

Private Enforcement of Competition Laws

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Private Enforcement of Competition Laws

Abstract

This article addresses a long-standing controversy in many antitrust/competition law regimes around the world, including Canada, as to the appropriate role for private enforcement of competition laws. The United States, from the origins of its antitrust law in 1890, has provided for an expansive role for private actions for violations through treble damages remedies, class action procedures, one-way cost rules, contingent fees, and civil jury trials. The Canadian experience has been sharply different: statutory recognition of any role for private action occurred only in amendments to the Competition Act in 1976, and private damages actions were confined to criminal violations of the Act. The Bureau of Competition Policy has recently proposed a more expansive role for private actions under the Competition Act, in particular providing mechanisms for private parties to have direct access to the Competition Tribunal in non-criminal matters. The authors review the comparative experience with private antitrust enforcement; evaluate the arguments for and against the private enforcement of public laws generally; and review theoretical debates over the role of private enforcement of antitrust laws on either deterrence or compensation grounds. The authors conclude with a set of procedural and remedial proposals designed to structure and discipline in appropriate ways a private enforcement regime under the Competition Act

PRIVATE ENFORCEMENT OF COMPETITION LAWS[©]

BY KENT ROACH* AND MICHAEL J. TREBILCOCK**

This article addresses a long-standing controversy in many antitrust/competition law regimes around the world, including Canada, as to the appropriate role for private enforcement of competition laws. The United States, from the origins of its antitrust law in 1890, has provided for an expansive role for private actions for violations through treble damages remedies, class action procedures, one-way cost rules, contingent fees, and civil jury trials. The Canadian experience has been sharply different: statutory recognition of any role for private action occurred only in amendments to the *Competition Act* in 1976, and private damages actions were confined to criminal violations of the *Act*. The Bureau of Competition Policy has recently proposed a more expansive role for private actions under the *Competition Act*, in particular providing mechanisms for private parties to have direct access to the Competition Tribunal in non-criminal matters. The authors review the comparative experience with private antitrust enforcement; evaluate the arguments for and against the private enforcement of public laws generally; and review theoretical debates over the role of private enforcement of antitrust laws on either deterrence or compensation grounds. The authors conclude with a set of procedural and remedial proposals designed to structure and discipline in appropriate ways a private enforcement regime under the *Competition Act*.

Cet article aborde une controverse de longue date existant en droit de la compétition/antitrust à travers le monde, y compris au Canada, concernant le rôle des mesures privées de mise en application de la législation pertinente à ce domaine. Les États-Unis, depuis les origines de leur loi antitrust en 1890, ont pris une tangente vers la reconnaissance du rôle des recours judiciaires de nature privée, notamment par le biais de dommages-intérêts triples, de procédures en recours collectif, de règles prévoyant la condamnation aux dépens par une partie spécifique, d'honoraires fixés selon un pourcentage et de procès civils devant jury. L'expérience canadienne a été très différente: un rôle quelconque pour les actions privées a été introduit seulement par les amendements à la *Loi sur la concurrence* en 1976 et les recours privées en dommages ont été limitées aux violations pénales de la *Loi*. Le Bureau de la politique de concurrence a récemment proposé l'introduction d'un rôle élargi pour ces actions en permettant aux parties privées d'avoir accès au Tribunal dans les litiges de nature autre que pénaux. Les auteurs soulignent l'expérience comparative des mesures privées de mise en application des lois antitrust, examinent les arguments des protagonistes, et survolent les débats académiques sur le rôle de celles-ci, que ce soit du point de vue de la prévention ou de la compensation. En conclusion, les auteurs suggèrent des moyens procéduriers et curatifs en vue de structurer et d'implanter, d'une manière appropriée, un régime privé de mise en application de la *Loi sur la concurrence*.

I. INTRODUCTION 462

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** Professor of Law and Economics, Faculty of Law, University of Toronto. This paper is derived from a larger study for the Amendments Unit, Competition Policy Bureau, Industry Canada by Kent Roach and Michael Trebilcock, "Private Party Access to the Competition Tribunal" (Hull, Que.: 7 May 1996). We are entirely responsible for the views expressed herein, which should not be attributed to the Bureau.

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I. INTRODUCTION

The role of private enforcement of competition/antitrust laws has been the subject of long-standing and vigorous debates in many jurisdictions throughout the industrialized world. In a 1995 *Discussion*

Paper,¹ the Director of Investigation and Research of the Competition Policy Bureau proposed a number of amendments to the Canadian *Competition Act*.² These proposals included the creation of a right of direct access to the Competition Tribunal by private complainants with respect to reviewable practices such as mergers, abuse of dominant position, vertical distribution practices, and refusals to deal. The proposals envisaged that private parties would only be entitled to the same remedies as the Director (primarily injunctive relief), and that mergers might be excluded from the private enforcement regime. Following release of the *Discussion Paper*, the Director formed a Consultative Panel to receive and review reactions to the proposals and to advise the Director. The proposal for private party access to the Competition Tribunal engendered substantial opposition from the business and legal communities and within the Consultative Panel, which recommended further study of the issue. The Bureau commissioned the study from which this paper is derived, which was released in late September 1996. Amendments to the *Competition Act* were introduced into the House of Commons on 7 November 1996 (Bill C-67), but did not include the proposed private party access regime. The Director stated that the regime would remain under consideration, but action, if any, would be deferred to subsequent amendment processes.

