Ontario Class Actions 2019 Year in Review

An overview of developments and trends that affected the Class Actions landscape in Ontario in 2019, presented by BLG's leading Class Actions team

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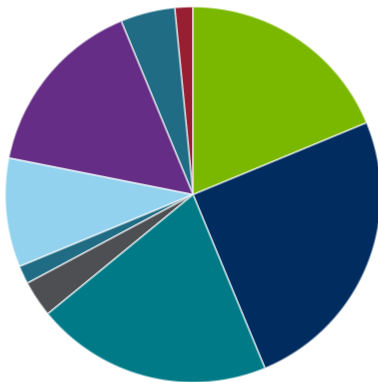
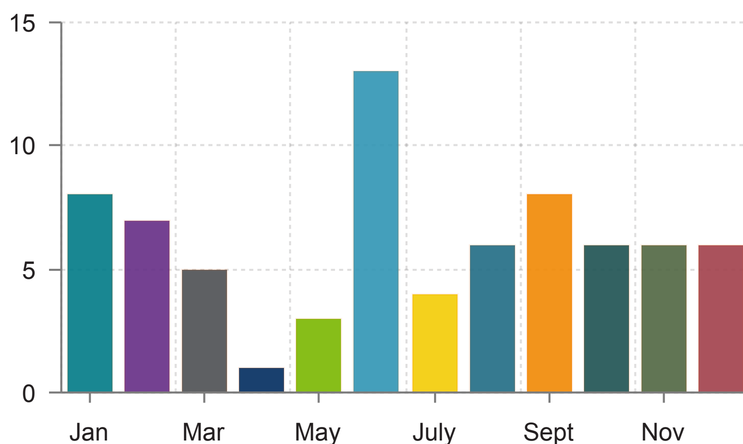
Spring 2020

Newly-Filed Class Actions

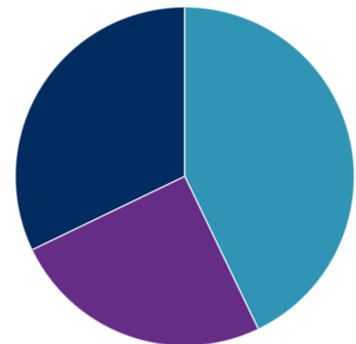


Consumer Protection	18.8%
Securities	25.0%
Product Liability (non-drug)	20.3%
Product Liability (drug)	3.1%
Financial Services	1.6%
Employment Law	9.4%
Privacy	15.6%
Competition	4.7%
Negligence	1.6%

Newly-Filed Class Actions by Month

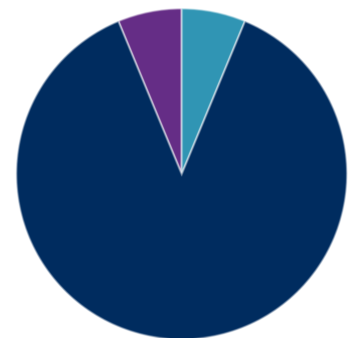


Certification Motions



Granted	42.9%
Denied	25.0%
Consent for Settlement	32.1%

Appeals



Certification Overturned	6.3%
Denial of Certification Upheld	87.5%
Denial of Certification Overturned	6.3%

TOP 3 Decisions of 2019

1 ***Pioneer Corp. v. Godfrey***: The Supreme Court of Canada's landmark decision in this price-fixing class action was the most significant legal development in class actions in the past year. The Supreme Court held that the civil right of action under section 36 of the *Competition Act* is not a "complete code" and does not preclude common law claims for breach of the statute, which class counsel will argue should apply to other statutory causes of action as well. The availability of parallel claims for conspiracy or unjust enrichment is important because such claims may be subject to different limitation periods and may entitle successful plaintiffs to different remedies, such as disgorgement of profits. The Court also held that in price-fixing class actions, plaintiffs only need to present an expert methodology that is sufficiently credible or plausible to establish that one or more purchasers suffered a loss. Expect plaintiffs to argue that this low bar for establishing "some basis in fact" for common issues as to damages should be applied with equal leniency in other contexts. In the competition context, expect to see larger classes, both because the Court held that the discoverability principle applies to claims under s. 36 of the *Competition Act* (allowing classes to extend further back in time), and because the Court held that price-fixing class actions could cover "umbrella purchasers" (people who bought a product from a party not involved in the alleged conspiracy but who allege that the price-fixing arrangement artificially increased prices across the market, including those charged by non-participants in the conspiracy). Read BLG's commentary here.

2 ***Telus Communications Inc. v. Wellman***: The Supreme Court of Canada held that legally enforceable arbitration clauses can preclude parties from participating in class actions. The Court held that while *Ontario's Consumer Protection Act* invalidates arbitration clauses to the extent that they apply to "consumers" (as defined in the act), an arbitration clause in a service contract was enforceable against non-consumers, who could not participate in the class proceeding. Read BLG's commentary here. The Court also heard the appeal in *Uber Technologies Inc. v. Heller* on November 6, 2019. The Ontario Court of Appeal had held that arbitration clauses in Uber's licensing agreements were unenforceable. The Supreme Court of Canada's decision is expected in 2020 and likely will shed more light on the ability to contract out of arbitration clauses.

