

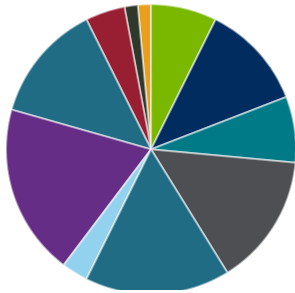
Ontario Class Actions 2020 Year in Review



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

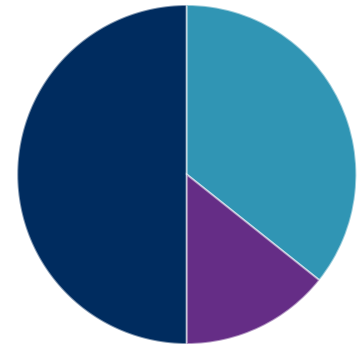
Winter 2021

Newly-Filed Class Actions



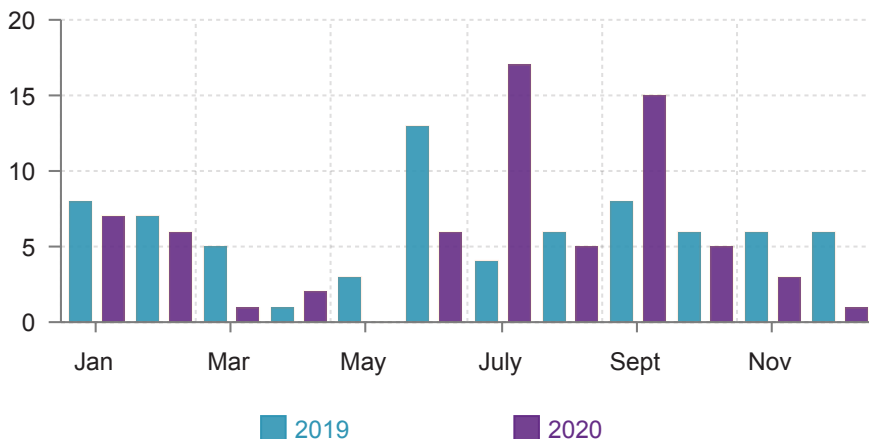
Consumer Protection	7.4%
Securities	11.8%
Financial Services	7.4%
Employment Law	14.7%
Privacy	16.2%
Competition	2.9%
Negligence	19.1%
Insurance	13.2%
Charter / Human Rights Claims	4.4%
Product Liability (Drug)	1.5%
Product Liability (Non-Drug)	1.5%

Certification Motions

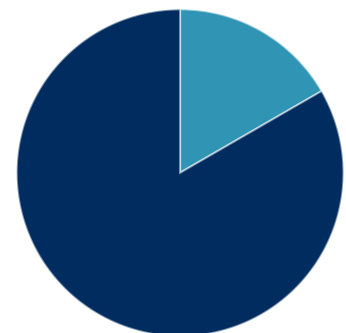


Granted	35.7%
Denied	14.3%
Consent for Settlement	50.0%

Newly-Filed Class Actions by Month



Appeals



Denial of Certification Upheld	16.7%
Denial of Certification Overturned	83.3%

TOP 3 Legal Developments of 2020

1

Atlantic Lottery Corp. Inc. v. Babstock: In this significant decision for class actions, the Supreme Court of Canada rejected the notion of waiver of tort as a cause of action under Canadian law, restricted the availability of disgorgement as a remedy for breach of contract and made it much more difficult for plaintiffs to advance class actions in cases where damages cannot be proved on a class-wide basis.

The theory behind waiver of tort was that a negligent defendant could be ordered to pay plaintiffs the gains the defendant obtained from the wrongful conduct, even without proof that the plaintiffs suffered losses as a result.

In the past plaintiffs often pled waiver of tort, because it seemed to offer the potential to bring class actions on behalf of large classes, without the need for individual proof of loss. The need to prove causation and damages on an individual basis often renders class actions unmanageable. For this reason, the Court's rejection of waiver of tort is likely to have significant repercussions for future litigation. [Read BLG's commentary on the decision](#) and its implications, or [watch a presentation on the case](#) from BLG's latest Class Actions Seminar (the relevant portion begins at 1:14:12).

2

1688782 Ontario Inc. v. Maple Leaf Foods Inc.: The majority of the Supreme Court of Canada held in this case that there is no general duty in negligence to avoid causing pure economic loss (although such losses may be recoverable in specific circumstances, such as in the case of a negligent misrepresentation). In the past, many class actions sought recovery for pure economic losses. These claims were attractive to class counsel because they would not require class members to prove personal injury, damage to property, or a contractual relationship with the defendant. [Read BLG's commentary on the decision](#) and its implications.