This article attempts to evaluate and advance the case for private enforcement of competition/antitrust laws, and to develop a set of procedural proposals that would govern such a regime. In Part II of the paper we review the sharply divergent comparative experience in the United States, Australia, and Canada with the private enforcement of competition/antitrust laws. In Part III, we review the arguments for and against private enforcement of public laws generally. In Part IV, we review the arguments for and against private enforcement of competition/antitrust laws specifically, and develop a corrective justice case for specific and compensatory relief for private parties harmed by competition law violations. In Part V, we sketch some procedural and remedial ground-rules that, in our view, should govern private party access to the Competition Tribunal with respect to reviewable practices and perhaps also to criminal violations of the *Competition Act*. These design features respond to the advantages and weaknesses of private enforcement identified earlier in the article, and attempt to maximize the potential for effective and efficient private enforcement of

¹ Director of Investigation and Research, Bureau of Competition Policy, *Discussion Paper on Competition Law* (28 June 1995) [unpublished].

² R.S.C. 1985, c. C-34 [hereinafter *Competition Act*].

competition law while minimizing the risks of strategic behaviour that could delay and hinder legal and competitive behaviour.

II. THE COMPARATIVE EXPERIENCE WITH PRIVATE ANTITRUST ENFORCEMENT

Private enforcement of antitrust laws has a long history. The U.K. *Statute of Monopolies*,³ enacted in 1623, provided that an individual, financially injured in his business or property by a restraint of trade, could bring suit and, if successful, collect treble the amount of his damages from the perpetrator of the anti-competitive activity.⁴ More generally, the common law of restraint of trade, whose genesis predates even the *Statute of Monopolies*, has long recognized the right of private parties to challenge unreasonable restraints of trade in contracts to which they are parties (*e.g.* employment contracts, contracts for the sale of a business) and restrictions on trade contained in by-laws or rules of guilds and other trade associations with regulatory powers.⁵ This body of doctrine also recognized, albeit in limited circumstances, the right of private parties to maintain tort actions for conspiracy where they were able to demonstrate injury from the collusive activities of other parties. The courts, however, proved more willing historically to apply this doctrine to the activities of trade unions than to business firms conspiring to eliminate competitors through boycotts or other forms of predatory behaviour.⁶

A. United States

In the United States, section 7 of the *Sherman Act of 1890*⁷ provided that “any person who shall be injured in his business or property ... by reason of anything forbidden ... by this Act may sue

³ *An Act concerning monopolies and dispensations with Penal Laws and forfeitures thereof*, (U.K.), 21 Ja. I, c. 3 [hereinafter *Statute of Monopolies*].

⁴ See K.G. Elzinga & W. Breit, *The Antitrust Penalties: A Study in Law and Economics* (New Haven: Yale University Press, 1976) at 63 [hereinafter *Antitrust Penalties*].

⁵ See M.J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986) c. 1.

⁶ *Ibid.* at 27-28.

⁷ *An Act to Protect trade and commerce against unlawful restraints and monopolies*, ch. 647, 26 Stat. 209 (1890) [current version at 15 U.S.C. § 1 et seq. (1996)] [hereinafter *Sherman Act*].

therefor ... and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." Section 7 of the *Sherman Act* has now been superseded by section 4 of the *Clayton Act of 1914*,⁸ which enables private persons to bring antitrust suits for treble damages for damage suffered as a result of any antitrust violation. The *Clayton Act* also includes a one-way costs rule favouring plaintiffs. It provides that final determinations resulting from prior government enforcement proceedings are *prima facie* evidence of similar facts alleged in subsequent antitrust proceedings. In addition, section 16 of the *Clayton Act* permits private parties who have suffered injury as a result of any antitrust violation, or are threatened with injury, to seek equitable relief from the courts, including, most prominently, injunctive relief. In the United States, the treble damages remedy available to private parties runs parallel to three classes of sanctions that may result from public enforcement of the antitrust laws: fines, incarceration, and structural remedies (such as divestiture).

Whether Congress, in enacting these provisions of the *Sherman* and *Clayton Acts*, intended private actions to be the primary tool for deterring anti-competitive activity or, instead, meant them merely to be a device enabling the compensation of injured parties has been the subject of some debate. Lack of any initial budgetary appropriation by Congress for *Sherman Act* enforcement provides some support for the former view, although during the first fifty years of *Sherman Act* enforcement only 175 private suits were filed and, of these, the plaintiffs were successful in only thirteen.⁹ More recent American experience reflects a sharply different and larger role for private antitrust suits. A 1970 study by Richard Posner estimated that between 1890 and 1969, 9,728 private antitrust suits were filed in the United States and up to 1965, the ratio of private to government cases tended to be 6:1 or less.¹⁰ More recent empirical studies, including most prominently the Georgetown Private Antitrust Litigation Project (the Georgetown Project), which collected and analyzed data on all private antitrust cases filed from 1973 to 1983 in five federal districts, found that from the mid-1960s until the late 1970s, the absolute and relative number of private antitrust cases grew, peaking at 1,611 in 1977, while the ratio of private to public cases exceeded 20:1. In the 1980s, however, both the absolute

⁸ *An Act to Supplement existing laws against unlawful Restraints and Monopolies, and for other purposes*, ch. 323, 38 Stat. 730 (1914) [current version at 15 U.S.C. § 12 (1996)] [hereinafter *Clayton Act*].

