The Bre-X Affair and Cross-Border Class Actions.

*H. Patrick Glenn**
Montréal

The *Bre-X* affair[1] provides us with a further example of a class action bearing on losses from the purchase or sale of securities, of which there have been hundreds if not thousands in the United States. In that country there has been a significant legislative and judicial reaction designed to limit the extent of these suits.[2] *Bre-X* is more interesting than many of these cases, however, since it involves class actions which are cross-border and concurrent in the North American context. While most cross-border class actions in North America have been inter-state (and very rarely inter-provincial), an increasing number, like *Bre-X*, are now international.

How should we think about cross-border class actions? Three questions appear to arise: I. The jurisdiction of the court seized with the class action; II. The procedure followed by that court; and III. The law applicable to the merits of the underlying dispute or disputes. These questions are not completely autonomous; the answers to each of them appear to influence the answers to the others.

I. *Jurisdiction of the Court seized with the Class Action*

Historically, territorial jurisdiction or jurisdiction *ratione personae* has been defined in terms of the jurisdiction of the court in relation to the defendant. In the common law it has been the exercise of sovereign authority over the person

* H. Patrick Glenn, of the Faculty of Law & Institute of Comparative Law, McGill University, Montréal, Québec. This is an English language version of remarks made to a meeting of the Québec Division of the Canadian Bar Association in Montreal, April, 1999. A French version will appear in the *Revue québécoise de droit international*, which has kindly agreed to the publication of this article. The author was one of a number of Canadian lawyers who filed affidavits in the Texas *Bre-X* proceedings on behalf of Canadian defendants.

[1] See, for the pleadings and decisions thus far, in Ontario and Texas (though proceedings have also been initiated in Québec and British Columbia), http://www.brexcanact.com and http://www.brexclass.com; and the decisions cited *supra* notes 4 (Texas) and 8 (Ontario). The *Bre-X* affair involves allegedly fraudulent or negligent misrepresentations, causing damage to investors, concerning the value of a gold-mining property held by the Bre-X company in Indonesia.

[2] See the *Private Securities Litigation Reform Act*, Pub. L. No. 104-67, 109 Stat. 737 (1995); the *Securities Litigation Uniform Standards Act of 1998*, Pub. L. 105-353, 112 Stat. 3227 (1998); M. Collora & D. Osbone, "Class-Action Reforms Spur Derivative Claims", National Law Journal, 15/2/99, at B-8 (listing shorter limitation periods, stricter pleading requirements, stay of discovery pending motions to dismiss, transfer to Federal Court to ensure adherence to "national standards", though noting increased use of stockholder derivative suits as technique of avoidance).

of the defendant which has justified jurisdiction; in the civil law the domicile of the defendant has been seen as the "natural forum". *Actor sequitur forum rei.* Even with expansion of territorial jurisdiction beyond the place of service on the defendant or the defendant's domicile, the expansion was in terms of accepting an increasing range of the defendant's activities to justify extraterritorial jurisdiction. Though defendants stayed clear of local territory or local authority, jurisdiction over them could be asserted if they signed a contract locally, or caused local damage by goods they produced abroad.[3]

The cross-border class action adds another dimension to territorial jurisdiction, which is that of jurisdiction with respect to members of the class situate outside of the jurisdiction seized with the class action. Here it becomes necessary to think of jurisdiction in terms of *plaintiffs*, either to allow them to benefit from a favourable judgment or to hold them bound by the *res judicata* effect of a negative judgment (preclusion). Given a Québec class action judgment in favour of a North American class, can the Québec judgment have *res judicata* effect throughout North America to prevent further actions? Can a judge in Québec bind the continent, and after that the world? Conversely, are potential plaintiffs in Québec, in the *Bre-X* affair for example, bound in Québec by an Ontario or United States judgment such that they lose their right of action in Québec? Is a plaintiff with a sustainable cause of action in a Canadian province which has no class action legislation bound by a class action judgment in one of the three Canadian provinces (Québec, Ontario, British Columbia) which have authorized class actions?

