BA Tab 5].
[11] *Parsons v Canadian Red Cross Society*, (2000), 49 OR (3d) 281 at para 50 [BA Tab 14].
[12] *Main v Cadbury Schweppes plc*, 2012 BCSC 1062 [BA Tab 15].

Called to the bar in 2007		
Alexander Kinrade Called to the bar in 2022	24.7	175.00
Gloria Wozniuk Paralegal	28.5	$200.00
Janelle Clayton Paralegal	40.2 hrs	$200.00
Total Time		**$54,512.50**
Disbursements		
Total Disbursements (including cost of notice $26,259.00)		$29,292.75
Grand Total		**$83,805.25**

Results Achieved

80. Pending Court approval, Class Counsel reached an agreed upon settlement with IBM, a non-government actor which had a minor role in the implementation of the Phoenix Pay System and the events that caused harm to the Class.

Litigation Risk Assumed by Class Counsel

81. The litigation risk assumed by counsel is a function of the probability of success, the complexity of the proceedings, and the time and resources expended to pursue the litigation.[13]

82. "Certification risk" and "resolution strategy risk" are also factors to consider when assessing the reasonableness of the proposed fee award. Protracted negotiations involve a commitment of time and resources, without any guarantee that a settlement will be achieved or approved by the Court.

83. The risks involved in pursuing the class litigation must be assessed as they existed when the litigation commenced and as the litigation continued.

Conduct by Class Counsel

84. The degree of skill and competence demonstrated by Class Counsel is high as evidenced by the proposed Settlement Agreement.

[13] *Parsons v Canadian Red Cross Society*, (2000), 49 OR (3d) 281 at paras 13 and 18-47 (SCJ) [BA Tab 14].

Clients' Expectation and Appropriateness of Fees Sought

85. The fee sought is consistent with the fee agreements and approved by the representative plaintiff. As the Ontario Court of Appeal has noted, a "representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report." Their approval of and support for a fee request should not be taken lightly.[14]

86. Fees valued at 30% of recoveries are often granted. Class Counsel is requesting 25% of the recovery amount.

87. Canadian Courts have recognized that Class Counsel are entitled to reasonable fees to compensate for the difficult contingency cases in which they have to wait many years before recovering any of their fees and the ever present risk of recovering nothing if the case is unsuccessful. Fees should not only reward meritorious effort but also encourage counsel to take on risky class action litigation. The Ontario Superior Court recognized the need for economic incentives in *Baker Estate v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 at para. 67:

> If first-class lawyers cannot be assured that the Courts will support their reasonable fee requests, how can the Courts and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution?

88. Nor should a reasonable fee agreed upon in a contingency agreement be reduced because the matter was resolved through settlement negotiations rather than a trial. Settlement negotiations require substantial expenditures of time and resources and often take place over a lengthy period of time. In class actions, settlement agreements must be approved by the Court, therefore they maintain the risk that they might not be approved.

The Position of any Objectors

89. Class Counsel have received no objections to this fee approval application to the date of this application.

Conclusion

90. The Settlement Agreement will benefit the Settlement Class Members both because of the monetary recovery and because they will advance the Canadian Proceedings against the Non-Settling Defendants through cooperation.

91. Class Counsel recommends approval of the Settlement Agreement to the Court. It is Class Counsel's opinion that the Settlement Agreement is in the best interest of the Settlement Class Members and represent a fair and reasonable compromise of the litigation against these parties.

---

[14] *Manuge v Canada*, 2013 FC 341 at paras 36-38 [BA Tab 16].

PART 4 – ORDER REQUESTED

92. The Plaintiff requests orders approving:

    a. the Settlement Agreement;

    b. the payment of Class Counsel fees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this … day of December, 2022

_____

Counsel for the Plaintiff
Clint Docken Q.C.