⁹ *Antitrust Penalties*, *supra* note 4 at 66-68.

¹⁰ R.A. Posner, "A Statistical Study of Antitrust Enforcement" (1970) 13 J.L. & Econ. 365.

and relative numbers of private antitrust cases have declined, and the ratio of private to public cases has fallen to the 10:1 range.¹¹ In the sample of cases analyzed in the Georgetown Project, horizontal price fixing was the most frequent primary allegation, followed by refusal to deal. When primary and secondary allegations were combined, refusal to deal was the most frequent allegation, followed by horizontal price fixing, tying or exclusive dealing, and price discrimination. Vertical allegations outnumbered horizontal allegations. The largest group of plaintiffs were downstream business entities—dealers, business customers, franchisees, and licensees—suing their suppliers. The next largest group of plaintiffs was competitors suing each other. Challenges by competitors to mergers outnumbered those by suppliers, dealers and customers by a ratio of 2:1. Of the cases for which the final disposition was known, more than 80 per cent of the cases settled. Only 5.4 per cent of all cases went to trial. While some estimates of private treble damages actions filed in the United States before 1960 suggested that about 75 per cent of all such actions were initiated after and in reliance on similar government enforcement actions, data from the Georgetown Project suggest that the average percentage of independently initiated cases for the period 1973 to 1977 was 88.8 per cent and follow-on cases 11.2 per cent. For the period 1978 to 1983, the percentage of independently initiated cases was 94.1 per cent and the percentage of follow-on cases averaged 5.9 per cent.¹²

B. *Australia*

Prior to 1974, private statutory rights of action for breach of prohibited restrictive practices were not recognized in Australia. However, the *Trade Practices Act 1974*¹³ provides that private parties may bring proceedings before the Federal Court relating to restrictive trade practices under Part IV of the *Act*. Remedies available to private litigants include single damages; injunctions (except for mergers); divestiture orders for mergers only; and other orders. The *Federal Court*

¹¹ See S. Salop & L. White, "Economic Analysis of Private Antitrust Litigation" (1986) 74 *Geo. L.J.* 1001 at 1002; and H. Latimer, "Private Enforcement of the Antitrust Clause in the United States—Is Reform Called For?" in R.S. Khemani & W.T. Stanbury, eds., *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) c. 32, Table 1 at 667.

¹² T. Kauper & E. Snyder, "An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared" (1986) 74 *Geo. L.J.* 1163 at 1174.

¹³ Aust'l. 1974, no. 51 [hereinafter *Trade Practices Act*].

of *Australia Act 1976*¹⁴ also permits a person to bring a representative or class action on behalf of others. According to a recent comment on the Australian experience by David Smith,¹⁵ the Trade Practices Commission actively encourages private actions as an alternative to instituting proceedings itself. Over the period 1975 to 1994, seventy-nine private actions were decided under the competition provisions of Part IV of the *Trade Practices Act*, compared to sixty-one Commission cases. About a third of the private actions related to secondary boycotts by labour unions, which do not fall within the Canadian *Competition Act*. Setting aside these cases, misuse of market power, anti-competitive agreements and exclusionary provisions, and exclusive dealing are the most common areas of private enforcement activity. In the Australian experience, apparently, the type of practices or conduct where private action has occurred or is most likely to occur involves some of the *per se* breaches or the less complex rule of reason or abuse cases—that is, conduct with immediate impact or detriment. Examples include refusal to supply, boycott, supply on discriminatory terms, and blatant misrepresentations in advertising or promotional material. Over the entire period 1975 to 1994, private parties challenged only two mergers by way of an application for a declaration, which may be followed by a divestiture order. Injunctive relief is not available to private parties seeking to oppose a merger. Smith claims that there is acceptance by all stakeholders of the positive role that private enforcement has played in the application of competition law in Australia, and that the right of private action has complemented public enforcement and played a significant role in enhancing the level of understanding of the *Trade Practices Act* and the overall level of compliance within the business community.

C. Canada

The historical experience has been sharply different in Canada. The *Combines Investigation Act*,¹⁶ enacted in 1889, provided for no private rights of action and recognized no such rights until the *Act* was amended in 1976. However, the courts from an early date recognized

¹⁴ Aust'l. 1976, no. 156, as am.

¹⁵ "Private Rights of Action; Some Comments on the Australian Experience" (mimeo, Australian Trade Practices Commission, undated).

¹⁶ *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, S.C. 1889, c. 41 [hereinafter *Combines Investigation Act*].

that an agreement in violation of the *Act* was invalid and unenforceable as between the parties,¹⁷ and much more recently, they have recognized that violations of the criminal provisions of the *Competition Act* may provide the basis for common law tort actions for conspiracy or unlawful interference with economic or contractual interests or relations.¹⁸ Similarly, some courts have suggested that in interpreting and applying the common law of restraint of trade in a contemporary context, the courts should be influenced by the objectives of the *Competition Act*, particularly in applying the public interest (as opposed to parties' interest) strand of the *Nordenfelt* common law restraint of trade test.¹⁹ However, the preponderance of opinion in recent case law is that the reviewable practice provisions contained in Part VIII of the *Competition Act* do not provide private parties with a basis for civil relief, because they do not entail *per se* illegality,²⁰ although this issue cannot yet be regarded as conclusively resolved.