Although the distinction has not been made with great clarity in all the cases, it seems necessary to distinguish between two situations. In the first, territorial jurisdiction or jurisdiction *ratione personae* is lacking, at least partially, with respect to the defendant; in the second, jurisdiction would clearly exist with respect to the defendant. Why is it necessary, in order to establish jurisdiction with respect to plaintiffs, to return to criteria for jurisdiction with respect to defendants?

i) *Absence of jurisdiction over the defendant*

Normally a court lacking jurisdiction over a defendant is simply deprived of jurisdiction. In a class action, however, matters are more complex, since it may be a question of jurisdiction over a defendant with regard to all members or only certain members of the class. This appears well illustrated in the jurisdictional decision of the United States Federal District Court, of the Eastern

[3] See the two leading cases in common law and civil law, *Moran* v. *Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Wabasso Limited* v. *The National Drying Machinery Co.*, [1981] S.C.R. 578; and for the expansion of jurisdiction *ratione personae* in Québec, H.P. Glenn, «De la cause d'action et de la compétence territoriale» (1981) 27 R.D. McGill 793.

District of Texas, in *Bre-X*.[4] The class in the Texas *Bre-X* action is said to be composed of all investors, in Canada and the United States, who lost money following the decline in value of the shares of the company. The defendants are the company itself, certain officers and directors, an affiliated company, and a number of other companies or brokerage houses which are alleged to have made unjustifiable representations with respect to the value of the shares. The Texas class action is thus aimed at acts of the defendants, accomplished in the United States, which affected investors resident in the United States, and also acts of the defendants (many of whom appear domiciled in Canada) accomplished in Canada, which affected investors resident in Canada. Some of the impugned acts thus took place entirely in the United States; others took place entirely in Canada. Jurisdiction on the part of the United States District Court certainly existed with regard to acts accomplished in the United States. What is the position of the United States Court, however, with respect to acts accomplished in Canada?

The Federal District Court for the Eastern District of Texas decided that it did not have jurisdiction over claims of Canadian investors who had purchased their shares on Canadian exchanges. It did so for reasons which are rooted in the nature of the court structure in the United States. In such circumstances, jurisdiction of a Federal Court in the United States must be founded on application of Federal law, more particularly on United States Federal securities legislation. While these laws are clearly applicable to activities which took place in the United States, their extraterritorial application depends on a process of interpretation which looks to the effect of extraterritorial activity on United States markets. Even if the activity in Canada could have affected United States markets, the Court concluded, the Canadian class members did not have standing to invoke protection of the United States Federal legislation and its application for their protection would not have had the effect of protecting United States markets.[5] The lack of jurisdiction of the Court thus flowed from the inapplicability of United States Federal law to the merits of the claims of Canadian investors, in the particular context of the United States judicial system.

The judgment of the Texas District Court is however of interest for its insistence on the divisibility of the class and the necessity that jurisdiction be established with respect to each juridical relation between the individual members of the class and the defendants. In the language of the Court, the Canadian claims could not be "bootstrapped" to independent United States losses or claims; there could be no ancillary or pendent jurisdiction with respect to some members of the class once jurisdiction was established with regard to other members of the class, based on the defendants' activities with respect to them.[6] Absence of jurisdiction may thus be established with respect to certain

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[4] See *McNamara* v. *Bre-X Minerals Ltd.*, 32 F. Supp.2d 920 (E.D. Tex. 1999). There is presently a motion before the Court for reconsideration of the decision, alleging that Canadian investors would have been influenced by representations coming from the United States and not only from Canada.

[5] *Supra* note 4, at 922 et seq.

[6] *Ibid.* at 923.

members of the class; it is not established in cross-border class actions by considering the class as a whole.