3

Uber Technologies Inc. v. Heller: This decision of the Supreme Court of Canada 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.

TOP 3 Trends of 2020

- 1 A good year for plaintiffs.** 2020 was a good year for class action plaintiffs. The proportion of contested motions that resulted in certification increased by 13 per cent over the previous year, and more than 80 per cent of outcomes on appeal also favoured plaintiffs. It remains to be seen whether the legal developments described above, and the amendments to Ontario's class actions legislation, will create a less hospitable environment for plaintiffs in Ontario in 2021.
- 2 The COVID-19 effect.** COVID-19 appears to have had an interesting effect on the timing of new class action filings. In past years, a summer lull in filings was often preceded by a spike in late spring. COVID-19 seems to have delayed that spike to the summer. Filings for the period from March to June were less than half what they were the previous year, but came roaring back from July to September 2020, more than doubling the filings over the same period in 2019. Over the course of the year, we saw an increasing number of COVID-related claims, including a large number of claims against long-term care facilities and claims for denial of coverage under business interruption and travel insurance policies. [Read BLG's COVID-19 2020 year-end class actions update and forecast](#) or [watch a presentation on the trends](#) from BLG's latest Class Actions Seminar (the relevant portion begins at 1:34:19).
- 3 The Bill 161 buzzer-beater.** After almost 30 years, [Ontario's Class Proceedings Act, 1992](#), received a comprehensive overhaul, with the changes coming 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 now 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. That certainly seems to be the view taken by class counsel, who commenced a number of new class actions at the end of September (almost twice the number issued in September 2019), in an apparent attempt to "get in under the wire." Most of the changes implemented by Bill 161 apply only to proceedings started on or after Oct. 1, 2020. [Read BLG's commentary on the amendments](#) or [watch a presentation on them](#) from BLG's latest Class Actions Seminar (the relevant portion begins at 0:01:45).

TOP 3 Things to Watch for

1

Class Actions in the time of COVID. Expect to see the pandemic continue to give rise to many new class actions in 2021. There has already been a spike in such cases in the United States, and, in Ontario, the beginning of a spike in cases in the second half of 2020. There will likely be more claims related to cancelled trips, sporting and entertainment events, insurance claims and the provision of healthcare and related services, among others. [Read BLG's COVID-19 2020 year-end class actions update and forecast](#) or [watch a presentation on the case](#) from BLG's latest Class Actions Seminar (the relevant portion begins at 1:34:19).

2

Possible court-shopping by plaintiffs. Ontario arguably became a less plaintiff-friendly jurisdiction in 2020. The amendments to [Ontario's Class Proceedings Act, 1992](#), among other things, imported the requirement that common issues “predominate” over individual issues and encourage pre-certification motions.

At the same time, the Divisional Court's decision in [Kuiper v. Cook \(Canada\)](#) held that, to succeed on a certification motion, plaintiffs must show that there is some basis in fact to support both the *existence* of the proposed common issues, and *that they are common* to the whole class. These changes, when combined with Ontario's “loser pays” costs regime and the fact that a national class can be certified in any province, could lead some plaintiffs' lawyers to look for greener pastures for class actions. It will be interesting to see whether 2021 brings a reduction in 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 legislative amendments](#) or [watch a presentation about them](#) from BLG's latest Class Actions Seminar (relevant portion begins at 0:01:45). [Read BLG's commentary](#) on the *Kuiper* case.

3

Is the Supreme Court of Canada pumping the brakes? It will be interesting to see whether the Supreme Court's decisions in [Atlantic Lottery Corp. Inc. v. Babstock](#) and [1688782 Ontario Inc. v. Maple Leaf Foods Inc.](#) are isolated cases dealing with narrow issues, or signal a more general intention on the part of the Court to push back against class actions in which class members cannot prove they suffered direct and foreseeable damages.

It is notable in this regard that the Majority in *Atlantic Lottery* acknowledged that uncertainty about the remedies available at law can result in the certification of doubtful claims and that, once claims are certified, defendants are under tremendous pressure to settle. [Read BLG's commentary](#) on the *Atlantic Lottery* decision and its implications or [watch a presentation on the case](#) from BLG's latest Class Actions Seminar (the relevant portion begins at 1:14:12). [Read BLG's commentary on the Maple Leaf decision.](#)

TOP 3 TAKE-AWAYS

1

Prepare for more COVID-19 claims.

Companies and organizations whose ability to perform their normal functions has been 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 changes in the law in Ontario, we may see more plaintiffs commencing 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. To get a sense of where your risk lies, monitor and track complaints whether sent directly to you or expressed through social media.

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](#)

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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.