While the common law thus recognizes limited private rights of actions in various contexts for anti-competitive practices, the process of reforming Canada's competition laws began in 1969 with the publication of the Economic Council of Canada's *Interim Report on Competition Policy*.²¹ It focused significant attention on the question of whether a more prominent role should be assigned to the private enforcement of antitrust laws. The Council supported a larger role, and in 1971, its views were adopted in Bill C-256 in the form of a double damages provision modelled after the *Clayton Act*.²² However, the Bill was

¹⁷ See *Weidman v. Shragge* (1912), 46 S.C.R. 1.

¹⁸ See *Canada Cement Lafarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452; *Westfair Foods Ltd. v. Lippens Inc.* (1989), 61 Man. R. (2d) 282 (C.A.); *Direct Lumber Co. v. Western Plywood Co.*, [1962] 2 S.C.R. 646; *Valley Salvage Ltd. v. Molson Brewery B.C. Ltd.* (1975), 64 D.L.R. (3d) 734 (B.C.S.C.); and *Philco Products Ltd. v. Thermionics Ltd.*, [1940] S.C.R. 501.

¹⁹ See *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 (C.A.); and *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd.*, [1894] A.C. 535 (H.L.).

²⁰ See *Proctor & Gamble Co. v. Kimberley-Clark of Canada Ltd.*, (1991) 40 C.P.R. (3d) 1 (F.C.T.D.); *R.D. Belanger and Associates Ltd. v. Stadium Corp. of Ontario* (1991), 26 A.C.W.S. (3d) 509 (Ont. Ct. (Gen. Div.)), rev'd 5 O.R. (3d) 778 (C.A.); *Harbord Insurance Services Ltd. v. I.C.B.C.* (1993), 13 C.C.L.I. (2d) 262 (B.C.S.C.); *Polaroid Canada v. Continent-Wide Enterprises Ltd.* (1995), 59 C.P.R. (3d) 257 (Ont. Ct. (Gen. Div.)); and *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1994), 116 D.L.R. (4th) 514 (Ont. Ct. (Gen. Div.)), rev'd (1995), 23 O.R. (3d) 766 (Div. Ct.).

²¹ Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969).

²² Bill C-256, *An Act to promote Competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competition Practices Tribunal, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act*, 3d. Sess., 28th Parl., 1970-71.

withdrawn in the face of intense business and political opposition, and in the Stage I amendments to the *Combines Investigation Act*, enacted in 1976, a single damages remedy for breach of the criminal provisions of the *Act* was adopted instead. This provision is now found in section 36 of the *Competition Act*, which provides as follows:

36.(1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

(4) No action may be brought under subsection (1),

(a) that in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) the day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later.

The level of private enforcement activity under section 36 since its enactment has been extremely sparse.²³ This may be explained in part by constitutional doubts as to the validity of the section which

²³ For a review of this experience, see G. Leslie & S. Bodley, "The Record of Private Actions Under Section 36 of the *Competition Act*" (1993) Can. Comp. Record 50.

persisted until 1989, when the Supreme Court of Canada upheld its validity in *General Motors of Canada Ltd. v. City National Leasing*.²⁴ However, even since the constitutional validity of the section was resolved, there appears to be only one reported case on section 36, and since 1976 only three reported cases where plaintiffs sought (unsuccessfully) to prove a violation of the criminal provisions of the *Act*, and only two reported actions (both unsuccessful), where plaintiffs sought to rely on a previous criminal conviction.²⁵ Thus, in sharp contrast to the American experience, public enforcement actions with respect to the criminal provisions of the *Competition Act* (including the misleading advertising provisions) vastly outnumber private actions with respect to alleged violations of the same provisions.

With respect to the reviewable practice provisions in the *Competition Act* (now Part VIII), first enacted in the 1976 amendments and extended in the 1986 amendments through the transfer of the merger and monopoly provisions from the criminal law to administrative review by the Competition Tribunal, section 36 has no application since, by its terms, it is confined to the criminal provisions in Part VI of the *Act*. Moreover, the record of public enforcement of these provisions, at least as reflected in concluded proceedings before the Competition Tribunal, is itself quite sparse. Between 1976 and 1986, there were only two reported decisions of the former Restrictive Trade Practices Commission (superseded in 1986 by the Competition Tribunal)—one an exclusive dealing case²⁶ and the other a tying case.²⁷ Since the 1986 amendments, the tribunal has decided two refusal to deal cases,²⁸ three abuse of dominant position cases,²⁹ one exclusive dealing case,³⁰ and two

²⁴ [1989] 1 S.C.R. 641.

²⁵ See *Leslie & Bodley*, *supra* note 23 at 51-52.

²⁶ *Director of Investigation and Research v. Bombardier Ltd.* (1980), 53 C.P.R. (2d) 47 (Rest. Trade Pract. Comm.—Combines).

²⁷ *Director of Investigation and Research v. BBM Bureau of Measurement* (1981), 60 C.P.R. (2d) 26 (Rest. Trade Pract. Comm.—Combines).

²⁸ *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.); and *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

²⁹ *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.); and *Canada (Director of Investigation and Research) v. Tele-Direct Inc.* (Tribunal File No. CT-94/03, February 1997) [as yet unreported].