This conclusion appears of consequence given the diversity of legal relations which may exist within cross-border class actions. In the case of a defendant domiciled in Manitoba, for example, who is sued by way of class action in Québec or Ontario, the court in Québec or Ontario could have jurisdiction over the defendant in relation to members of the class situate in Québec or Ontario, where the defendant would have committed wrongful acts. In relation to class members resident in other provinces, however, there would be no contact with a Québec or Ontario forum on the part of either defendant or such potential plaintiffs. In the result, in such a case, it seems difficult to justify jurisdiction over a pan-Canadian class. In Québec and in the common law provinces, moreover, recognition elsewhere of such a judgment depends on the existence either of a head of jurisdiction established by the Civil Code or by a "real and substantial connection" between the case and the adjudicating jurisdiction.[7] Assumption of jurisdiction in such a case, absent contacts in the forum between extra-provincial plaintiffs and defendants, would yield no obligation of recognition and no *res judicata* effect.

ii) *Jurisdiction is established over the defendant*

There are other circumstances, however, in which the territorial jurisdiction of the court would be established definitively with respect to the defendant, *erga omnes*, because of a connection between the defendant and the forum. These are the original, classic instances of territorial jurisdiction, in which jurisdiction exists either because of authority being exercisable over the defendant, evidenced by service, or because of the domicile of the defendant in the forum. There may be other circumstances. In the Ontario *Bre-X* class action the jurisdiction of the Ontario Court seemed definitively established, with respect to the entire pan-Canadian class, either because of the domicile of the defendants in Ontario or because of activities of the defendants in Ontario which affected all members of the class.[8]

This situation appears to be the one which has most frequently occurred in United States case law, probably because of the relative ease with which United States courts may establish what is there known as "general" jurisdiction over out-of-state defendants.[9] Jurisdiction once established, *erga omnes*, the

[7] Art. 3155, C.C.Q.; *De Savoye* v. *Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077.

[8] *Carom* v. *Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441. In a subsequent judgment, however, the Court excluded from the action a significant number of defendants given the absence of common elements in the claims made against them. See *The Globe and Mail*, May 14, 1999, p. B-1.

[9] General jurisdiction would be independent of the dispute between the parties; specific jurisdiction would be dependent on the dispute between the parties. See A. von Mehren & D. Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966) 79 Harv. L. Rev. 1121.

question then becomes whether there is any residual question which prevents its exercise with respect to class members situate outside of the forum. In the leading United States Supreme Court case of *Phillips Petroleum Co.* v. *Shutts*,[10] the jurisdiction of the state court of Kansas was based on the circumstances that the defendant was conducting business in Kansas and was the owner of property situate in Kansas.[11] The question eventually put to the United States Supreme Court was whether the courts of Kansas could exercise their jurisdiction over out-of-state class members and if so, according to what conditions. The affirmative response of the Supreme Court to this question eliminated the need for all such class members to have some connection with the forum or to affirmatively opt into the Kansas proceedings. Jurisdiction of the Kansas courts thus established, it followed from the Full Faith and Credit Clause of the United States Constitution that all members of the class would be bound, in principle, by the judgment of the Kansas state court.

This United States case law has now found its echo in decisions of first-instance courts in Canada. In *Nantais* v. *Telectronics Proprietary (Canada) Ltd.* the Ontario Court (General Division) decided to authorize a class action directed towards a pan-Canadian class the members of which would all have suffered damage caused by defective cardiac pacemakers manufactured and distributed by the defendants throughout the Canadian market, through Ontario.[12] In *Bre-X* the same Ontario Court authorized a class action for the benefit of all Canadian investors in the company, citing both *Shutts* and *Nantais* in support of its decision and rejecting the argument that such an exercise of jurisdiction would be contrary to the principle of the territoriality of provincial authority.[13] In *Robertson* v. *Thomson Corporation* the Ontario Court authorized a multiple-jurisdiction class in an action for breach of copyright against an Ontario-based publisher.[14] In Québec, the Superior Court has rejected authorization of a environmental class action, in favour of residents of Guyana, against a defendant mining corporation domiciled in Québec, but did so not because of lack of jurisdiction but because in the circumstances Québec constituted a *forum non conveniens*.[15]

