

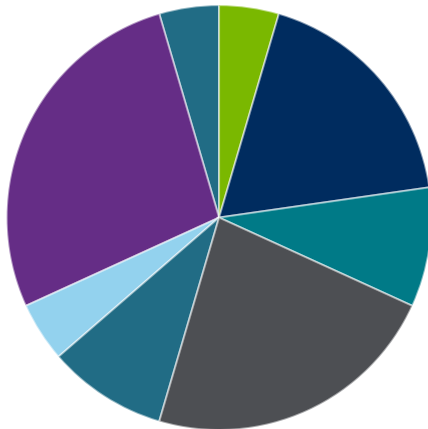
Ontario Class Actions 2020 Mid-Year Review



An overview of developments and trends that affected the Class Actions landscape in Ontario in 2020, presented by BLG's leading Class Actions team

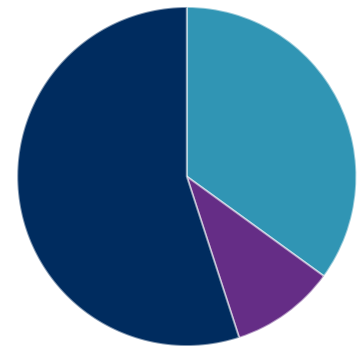
Fall 2020

Newly-Filed Class Actions



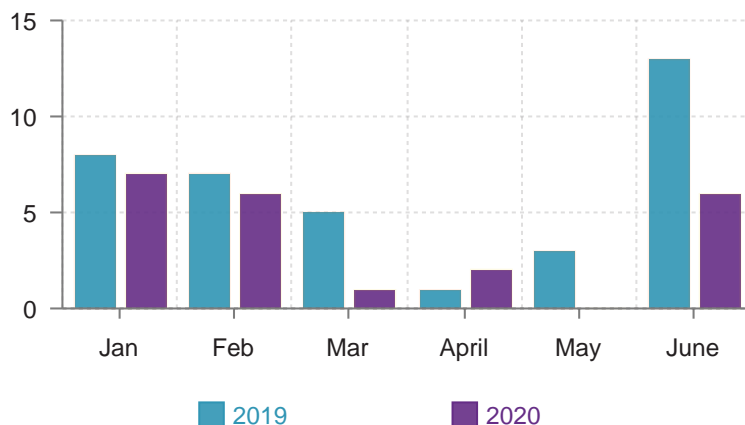
| | |
|---------------------|-------|
| Consumer Protection | 4.5% |
| Securities | 18.2% |
| Financial Services | 9.1% |
| Employment Law | 22.7% |
| Privacy | 9.1% |
| Competition | 4.5% |
| Negligence | 27.3% |
| Insurance | 4.5% |

Certification Motions

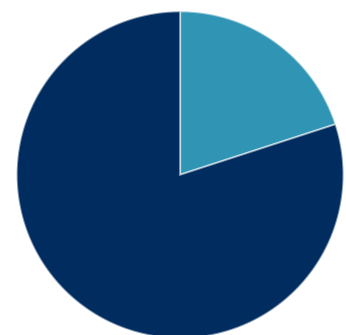


| | |
|------------------------|-------|
| Granted | 35.0% |
| Denied | 10.0% |
| Consent for Settlement | 55.0% |

Newly-Filed Class Actions by Month



Appeals



| | |
|------------------------------------|-------|
| Denial of Certification Upheld | 20.0% |
| Denial of Certification Overturned | 80.0% |

TOP 3 Legal Developments of 2020 (so far)

1

Kuiper v. Cook (Canada): Counsel have long debated the test that judges hearing certification motions should apply when deciding whether a case raises suitable "common issues". Specifically, the question was whether a two-step test applies, requiring the plaintiff to show that there is some basis in fact to support both the *existence* of the proposed issues, and *that they are common* to the whole class.

In *Kuiper*, the Divisional Court held that a two-step analysis applies and that, in Ontario, plaintiffs must present evidence that the proposed common issues are "real" issues. The decision will have significant repercussions for future cases. [Read BLG's commentary on the case.](#)

2

Uber Technologies Inc. v. Heller: The Supreme Court of Canada decision addresses the enforceability of arbitration clauses and, in particular, the scope of the unconscionability doctrine. In the class actions area, however, it may raise more questions than it answers.

The Court has held previously that legally enforceable arbitration clauses can preclude parties from participating in class actions. In holding that such clauses may be unenforceable pursuant to the unconscionability doctrine, the *Uber* decision raises interesting questions about how that issue should be determined in a class actions context.

The inequality of bargaining power that is a prerequisite for the application of the doctrine would seem to be something that, at least in some cases, could vary from one class member to another. This begs the question: is the enforceability of an arbitration clause an individual issue that must be answered separately for each class member or group of class members, or can it be determined on a class-wide basis? [Read BLG's commentary on the decision and its implications.](#)

3

Wright v. Horizons ETFs Management (Canada): In *Wright*, The Ontario Court of Appeal expanded the scope of negligence claims for pure economic loss and opened the door to a potential new common law duty of care for investment fund managers. To the extent that the reasoning in *Wright* is extended to claims for pure economic loss outside of the fund manager context, its impact may be significant. Claims for pure economic loss are attractive for class counsel because they are often easier to quantify on a class-wide basis than, for example, damages for property damage or physical injury. [Read BLG's commentary on the decision.](#)

TOP 3 Trends of 2020 (so far)

1 **A good six months for plaintiffs.** So far, 2020 has been a good year for class-action plaintiffs. The proportion of contested motions that resulted in certification increased by 50 per cent in a period that also saw a 50 per cent increase over the previous year in the number of reported certification decisions. In addition, 80 per cent of reported appellate decisions were favourable to plaintiffs.

