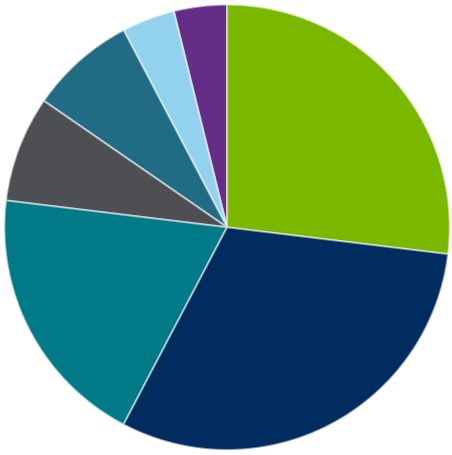
Ontario Class Actions 2019 Mid-Year Update

A bi-annual overview of recent developments and emerging trends affecting the Class Actions landscape in Ontario, presented by BLG's leading Class Actions team.

BLG

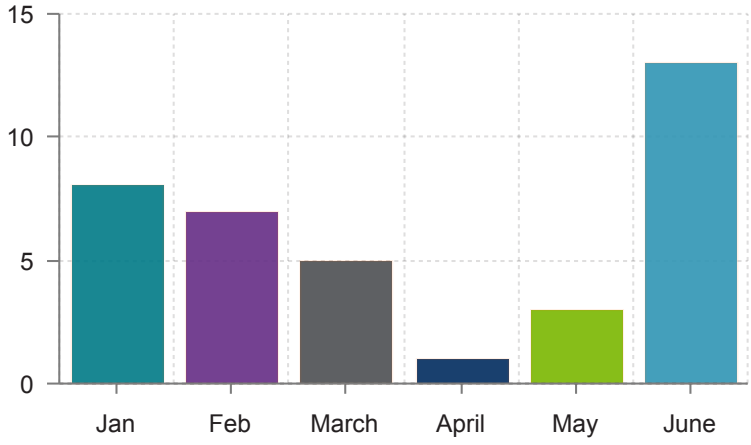
Q1/Q2

Newly-Filed Class Actions

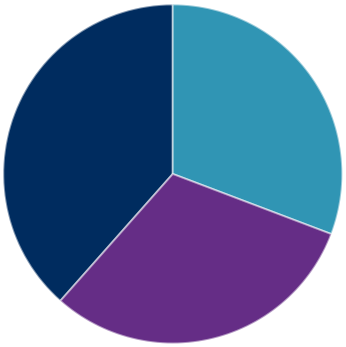


Consumer Protection	26.9%
Securities	30.8%
Product Liability (non-drug)	19.2%
Employment Law	7.7%
Privacy	7.7%
Competition	3.8%
Negligence	3.8%

Newly-Filed Class Actions by Month

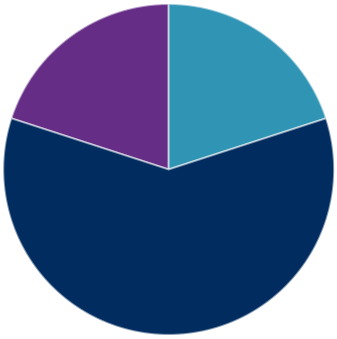


Certification Motions



Granted	30.8%
Denied	30.8%
Consent for Settlement	38.5%

Appeals



Certification Overturned	20.0%
Denial of Certification Upheld	60.0%
Denial of Certification Overturned	20.0%

TOP 3 Decisions of 2019 Q1/Q2

1 ***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**.

2 ***Welsh v. Ontario:*** The Ontario Court of Appeal confirmed that it is the parties (and not the court) who decide the terms of a proposed settlement. The proposed settlement contemplated a $15 million settlement fund, with a maximum of $3.75 million of that amount to go to class counsel's fees. The judge below granted the settlement approval motion but (without hearing from the parties) ordered that class counsel receive the requested fee only if they donated $1.5 million of their fees to a charity. The Court of Appeal held that the motion judge could not alter a material term of the settlement in this manner. The motion judge could only raise the issue and then allow the parties to address the issue through further submissions or a renegotiation of the settlement. **Read BLG's Commentary here**. For an interesting contrast, see *Micevic v. Johnson and Johnson*, where the motion judge modified a distribution protocol, with the approval of the parties. **Read BLG's commentary on that case here**.

3 ***Berg v. Canadian Hockey League:*** The Divisional Court provided a helpful summary of the principles applicable in determining whether the plaintiff has met the certification requirement of demonstrating that a class proceeding would be the "preferable procedure" for resolving the class members' claims. The motion judge had held that a class proceeding would not be the preferable procedure to decide certain of the class members' pleaded causes of action. He held that those causes of action would be redundant and add unmanageable complexity to the proceeding. In overturning that finding, the Court of Appeal clarified that the "preferability analysis" requires the certification judge to compare the relative advantages of a class action to other available forms of resolving the dispute. The judge should not compare a class action that includes all of the causes of action that the plaintiffs pleaded to a hypothetical alternative version of the claim with only some of those causes of action.

TOP 3 Trends of 2019 Q1/Q2

1. While we are working from a small sample, **appellate courts in Ontario were more favourable to defendants than to plaintiffs** in the first half of 2019. While plaintiffs were successful in half of the contested certification motions, plaintiffs were successful only 20% of the time on appeal (with success meaning that the appellate court either upheld a certification decision or overturned a decision denying certification).

2. The most common new claims filed involved **consumer protection** and **securities law claims**. Learn more about **BLG's expertise in securities litigation here**. Compared to previous periods, we seem to be seeing a decline in employment-related claims, and an increase in privacy claims.

3. Certification motions (and appeals from certification decisions) increasingly seem to turn on the "**preferable procedure**" requirement for certification. The Law Commission of Ontario has since released its Report on Class Actions, in which it recommends, among other things, that courts consider the preferable procedure requirement "more rigorously". **Read BLG's commentary on the LCO Report here**.

TOP 3 Things to Watch for in 2019 Q3/Q4

1 The Supreme Court of Canada has tentatively scheduled November 6, 2019 for the hearing of the appeal in ***Uber Technologies Inc. v. Heller***. The Ontario Court of Appeal held that arbitration clauses in Uber's licensing agreements were unenforceable. The Supreme Court of Canada's decision likely will shed more light on the ability to contract out of arbitration clauses.

2 There is a good chance that the Supreme Court will release its long-awaited decision in ***Toshiba Corporation v. Godfrey***, a case involving price-fixing allegations. The Court heard the appeal in December 2018, and the Court dismissed a motion to adduce additional evidence in April. On average, the Court takes six months to release its decisions on appeals, so look for this one to come out before the end of the year. The issues argued in the case include the evidentiary standard that plaintiffs must meet in order for a court to certify the existence of harm as a common issue and whether or not "umbrella purchasers" can assert claims for damages. Umbrella purchasers are people who did not buy a product from the companies that are alleged to have engaged in price-fixing, but bought a product from a competitor who is alleged to have been able to charge higher prices as a result of the alleged conspiracy, despite not having participated in it. A number of competition class actions across Canada have been "paused", awaiting the Court's decision. ***Read BLG's commentary on the appeal here***.

3 There are a number of class actions currently pending before that courts alleging "hacks" of personal data. To the extent that these cases rely on the wrong-doing 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.

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.com/classactions
- BLG's Recent client bulletins on class actions
- BLG's Summary of Canadian Class Action Procedure and Developments

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 most grateful to Laura Thistle, Summer Law Student.