This case law can be criticized, both in terms of extraterritoriality and in terms of disparity of treatment between defendants (necessarily connected to

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[10] 86 L Ed 2d 628 (1985); see A. Miller & D. Crump, "Jurisdiction and Choice of Law in Multistate Class Action After *Phillips Petroleum Co.* v. *Shutts*" (1986) 96 Yale L.J. 1, with references. For the uncertain situation which prevailed prior to *Shutts*, see B. Winters, "Jurisdiction over Unnamed Plaintiffs in Multistate Class Actions" (1983) 73 Cal. L. Rev. 181.

[11] 679 P.2d 1159 at 1174.

[12] (1995), 127 D.L.R. (4th) 552, notably at 553 for distribution of the product through Ontario; leave to appeal refused at (1995), 25 O.R. 347.

[13] *Supra* note 8.

[14] (1999), 171 D.L.R. (4th) 171. The class was recognized as potentially including foreign plaintiffs as well as Canadian plaintiffs but the Court concluded that "... the possibility that such question [of preclusion] might arise elsewhere with respect to an atypical class member cannot be sufficient to defeat this claim from proceeding in Ontario."

[15] *Recherches Internationales Québec* c. *Cambior Inc.*, Que. Sup. Ct., Aug. 14, 1998, No. 500-06-000034-971, J.E. 98-1905.

the forum) and plaintiffs (who need not be connected to the forum).[16] The case law, however, does not appear incompatible with the inherent logic of a class action, which presumes that a court is capable of adjudicating on the rights and obligations of a large and diffuse group of people. If jurisdiction is established with respect to the defendant, the benefit of the judgment is not necessarily limited by political or judicial boundaries, since recovery of damages by the members of the class necessarily implies their consent. The preclusory effect of a judgment, moreover, would not be of extraterritorial effect by its own force, but only if another court decided to recognize the *res judicata* effect of the judgment. Such recognition would depend on an appreciation by the recognizing court of the criteria for jurisdiction used by the original court,[17] and also on an appreciation by the recognizing court of the procedure used in the class action proceedings.

II. *The Procedure used in the Class Action*

In Québec a decision rendered outside Québec cannot be recognized if it was rendered in contravention of fundamental principles of procedure.[18] In Canadian common law jurisdictions the same principle has long been recognized.[19] Before deciding that a local plaintiff is bound by an extra-provincial judgment bearing on a class action, all Canadian courts must therefore evaluate the procedure followed by the class action court.[20] What

[16] See, for these arguments in the U.S., L. Mullenix, "Class Actions, Personal Jurisdiction, and Plaintiff's Due Process: Implications for Mass Tort Litigation" (1995) 28 U.C.Davis L. Rev. 871, notably at 910.

[17] *Supra* note 7. In the situation discussed in the text the jurisdiction of the foreign court would be recognized in Quebec law, for example, if it was based on the domicile of the defendant in the province or state of the foreign court. See arts. 3164, 3168, C.C.Q.

[18] Art. 3155(3), C.C.Q.

[19] See J.-G. Castel, *Canadian Conflict of Laws*, 3rd ed. (Toronto/Vancouver: Butterworths, 1994) at 272, 273 ("Proceedings contrary to natural justice").