³⁰ *Canada (Director of Investigation and Research) v. Neilson* (1995), (Comp. Trib.) [unreported].

contested merger cases.³¹ In public enforcement proceedings under Part VIII of the *Act*, the primary remedy is injunctive relief (cease and desist orders), and, only in extreme cases where such orders are likely to prove ineffective, structural relief. The tribunal cannot impose fines for conduct or practices found to violate any of the provisions of Part VIII except for ensuing breaches of orders that it has made with respect to such conduct or practices.

III. THE PRIVATE ENFORCEMENT OF PUBLIC LAWS

There has been a traditional tendency to assume that laws designed to produce public benefits should be enforced by public authorities while laws designed to regulate the interactions of private actors should be enforced by private actors. This has always been an oversimplification given the dominant role that private prosecutions played in the criminal law well into the nineteenth century.³² Even today, when vast resources are devoted to public prosecution of crimes, the criminal law can still be enforced by private prosecutions.³³ Although public prosecutors can take over or stay private prosecutions, the Supreme Court of Canada has recognized that the ability of a private

³¹ *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.); and *Canada (Director of Investigation and Research) v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.).

³² This, of course, led to some abuses of the criminal process such as the use of private prosecutions as a form of blackmail. At the same time, public prosecutors with a monopoly of prosecutorial powers may be vulnerable to charges of favoritism. B. Boyer & E. Meidinger, "Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws" (1985) 34 *Buff. L. Rev.* 833 at 956-57:

In short, experience has shown that both an extensive system of private prosecution and a public monopoly in criminal enforcement are susceptible to abuse. What is needed is the appropriate mix of public and private enforcement that will fit the particular times and its social needs, together with adequate systems of accountability to prevent abuse.

³³ The Supreme Court of Canada has stated that "the right of an ordinary citizen, the victim of a criminal offence, to lay an information against the offender" is a "fundamental precept" of the criminal justice system, and has overturned attempts to vest exclusive prosecutorial policy over young offenders to provincial authorities: *Quebec (A.G.) v. Lechasseur (Quebec Youth Court Judge)*, [1981] 2 S.C.R. 253 at 261. See generally F. Kaufman, "The Role of the Private Prosecutor: A Critical Analysis of the Complainant's Position in Criminal Cases" (1960) 7 *McGill L.J.* 102; P. Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 *McGill L.J.* 269; P. Stenning, *Appearing for the Crown: A Legal and Historical Review of Criminal Prosecutorial Authority in Canada* (Cowansville, Que.: Brown Legal Publications, 1986) c. 12; and Law Reform Commission of Canada, *Private Prosecutions*, (Working Paper No. 52) (Ottawa: Law Reform Commission of Canada, 1986).

individual to present a case to a judicial official can increase the prosecutor's accountability.³⁴ Another important form of public law, constitutional law, depends almost entirely on private enforcement. Canadian courts have granted public interest standing to those not directly affected by the impugned laws in order to better protect the "right of the citizenry to constitutional behaviour by Parliament ...".³⁵ Environmental and consumer protection laws are enforced through a mixture of private and public enforcement.³⁶ Thus, private enforcement is an established feature of many areas of public law.

The initial case for private enforcement is quite strong. The private enforcement of public laws can act as a check on the monopoly power of enforcement that public authorities would otherwise enjoy. A private individual who has suffered a violation may be in a better position and may have better information to enforce public laws than a public official. It is the aggrieved person rather than the public official who has the greatest incentive to seek corrective justice in the form of damages or other remedies.

Nonetheless, the assumption that public laws should be administered by public officials has persisted. This has particularly been true in Canada where governments often appear to be the only actors with the resources and accountability structures necessary to develop effective prosecution policies. Private actors, in many cases, may lack the desire, resources, or expertise to enforce public laws. Those that do possess these qualifications may seek to appropriate the enforcement powers and remedies ordinarily available only to public officials in order to advance their own strategic ends.

³⁴ *Dowson v. R.*, [1983] 2 S.C.R. 144 at 155-56. See generally J.L.J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) c. 6.

³⁵ *Thorson v. Canada (A.G.) (No. 2)*, [1975] 1 S.C.R. 138 at 162. This case has been expanded to allow public interest standing when the legality as opposed to the constitutionality of governmental actions is challenged: *Finlay v. Canada (Finance)*, [1986] 2 S.C.R. 607. Recently, the courts have restricted public interest standing especially when there is a directly affected person who could bring a similar challenge. See generally K. Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 1994) c. 5. In a very recent case, *R. v. Edwards*, [1996] 1 S.C.R. 128, the Court denied an accused standing to argue that evidence should not be admitted on the basis that the search and seizure rights of a third party had been violated when it was obtained. American courts have reached similar conclusions even though it may only be the accused and not the third party who has the incentive to challenge the constitutionality of the search and seizure. See D. Meltzer, "Deterring Constitutional Violations By Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General" (1988) 88 Colum. L. Rev. 247.

³⁶ See for example *Environmental Bill of Rights*, S.O. 1993, c. 28, Part VI, as am. by S.O. 1996, c. 27, s. 22.