2 **The COVID-19 effect.** There were less than 2/3 as many new claims issued in the first half of 2020 as compared to the same period last year. This was largely due to a substantial drop (to 1/3 of the previous year's number) from March to May. It is likely that this short-term decrease in new filings was at least partially due to COVID-19.

This is likely the calm before the storm, as we expect the pandemic to give rise to many new class actions. The first half of 2020 saw the tip of this iceberg begin to emerge, in the form of several class actions against long-term care facilities. Learn more about [the relationship between COVID-19 and class actions](#).

3 **The federal phenomenon.** Part of the decline in new Ontario class actions may also be the result of more plaintiffs choosing to sue in Federal Court instead. While the Federal Court's jurisdiction is limited to certain substantive areas (when federal entities are not involved), those areas include claims under the [Canadian Charter of Rights and Freedoms](#) and the [Competition Act](#). Read BLG's commentary on [an interesting case about the Federal Court's jurisdiction](#).

TOP 3 Things to Watch for

1

The COVID “bump”. While the COVID-19 pandemic appears to have slowed briefly the filing of new class actions this spring, expect to see the pandemic give rise to many new class actions as the year progresses. There has already been a spike in such cases in the United States, and Canada often follows the U.S.’ lead in class actions. Expect to see claims related to cancelled trips, sporting and entertainment events, insurance claims and the provision of healthcare and related services, among others. [Read BLG’s class actions forecast.](#)

2

Overhaul of the *Class Proceedings Act*. After almost 30 years, [Ontario’s Class Proceedings Act](#), 1992 has received a comprehensive overhaul through legislation that received Royal Assent in June. The changes are due to come into effect on Oct. 1, 2020.

The amendments to the Act will significantly affect how class actions are litigated in Ontario. Perhaps most importantly, plaintiffs will have to demonstrate that the common issues in a case “predominate” over individual issues. This requirement, new to Ontario, should raise the bar for certification. It will be interesting to see whether it affects the number of plaintiffs who choose to litigate in Ontario, as opposed to commencing claims in other provinces or in Federal Court.

[Read BLG’s commentary on the amendments.](#)

3

Divergent treatment of privacy breaches in Ontario and Québec. Recent jurisprudence in Ontario and Québec has revealed a stark divide in the ability of Canadians affected by privacy breaches to bring class action claims, depending on which province they live in.

While Québec courts have refused to authorize class actions in cases where class members have suffered neither pecuniary losses nor serious and prolonged mental injuries, such claims have been certified in Ontario. It will be interesting to see whether this trend continues.

TOP 3 TAKE-AWAYS

1

Prepare now for COVID-19 claims.

Companies and organizations whose ability to perform their normal functions was undermined by the pandemic should be prepared to face class actions from patients, customers and insureds who may have been adversely affected. Companies should seek advice before they are sued in order to reduce the risk of claims and improve their chances of successfully defending any claims they do face.

2

Be prepared for claims in other jurisdictions. As a result of amendments to the Ontario and British Columbia class proceedings legislation, we may see more plaintiffs commencing class national class actions in other provinces and in the Federal Court, rather than in Ontario. Companies and organizations will need legal counsel able to represent them in all of Canada's key class actions jurisdictions (Ontario, British Columbia, Québec and in the Federal Court).

3

Keep an eye on the “hot spots.”

Companies and organizations should continue to monitor policies and procedures that relate to likely “hot spots” in the time of COVID-19: consumer protection, **securities**, **employment**, **privacy**, **healthcare**, **insurance** and **products liability**. They should consult legal counsel as soon as they identify issues or receive complaints relating to these areas, in order to prepare for potential class actions before claims are brought.

Where to Learn More



[BLG's Ontario Class Actions 2019 Year in Review](#)



[BLG's Recent client bulletins on class actions](#)



[BLG's Summary of Canadian Class Action Procedure and Developments](#)



blg.com/classactions

The Fine Print

The graphs on the first page were compiled based upon information gleaned from searching legal research databases and monitoring new class actions filings in the Ontario Superior Court of Justice in Toronto. In addition to Toronto filings, the Court office captures most, but not all, filings outside of Toronto. In “counting” the number of new class actions, we have eliminated duplicates. We have also assigned each class action to a single category of claim, based on the dominant allegations in the pleading. There is a certain arbitrariness to this determination. Certification and appeal decisions are based solely on searches of legal research databases and will not have captured unreported decisions. Overall, these methods are imperfect but in our view gather sufficient data to provide a sense of ongoing trends. BLG is grateful for the assistance of articling students Tanvi Medhekar and Laura Thistle, and associate, Lance Spitzig, and to rounds clerks, Janice Francis and Larry White.