[20] This will be the case where no class action has been initiated in the recognizing forum and also the case where such an action has been initiated locally but local settlement, requiring court approval, is integrated with the terms of the extra-provincial judgment. For an example of such nesting of a local class action settlement and homologation into a large extra-provincial one, see *Tremaine* c. *A.H. Robins Canada Inc.*, C.S. Québec, 20 août 1993, No. 200-06-000006-935. In the latter case, where local judicial approval is given, the recognizing court will order its own procedural safeguards (notice, etc.) such that local class members will be bound by the local judgment. There could also be reliance on extra-provincial authorization of a national or continental class for purposes of resisting local authorization of a class action. The question is then not one of *res judicata* but of *lis pendens*. It is difficult, however, to see how a local court could accept an extra-provincial judgment authorizing a national class as constituting *lis pendens*. For there to be *lis pendens*, it must be decided that the extra-provincial judgment eventually to be obtained will be recognizable, yet it is impossible to come to this conclusion without knowing the procedural guarantees to be adopted by the originating court. For the dependency of *lis pendens* on recognizability in Quebec, see art. 3137, C.C.Q. A local court may yield to a foreign class action court, however, on the grounds of *forum non conveniens*, as in the *Cambior* decision cited *supra* note 13.

questions must be answered in this process? Once again the United States case law is of interest.

In *Shutts*,[21] the United States Supreme Court recognized the jurisdiction of the courts of Kansas to bind class members situate outside of Kansas, but did so by subjecting this jurisdiction to a number of rigorous procedural conditions. The essential question with respect to extra-territorial class members is therefore not so much one of jurisdiction as it is one of procedure. In *Shutt* all of the members of the class were known and the Supreme Court insisted that all members receive notice and be given the possibility of opting out.[22] In the circumstances all members of the class had received notice by first class mail and the court of first instance had eliminated from the class all individuals whose letter had been returned as undeliverable.[23] It is not evident, in United States law, whether less rigorous procedures would be accepted the Supreme Court. In Canada the decision of the Ontario Court in *Nantais* appears to meet the conditions set out by the United States Supreme Court, since all members of the class were known; all received notice; and all were given the occasion to opt out. In *Bre-X* the class representative is attempting to effect the same type of notice, to all class members, accompanied with notice of a right to opt out. As in *Nantais*, however, the only means of effecting such notice is through making use of information held by the defendants. The class representative is therefore requesting an order that notice be effected by the defendants, using their information and at their cost.[24] In the United States, however, the Supreme Court decided as early as 1974 that a class representative could not transfer to the defendant the costs of notice associated with a class action.[25] Two situations are therefore foreseeable in dealing with notice in cross-border class actions: either the class representative cannot effect individual notice because the members of the class are unknown, even to the defendant; or individual notice can be given but only with the assistance and at the cost of the defendant. Do these problems justify refusal of recognition of a class action judgment or court-approved settlement elsewhere in Canada?

Cross-border class actions aggravate the problems inherent in class actions: the classes are larger; the problems of notice (necessarily bilingual or even

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[21] *Supra* note 10.

[22] *Ibid.* at 642. It is for this reason that recent U.S. cross-border class action advertisements to class members having claims relating to the World War II era conduct of Swiss banks do not themselves constitute notice but instruct class members to request that a "Mailed Notice" and initial questionnaire be sent to them. See, e.g., *The Globe and Mail*, August 7, 1999, at A-6.

[23] *Supra* note 10 at 634, 635.

[24] See paras. 140, 195, et 196 of the written pleadings of the class representative in the *Bre-X* action in Ontario, *supra* note 8. Most of these defendants have however now been excluded from the class action; see *supra* note 8.

[25] *Eisen* v. *Carlisle & Jacquelin* 40 L Ed. 2d 732 (1974). In *Shutts* the class representative obtained the names and addresses of members of the class from the defendant, but assumed the costs of the mailing. See *supra* note 10 at 1167.

