LEGAL POST

CLASS ACTIONS

Canadian courts may fill in gaps

Looming U.S. decision could drive cases here

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Discoveries

Securities class action lawyers on both sides of the border are anxiously awaiting the United States Supreme Court's ruling in a case called *Erica P. John Fund Inc. v. Halliburton Co.*

A decision, which could emerge any day, will confirm whether the "fraud on the market" theory remains good law in the U.S. The theory has been the underpinning for the U.S. securities class action business for more than 25 years. It would be a huge upset for the plaintiffs bar if the court overturned the U.S. common law.

Since a 1988 case called *Basic v. Levinson*, the U.S. common law has been that plaintiffs in a shareholders class action don't have to prove they relied on a company's misstatements when making their investment decisions. The reliance is presumed, so it falls on the defendant company to disprove it.

The U.S. Supreme Court has been making things more difficult for plaintiff-side class action lawyers in recent years. Class action lawyers are therefore curious to see if a plaintiff-unfriendly *Halliburton* ruling inspires U.S. lawyers to look north to potentially greener pastures in Canada.

"If the U.S. Supreme Court rejects fraud on the market, that's going to be a stake in the heart for common law class actions in the U.S.," says Dana Peebles, a litigator in **McCarthy Tétrault LLP**'s Toronto office.

"It makes you wonder whether that will have an impact on the number of securities class actions in Canada at large and in Ontario specifically," adds David Di Paolo, a litigator with Borden **Ladner Gervais LLP** in Toronto.

Canadian courts have refused to find that "fraud on the market" exists in Canadian common law. This troubled the Ontario legislature. Love 'em or hate 'em, plaintiff-side class action litigators play an important enforcement role in the Canadian securities marketplace. The Ontario government therefore amended the province's Securities Act in 2005 to create a statutory tort to fill the Canadian common law void.

As U.S. courts make it harder for U.S. plaintiffs' counsel to mount U.S. securities class actions, Canadian courts have been welcoming, says Andrea Laing, a class action litigator with **Blake Cassels & Graydon LLP**.

She recently spoke about the state of Canadian securities class action law to an audience of U.S. litigators in California.

"There was a surprising amount of interest among U.S. lawyers, Ms. Laing says. "I think they realize that Canada may become the overflow jurisdiction for some of these cases that aren't finding a home in the U.S. as a result of some of these changes."

Halliburton hasn't come out yet, but there has been another case that has already caused U.S. counsel to look beyond the U.S.

In a 2010 case called *Morrison v. National Australia Bank Ltd.*, the U.S. Supreme Court basically said the reach of U.S. securities legislation stops at the U.S. border. A more recent U.S. appellate court said the *Morrison* case means U.S. plaintiffs can't sue companies over alleged frauds related to securities bought or sold on stock exchanges located outside the U.S., even if the order for the foreign stock was placed within the U.S.

Things are different in Canada. Ontario courts will accept cases that have foreign components, so long as the litigation has at least some rational connection to Ontario, explains Jason Squire of **Lerners LLP** in Toronto.

"It's the *Morrison* answer that may in the long run prove more attractive to investors who would otherwise have sued in the United States," Mr. Squire says.

"I don't see there being a huge move up to Canada, but since *Morrison* I think U.S. plaintiffs have been looking at all options," adds Nicole Lavallee, a U.S. counsel who is managing partner for the San Francisco office of **Berman DeValerio**.

> "We still have a good bench that's going to take a good hard look

Given that Ontario courts have already accepted foreign cases, how come the province isn't already flooded with U.S. counsel pleading U.S. actions?

When Ontario amended the law to create the statutory tort, there was some talk about an influx of U.S. cases, but this never materialized, points out Paul J. Martin, a litigator with **Fasken Martineau DuMoulin LLP** in Toronto.

If *Halliburton* changes the U.S. law, Canadian-based companies cross-listed on exchanges in both Canada and the U.S. would likely feel a momentary sigh of relief, Mr. Martin says. Some cases might find their way to Canada for a stretch of time, he says. "But I don't think there would ever be a landslide."

The Ontario statutory tort comes with a few hurdles. Plaintiffs must obtain the court's permission before pleading the statutory action, and the Ontario law places a cap on damages. These are things U.S. counsel aren't used to.

There's also the Canadian "real and substantial connection" test that determines when a Canadian court has jurisdiction to hear a case. Sometimes this does allow cases with a lot of foreign elements to proceed in Ontario courts, and sometimes it doesn't. Point is, if there is a logical reason for a U.S. lawyer to bring a case in Canada, circumstances already allow for that. *Halliburton* won't necessarily change things in that regard.

"There still has to be a connection to Ontario," says Mark Veneziano, a partner with **Lenczner Slaght Royce Smith Griffin LLP** in Toronto.

"Things are easier here now with legislation that deems reliance, but we still have a good bench that's going to take a good hard look at these cases."

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Andrea Laing of Blake, Cassels & Graydon LLP says that as U.S. courts make it harder to mount security class actions "Canada may become the overflow jurisdiction for some of these cases that aren't finding a home in the U.S."