As will be discussed below, the United States has facilitated private enforcement by encouraging private plaintiffs to act as private attorneys general in a number of fields. The American embrace of private enforcement can be related to willingness to see the law in instrumental terms and a skepticism about devoting resources and monopoly power to public enforcement. To be sure, much of the American enthusiasm for private enforcement has waned with the growing sense that private litigation of all forms is becoming a drag on much productive activity. It is feared that uncoordinated attempts by private individuals to deter socially undesirable behaviour will result in the deterrence of socially useful behaviour.

At the same time, Canadian attitudes towards private enforcement may be changing in the opposite direction because of a variety of factors. Canadian faith in governments has been sorely tested in recent years and private enforcement can increase the accountability of public officials. It can also serve as a fail-safe mechanism should public enforcement fall below optimal or acceptable levels. Anglo-Canadian costs rules such as the "loser pays" principle and restrictions on damage awards, civil jury trials, class actions, and contingency fees may prevent some of the excesses of the American experience with private enforcement. In addition, a growing lack of consensus about what is in the public interest in Canadian society makes exclusive public enforcement more problematic and suggests that private individuals and groups should be allowed an opportunity to advance their claims that they act in the public interest. Finally, in times of fiscal restraint, the prospect of attracting private resources to the enterprise of enforcing public laws is appealing.

A. The Political Theory of Private Enforcement

Theorists of the liberal state starting with Thomas Hobbes have taken an unfavourable view of private enforcement of public laws. For Hobbes, the state of nature which existed before the development of the state relied exclusively on private enforcement of the law. Primarily for that reason, "the life of man [was] solitary, poor, nasty, brutish, and short."³⁷ Individuals acting in their rational self-interest will willingly trade the ability to enforce law for a public monopoly over violence which will make their lives richer and longer. A public monopoly over enforcement is necessary to induce each person to divert his or her

³⁷ T. Hobbes, *Leviathan*, ed. by C.B. MacPherson (Middlesex, U.K.: Penguin, 1968) at 186.

resources from self-protection and self-help to more productive activities. The re-introduction of private enforcement of public law troubles those influenced by liberal state of nature theorists, even though the enforcement of private law has long depended on individual self-help.

Acceptance of exclusive public enforcement of the law has been augmented by other developments in political theory. Jean-Jacques Rousseau added the romantic concept of the general will to Hobbes' more utilitarian defence of the modern state.³⁸ Public enforcement was not simply more efficient, but also a more genuine expression of public policy. The modern state soon created its own argument for exclusive reliance on public enforcement. Max Weber, for example, suggested that more developed societies would regularize their policies through the mechanism of bureaucratic rationality.³⁹ Full-time professional prosecutors subject to hierarchical control were better situated to implement rational prosecutorial policies than private individuals, who would not be subject to bureaucratic control and might be motivated by irrational motivations such as the desire for vengeance. Unlike the part-time private prosecutor, a full-time public prosecutor could develop specialized expertise.

There are theoretical arguments in favour of private enforcement of public laws. Some commentators, drawing on retributive theories, have argued that private enforcement is justified if the litigant is vindicating pre-existing natural rights, but is not justified if it is based on legislation that attempts to maximize general welfare.⁴⁰ Much modern legislation, however, is concerned with both social welfare and individual rights. Expanded notions of entitlement and rights to citizen participation will increase the range of laws that can be subject to private enforcement. Private enforcement can be seen as a participatory activity which allows individuals and groups to compete over increasingly pluralistic understandings of the public interest. A growing sense of the deep pluralism of public ends creates skepticism about the ability of electoral and legislative politics to provide the only forum for mediating competing interests. Private enforcement, for example in the environmental field, allows individuals and groups with a sense of grievance a direct opportunity to make enforcement claims in court.

³⁸ J.-J. Rousseau, *The Social Contract*, ed. by M. Cranston, (Middlesex, U.K.: Penguin, 1968).

³⁹ M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. II, ed. by G. Roth & C. Wittich, trans. E. Fischoff (Berkeley: University of California Press, 1968) c. 8, 11.

⁴⁰ J.R.S. Prichard & A. Brudner, "Tort Liability for Breach of Statute: A Natural Rights Perspective" (1983) 2 *Law & Phil.* 89 at 100.

Increased skepticism about distinctions between public and private power also can support private enforcement. A private plaintiff may have as much, if not more, expertise and information than a public official. Moreover, such an actor may, because of its own self-interest, have a stronger incentive to enforce a public law than a public agency concerned with its own interests. Conversely, a private target of public enforcement may be in a position to obtain favours from public officials that are not in the public interest because they impose diffuse but significant costs on the public. Private enforcement can be a check on the capture of public enforcement officials.

An important but largely negative justification for private enforcement is governmental failure, particularly capture and public choice theories of governance.⁴¹ If public enforcers cannot be relied upon to enforce laws vigorously against regulated sectors, then it is necessary to replace or supplement their efforts with private enforcers. Greater numbers of private enforcers can less easily be lobbied or co-opted than a discrete number of public enforcement officials.

B. The Law and Economics of Private Enforcement

The optimal use of private enforcement of public laws has been a matter of contention in the law and economics literature. Following his pioneering work stressing the need for high penalties to compensate for low probabilities of detection,⁴² Gary Becker with George Stigler argued that deterrence could be as effectively achieved if private individuals enforced the law by competing for the high damages that would follow from demonstrating that a defendant was liable.⁴³ Reflecting the tendency to justify private enforcement as a response to governmental failure, Becker and Stigler were concerned with the possibility of malfeasance or inaction among public regulators. They argued that it was better to reward private enforcers "by a 'piece-rate' or a 'bounty'" instead of the fixed salary paid to public enforcers. They concluded:

⁴¹ M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Mass.: Harvard University Press, 1965); M.J. Trebilcock *et al.*, *The Choice of Governing Instrument: A Study Prepared for the Economic Council of Canada* (Ottawa: Economic Council of Canada, 1982); and D.A. Farber & P.P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991).