multilingual in linguistically complex jurisdictions) are greater; the difficulties of class recovery are more pronounced; and it is more difficult for class members to hold a watching brief over class procedures or to participate actively in the procedures.[26] For the lawyer of the class ethical problems of representation are more severe, since the lawyer must represent groups which are more distant and more diversified. In the United States accusations are now also made of collusion between defendants and class lawyers, the latter being chosen by the defendant to negotiate favourable settlements, particularly in cases of "settlement class actions."[27] A "settlement class action" is one in which the settlement proposal is submitted to the court at the same time as the motion for class action authorization, the entire package being previously negotiated between the defendant and the lawyer chosen (by the defendant) to represent the class. These settlements often give rise to sub-classes, which are treated differently depending on whether they fall within the "inventory" of the chosen class lawyer, or not. At worst, entire sub-classes may be denied recovery as an essential condition of the negotiated settlement, particularly where damage has yet to manifest itself. The class action in these circumstances functions as a means of denial of access to justice. The "settlement class action" has already appeared in Québec,[28] and it is not evident that the Canadian judiciary will be able to exercise more vigorous forms of control than that exercised by the United States judiciary. Are extra-provincial class members treated differently from those of the province or state from which the class action originates?[29] Have the class members of each province been represented separately? Has the settlement been negotiated hurriedly in the race to judgment in the case of multiple class actions? Has the notice been written to facilitate or to discourage its comprehension?[30] These questions become particularly crucial when the class members are not known and when they have not received individual notice. The B.C. class action legislation avoids these questions by allowing inclusion of extra-provincial

[26] For such difficulties of participation in the U.S., see S. Cottreau, "The Due Process Right to opt out of Class Actions" (1998) 73 N.Y.Univ.L.Rev. 480 at 489,490 (forum thus lacking "a solid source of authority").

[27] See J. Coffee Jr., "The Corruption of the Class Action: The New Technology of Collusion" (1995) 80 Cornell L. Rev. 851; and in the context of cross-border class actions, H. Monaghan, "Antisuit Injunctions and Preclusion against Absent Nonresident Class Members" (1998) 98 Col. L. Rev. 1148, notably at 1156; E. H. Cooper, "The (Cloudy) Future of Class Actions" (1998) 40 Arizona L. Rev. 923, notably at 933.

[28] See *Pelletier c. Baxter Healthcare Corp.*, S.C. Montreal 500-06-000005-955, 1998-04-16, J.E.98-1200. The summary in Jurisprudence Express does not mention that the settlement prohibits all claims on the part of those whose damage does not become known or manifest itself within a period of six years. On the phenomenon of settlement class actions, see H. P. Glenn "Le recours collectif, le droit civil et la justice sociale" (1998-99) R.D.U.S. 39, at 53, 54.

[29] On the dangers of discrimination against non-residents, see K. Schwarz, "Due Process and Equitable Relief in State Multistate Class Actions After *Phillips Petroleum Co.* v. *Shutts* (1989) 68 Texas L. Rev. 415, at 440.

[30] On such notices in U.S. practice, see Monaghan, *supra* note 27 at 1153, and 1156 (on the "full bore race to the bottom" in cross-border class actions in the U.S.).

class members only in the case where they opt affirmatively for inclusion in the class. In all other instances the class cannot extend beyond the province.[31]

In the United States the principle of "Full Faith and Credit" does not exclude the necessity of evaluating out-of-state judgments both with respect to jurisdiction of the adjudicating court and the procedure which it has followed.[32] The same solution necessarily prevails in Canada, given the nature of the Full Faith principle, and given the challenge to fundamental principles of procedure which class actions represent. The authority of *res judicata* necessarily declines over distance.

III. *The law applicable to the merits*

A cross-border class action necessarily raises the question of the law applicable to the merits of the case, or cases. In the United States the Supreme Court decided, in *Shutts*, that it was constitutionally impermissible to apply the law of the forum in the circumstances of that case.[33] Application of the law of the forum was one of the reasons for which the Court quashed the authorization of the class action, but the refusal of Kansas courts to apply any law other than that of Kansas would also have justified, for the same constitutional reasons, refusal to recognize in other states an eventual judgment by Kansas courts.

In Canada, given a federally-appointed judiciary, there is less tendency to constitutionalize questions of conflicts of laws. The normal sources of private international law have been considered sufficiently flexible to provide solutions in most cases and there has been no need to invoke the constitution to justify intervention by federally-appointed judges. How are the normal sources of private international law applicable to cross-border class actions?