3

Agnew-Americano v. Equifax Canada Co.: Given the recent prevalence of privacy class actions in Ontario, this decision, which tests the limits of the intentional tort of “intrusion upon seclusion,” is likely to be cited in many future cases. Intrusion upon seclusion is a unique tort, because it does not require proof damages and allows courts to award “symbolic damages” in cases where the plaintiffs would not be able to prove recoverable damages in negligence. It does, however, require that the defendant acted intentionally or recklessly, and was not simply negligent. This recent case arose out of the actions of third parties who hacked into the defendant’s systems and gained access to the personal information of thousands of Canadians. The defendants argued that the plaintiffs had not alleged intentional or reckless conduct on the part of the defendant (itself a victim of the hack). The motion judge held that it was not plain and obvious that the claim could not succeed, as the law is unsettled as to whether a “Database Defendant” who is alleged to have recklessly enabled a hacker attack can be liable for intrusion upon seclusion. Expect more privacy class actions against companies that have been hacked. Read more from BLG about recent privacy class actions in the *Class Action Defence Quarterly*.

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TOP 3 Trends of 2019

1

The second half of 2019 saw a **marked increase in the number of privacy class actions** filed in Ontario. This has been a growth area for some time and recent decisions have encouraged this trend. You can learn more about BLG's expertise in Cybersecurity, Privacy & Data Protection here, and read our analysis of recent privacy class actions in the *Class Action Defence Quarterly*.

2

While we are working from a small sample, **appellate courts in Ontario have upheld certification decisions in the vast majority of cases** (over 85 per cent of the time) and been slightly more favourable to defendants than to plaintiffs. While plaintiffs were successful in over 60 per cent of the contested certification motions, plaintiffs were successful less than 10 per cent of the time on appeal (with success meaning that the appellate court either upheld a certification decision or overturned a decision denying certification). The appellate level statistics are affected in part by the fact that there are more plaintiff appeals from the denial of certification than there are appeals by defendants from certification (because the latter requires leave, while the former do not).

3

2019 could be called the "**year of preferable procedure**" in Ontario. Not only did many certification motions (and appeals from certification decisions) turn on this aspect of the test for certification, it has also been a focus of proposals for legislative reform. In its Report on Class Actions, the Law Commission of Ontario recommended, among other things, that courts consider the preferable procedure requirement "more rigorously". The Ontario Government took that advice to heart in its proposed amendments to the *Class Proceedings Act, 1992*. Among other changes, the Government proposed to institute the requirement (applicable in many American jurisdictions) that the proposed common issues in a proceeding "predominate" over individual issues. The proposed amendments generated a great deal of controversy, with defence counsel generally favouring a more rigorous "preferable procedure" analysis, and plaintiff counsel generally opposed. Many groups have submitted comments on the proposed amendments. Read BLG's commentary on the LCO Report here, and our commentary on the proposed legislative amendments here.

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TOP 3 Things
to Watch for in 2020

1. As noted above, the Ontario Government has proposed a number of changes to the *Class Proceedings Act, 1992*. This will be the first significant amendment of the legislation since it came into force almost thirty years ago. Depending upon what amendments the Legislature ultimately enacts, the impact upon class proceedings in Ontario may be significant. Read our commentary here.

2. In its recent decision in *Kuiper v. Cook (Canada)*, the Divisional Court has provided important guidance on the test that judges hearing certification motions should apply, when deciding whether the case raises suitable "common issues". Specifically, the Divisional Court has affirmed that 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. This has been a subject of debate among counsel and this most recent decision offers clarification that defence counsel, in particular, will appreciate. The decision will have significant repercussions for future cases. Read BLG's commentary on the case here.

3. There are a number of class actions currently pending before Ontario courts alleging "hacks" of personal data. To the extent that these cases rely on the wrongdoing of third party "hackers," they raise the issue of whether the holder of the data (who was hacked) can be sued for intrusion upon seclusion, given that the Court of Appeal in *Jones v. Tsige* defined this cause of action as constituting an intentional tort. Watch for decisions that clarify whether the tort is available against companies that have been hacked. It will be particularly interesting to see whether the law of Ontario continues to diverge from Québec law, which has not permitted class actions to proceed where the class members have not suffered actual damages (compare, for example, the outcomes in *Agnew-Americano v. Equifax Canada Co* and in *Li c. Equifax inc.*) Read BLG's discussion of this issue in the Class Action Defence Quarterly.

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TOP 3 TAKE-AWAYS

1

Given recent decisions on the interaction between **arbitration clauses** and class actions, it may be time to review any contracts that contain such clauses (or consider whether to add them to contracts that do not).

2

Cyber-security and privacy class actions are becoming increasingly common. Companies that collect, maintain or use data should review their security measures, policies and procedures to minimize the risk of being a defendant in the next class action. Learn more about **BLG's expertise in Privacy and Data Protection here**.

3

Given the prevalence of securities class actions, this would also be an opportune time to audit your compliance with securities law. Learn more about **BLG's expertise in Securities, Capital Markets and Public Companies here**.

Where to Learn More

BLG's Ontario Class Actions 2019 Mid-Year Update

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. Certificaton 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 Laura Thistle, Summer Student and Lance Spitzig, Articling Student, and to its Rounds Clerks, Janice Francis and Larry White.*

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