⁴² G. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 *J. Pol. Econ.* 169.

⁴³ G. Becker & G. Stigler, "Law Enforcement, Malfeasance and Compensation of Enforcers" (1974) 3 *J. Legal Stud.* 1.

Society is more likely to use fines equal to damages divided by the probability of conviction to punish offenders if it must pay this amount to successful enforcers. Although private enforcement of rules need not change the rules, we predict that they would gain currency and relevance because enforcement would then be much more efficient and transparent.⁴⁴

Becker and Stigler acknowledged some potential problems in private enforcement. They recommended that both public and private enforcers who brought unsuccessful actions should be required to compensate the innocent defendant and that "the concept of double jeopardy would need elaboration,"⁴⁵ given anticipated competition among private enforcers.

A year later, William Landes and Richard Posner challenged the conclusion that private enforcement could be as efficient as public enforcement. They argued that if fines or damages higher than the social costs of the illegal activity were required to deter defendants, this would attract higher than optimal numbers of individuals seeking to collect such fines or damages by being private enforcers of the law and devoting their own private resources to detection and prosecution. This would increase the probability of detection beyond the low level posited by Becker and could result in over-enforcement and deterrence above socially optimal levels.⁴⁶ Public enforcers not driven by profit maximization could make better decisions about what resources to devote to prosecution than the uncoordinated activities of private individuals competing for high fines or damages. This insight about the potential for over-deterrence in private enforcement does not justify a total abandonment of private enforcement. Rather, it suggests a need for the rewards offered to private enforcers to be carefully controlled to ensure that private actors do not divert more private resources than are socially optimal to the enforcement of public standards.

Mitchell Polinsky subsequently challenged the Landes and Posner thesis of over-deterrence by stressing that rational private enforcers would only act in cases where the reward available was greater than the costs of enforcement. The fine or damages recovered by private enforcers would in many cases be limited by the net worth of the defendant. In cases with high enforcement costs and/or defendants with

⁴⁴ *Ibid.* at 14.

⁴⁵ *Ibid.* at 16.

⁴⁶ W.M. Landes & R.A. Posner, "The Private Enforcement of Law" (1975) 4 J. Legal Stud. 1 at 15. See also W.F. Schwartz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (Washington: American Enterprise Institute for Public Policy Research, 1981) at 9 [hereinafter *Economic Critique*]; and R.A. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little Brown, 1992) at 596 for similar conclusions.

low net worth, it would not be rational for potential private enforcers of the law to engage in that activity.⁴⁷ Like the Posner and Landes analysis, this insight does not justify the abandonment of private enforcement of the law. Rather, it points to the complementary roles that private and public enforcement can play. Private enforcement will be of most value in those cases in which the rewards available are greater than their enforcement costs (although excessive rewards may result in over-enforcement)⁴⁸ and public enforcement is most needed in those cases where the fine or damages that can be extracted from a wrongdoer is significantly less than the costs of enforcement.

C. The Theory of Private Attorneys General

The utility of private enforcement of public laws has frequently been discussed in the United States in the context of the role of litigants as “private attorneys general.” The phrase was first used by Judge Jerome Frank when he recognized the standing of a private litigant in an administrative law case on the basis that “[s]uch persons, so authorized, are, so to speak, private Attorney Generals.”⁴⁹ One of the founders of Legal Realism, Frank took an overtly instrumental approach to the use of law and he believed that the initiative of private litigants could usefully supplement the enforcement efforts of public authorities in achieving the goals of legislation in the post-New Deal era. Since that time, there has been support for the private attorney general from many quarters. It has been noted that:

⁴⁷ A.M. Polinsky, “Private versus Public Enforcement of Fines” (1980) 9 *J. Legal Stud.* 105 at 107 [hereinafter “Private vs. Public”]: “Under private enforcement, firms are willing to invest in enforcement only if they at least break even—their fine revenue must be at least as large as their enforcement costs. Under public enforcement, however, the optimal solution may result in fine revenue which is less than enforcement costs.”

⁴⁸ Polinsky recognizes that private enforcement may in different circumstances result in both over- and under-enforcement. See A.M. Polinsky, “Detrebling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement” (1986) 74 *Geo. L.J.* 1231 at 1234 [hereinafter “Detrebling”]:

If the same fine is used as under optimal public enforcement, the resulting probability of detection (generated by the self-interested choices of private enforcers) may be too high or too low. In other words, if the enforcing is done privately, there may be too much enforcement or too little enforcement.

⁴⁹ *Associated Industries of New York State v. Ickes*, 134 F.2d 694 at 704 (2d. Cir. 1943) vacated as moot 320 U.S. 707 (1943).