Internal to every class action are bilateral legal relations and these legal relations exist according to the law which is applicable to each of them. Legislation creating class actions has not changed this principle; in Canada the

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[31] Class Proceeding Act, R.S.B.C., ch. 50, s. 16; and see *Harrington* v. *Dow Corning Corp.* (1997) 29 B.C.L.R. (3d) 88, authorizing a class composed partially of members outside of British Columbia and stating, at 92, that «[t]he non-resident opt-in procedure avoids potential difficulties in exercising jurisdiction over class members outside the province who have not taken any initiative to attorn to the jurisdiction of the B.C. court."

[32] Miller, *supra* note 10, at 36 (also noting the difficulties in determining whether the judgment satisfies the classic conditions of *res judicata* ("wriggle room"); Monagahan, *supra* note 27 at 1151-1153, 1173; and for challenging, even by members of the class having received notice of the class action, the authority of *res judicata* of judgments approving settlements, see *Nottingham Partners* v. *Trans-Lux Corporation* 925 F.2d 29 (1st Cir. 1991); *Matsushita Electric Industrial Co., Ltd.* (1996) 134 L Ed 2d 6. The latter problem is inherent in even purely domestic class actions and it has recently been concluded that "... courts have great difficulty actually maintaining a consistent position concerning res judicata in cases where res judicata effects have practical significance." G. Hazard Jr., J. Gedid & S. Sowle, "An Historical Analysis of the Binding Effect of Class Suits" (1998) 146 U. Pa. L. Rev. 1851, at 1854.

[33] *Supra* note 10 notably at 643 et seq; and see Miller, *supra* note 10 at 14.

texts explicitly presume its existence in requiring some form of proof of the relation between the claim and the governing law or laws. This may be prima facie proof that the case is well-founded; or simply proof that the cause of action alleged by the pleadings does exist.[34] The laws applicable for purposes of these questions are those determined by the applicable rules of private international law; there are no rules of private international law developed particularly for class actions. The law applicable to the merits of a class action is even more important in Canada than in the United States since the United States legislation generally does not require any proof of the substantive merit of the claims at the stage of authorization.[35]

The class representative who seeks authorization of the class action must therefore provide the requisite proof of the merits of the case, and necessarily according to the law or laws designated by the private international law of the forum.[36] If the class representative offers no such proof of applicable law, the proof may be offered by the defendant who opposes authorization as a means of indicating the particularity of the claims (which may stand or fall depending on the law applicable to them) and the absence of a class presenting common elements.[37] If the court seized with the motion for authorization refuses or neglects to apply the relevant rules of private international law this would be a ground of appeal to the extent that appeal is available.[38] It is noteworthy that no proof of extra-provincial law appears to have been made in the Ontario cases leading to authorization of pan-Canadian classes.[39] What is the importance of

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[34] See, in Quebec, art. 1003, C.C.P. ("the facts alleged seem to justify the conclusions sought"); and in Ontario, s. 5(1)(a) of the *Class Proceeding Act 1992*, S.O. 1992, c. 6 ("the pleadings or the notice of application [disclose] a cause of action"); and on the differences between the two texts, H. P. Glenn, "Class Proceeding Act, 1992, S.O. 1992, c. 6 - Law Society Amendment Act (Class Proceeding Funding), 1992, S.O. 1992, c. 7" (1993) 72 Can. Bar Rev. 568, at 569, 570.

[35] See H.P. Glenn, "The Dilemma of Class Action Reform" (1986) 6 Ox. J. Leg. Studies 262 at 269, 270.

[36] See the judgment of the British Columbia Supreme Court in *Harrington*, *supra* note 31 at 91, 92 ("A non-resident woman whose entire implant medical history has no connection to British Columbia must have her claim determined by the law of a jurisdiction other than British Columbia .... The thorny choice of law issue ... is not directly before the court on this application but it is lurking in the background if any but the narrowest view of the appropriate class is adopted").

[37] For U.S. cases refusing authorization for such reasons, see W. Torchiana, "Choice of Law and the Multistate Class: Forum Interests in Matters Distant" (1986) 134 U. Pa. L. Rev. 913 at 928.

[38] Appeal would not however be available in Québec, given the restrictive provisions of art. 1010, para. 2, C.C.P.

[39] See *Nantais*, *supra* note 12, and the decision of Zuber J. of the Divisional Court (1995) 25 O.R. 347 ("I am not aware of any difference in the law respecting product liability or negligence in the common law provinces and I have not been shown that there is a real difference [between the common law provinces and Québec]", suggesting however that class could be redefined if differences in substantive law would make trial difficult); *Bre-X*, *supra* note 8; *Robertson*, *supra* note 14.

such a failure to establish the terms of the law applicable to each of the claims in a cross-border class action, where the question is whether an eventual judgment of the class action court should be recognized in another province?

In Quebec, the need for the foreign court to have applied the same law as a Quebec court would have applied has been abolished in principle by art. 3157 of the Civil Code. The language of this article is, however, worthy of attention, since it provides that "Recognition or enforcement may not be refused *on the sole ground* that the original authority applied a law different from the law that would be applicable under the rules contained in this Book" (emphasis added). The refusal of an extra-provincial court to have considered or applied its own rules of private international law in the disposition of cross-border class action may therefore be a ground among others, notably those relating to the procedure followed by the court,[40] for refusing to recognize such a judgment. The reasoning appears entirely compatible with the law of the common law provinces, and would be more compelling in cases where neglected provincial laws were impressed with a strong measure of public policy.[41]

This conclusion would seem to follow even in the case where none of the parties, in the originating forum, invoked rules of private international law or extra-provincial law. Normally, in all Canadian jurisdictions, foreign law is considered to be a fact and, in the absence of allegation of foreign law, the law of the forum is applied.[42] Should the same latitude with respect to underlying law be allowed to the parties in the case of a cross-border class action? One of the main reasons for the constitutionalization, by the United States Supreme Court in *Shutts*, of the necessity to apply laws other than that of the forum is that all parties are not before the court at the time of the motion for authorization of the class action. The Court stated that "[w]e also give little credence to the idea that Kansas law should apply to all claims because the plaintiffs, by failing to opt out, evinced their desire to be bound by Kansas law."[43] It is therefore not for a class representative to abandon application of applicable law, which may be more or less favourable to class members than the law of the forum. It is perhaps worth mentioning in this regard the adoption in the new Civil Code of Quebec of a regime of so-called strict liability for manufacturers of products.[44] Non-application of the applicable law or laws would therefore be a further

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[40] See *supra* Part II.

[41] See, for example, for the imperative nature of Québec securities legislation, the *Securities Act*, R.S.Q., c. V-1.1, s. 236.1, paras. 2 and 3:

In matters pertaining to the distribution of a security, the laws of Québec are applicable where the subscriber or purchaser resides in Québec, regardless of the place of the contract.

Any contrary stipulation as to the jurisdiction of the courts or the applicable legislation is null.

[42] In Québec see art. 2809, C.C. ("Where such law has not been pleaded or its content cannot be established, the court applies he law in force in Québec"); and for the common law provinces see J.-G. Castel, *supra* note 19 at 147, with references.

[43] *Supra* note 10 at 647.

[44] See arts. 1468, 1469, C.C.Q.

ground of non-recognition of a judgment in a cross-border class action. This ground can also be seen as a violation of fundamental principles of procedure, since class members would have been deprived of the possibility of claiming application of the applicable law in the authorization process or in the negotiations leading to a court-approved settlement.

Conclusion

Cross-border class actions create many problems, since they exacerbate problems which are already inherent in domestic class actions. Whatever their size, however, class actions present problems relating to essential principles of civil procedure. The reasons for refusing to recognize cross-border class action judgments are therefore closely related to reasons for questioning the purely domestic class action.