[l]iberals promote the private attorney general, in part, as an antidote to what they view as a conservative administration's reluctance to aggressively enforce various regulatory laws. Conservatives find virtue in the private attorney general concept because of its function in 'privatizing' law enforcement pursuant to the ideals of economic efficiency.⁵⁰

The private attorney general theory is based on the premise that a positive public good is secured when a private litigant vindicates a publicly endorsed standard or norm contained in a statute. A corollary assumption is that the public good is not significantly harmed when a self-appointed private attorney general is unsuccessful because it is that person who bears the costs of the unsuccessful litigation. This is especially true outside the United States, where an unsuccessful plaintiff would generally be responsible not only for its own legal costs, but for a significant portion of the costs incurred by its successful adversary. The private attorney general theory assumes that private litigants, because of their financial⁵¹ or ideological⁵² interests in the matter, will have adequate incentives to invest in investigation and litigation which, because it is designed to vindicate public standards, will be in the public interest.

The use of private attorneys general has flourished in the United States in a number of contexts. It has been used to justify the creation or maintenance of private causes of actions to enforce antitrust statutes,⁵³ securities law,⁵⁴ and environmental legislation.⁵⁵ The enforcement activities of private attorneys general are encouraged by one-way costs rules which allow successful plaintiffs who act as private attorneys

⁵⁰ B.W. Garth, I.H. Nagel & S.J. Player, "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Actions" (1988) 61 S. Cal. L. Rev. 353 at 353.

⁵¹ Landes & Posner, *supra* note 46; "Private vs. Public," *supra* note 47; and W.F. Schwartz, "An Overview of the Economics of Antitrust Litigation" (1980) 68 Geo. L. J. 1075 [hereinafter "Overview"].

⁵² L. Jaffe, "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff" (1968) 116 U. Pa. L. Rev. 1033; A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281; and O.M. Fiss, "Foreword: The Forms of Justice" (1979) 93 Harv. L. Rev. 1.

⁵³ Private actions were available since 1890, but their frequency increased rapidly in the post-war era and especially since the 1960s. See R.A. Posner, "A Statistical Study of Antitrust Enforcement" (1970) 13 J. L. & Econ. 365 at 371; and Salop & White, *supra* note 11.

⁵⁴ *J.I. Case Co. v. Borak*, 421 U.S. 723 (1964).

⁵⁵ R.F. Blomquist, "Rethinking the Citizen as Prosecutor Model of Environmental Enforcement under the *Clean Water Act*: Some Overlooked Problems of Outcome-Independent Values" (1988) 22 Ga. L. Rev. 337.

general to be indemnified for the costs of successful litigation⁵⁶ without facing the disincentive of paying their adversary's costs should they lose. In addition, fee arrangements between a litigant and his or her lawyer can encourage litigation by private attorneys general. For example, the legal fees of a private attorney general might be collected from a common fund or paid only if the litigant is successful. Contingency fee arrangements allow the plaintiff's lawyer to be the *de facto* private attorney general. Cost and fees arrangements are particularly important when private attorneys general are motivated by ideological concerns about the public interest rather than their own financial concerns.⁵⁷

D. *The Strengths of Private Attorneys General*

Private attorneys general can supplement public enforcement. This can occur when a private attorney general seeks a remedy for a matter that has escaped the attention of public authorities. This may frequently occur in cases where the costs of investigation are high for public enforcers, but relatively low for private enforcers. Alternatively, public enforcers could be aware of the matter but decide that a public prosecution is not a rational allocation of resources. Even if a public prosecution is undertaken it may only secure a criminal or quasi-criminal conviction, or perhaps an order requiring a defendant to comply with public standards. Private attorneys general can usefully supplement public enforcement efforts by securing fuller compensation for the damages caused by non-compliance⁵⁸ and by giving the court added

⁵⁶ "Comment—Court Awarded Attorney's Fees and Equal Access to the Courts" (1974) 122 U. Pa. L. Rev. 636. A United States Supreme Court decision that drastically reduced one way fee shifting, *Alyseka Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), was quickly overruled by Congress in part out of a desire to encourage private attorneys general and to limit "the growth of the enforcement bureaucracy": *The Civil Rights Attorney's Fees Awards Act of 1976*, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (1976)), quoted in J.C. Coffee Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working" (1983) 42 Md. L. Rev. 215 at 226.

⁵⁷ C. Tollefson, "When the 'Public Interest' Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995) 29 U.B.C. L. Rev. 303.

⁵⁸ Professor Coffee has commented, *supra* note 56 at 224-25 that:

[a]bsent these private actions, the monetary penalties for antitrust and securities fraud plainly would be insufficient to deter. Second, it often may be more efficient for public agencies to concentrate on detection (an area where they have the comparative advantage because of their superior investigative resources) and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics.

information that may help it to make better orders to achieve compliance in the future. Adding private resources to public enforcement efforts is effective so long as the additional resources do not result in over-deterrence.⁵⁹

Private enforcement is superior to public enforcement in compensating those aggrieved by violations and achieving corrective justice.⁶⁰ Compensation is usually thought of as damages, but can include any order designed to correct the harm that the plaintiff has suffered from a violation. The virtues of private enforcement as a form of corrective justice are often discounted in American debates because of the stress placed on treble damages and other devices to encourage private enforcement in order to achieve deterrence. Public prosecutions can include some elements of compensation if orders for restitution are made.

Private enforcers may in some instances be at a comparative advantage to their public counterparts. Because they may be directly affected by the matter, they may have a greater incentive to take some enforcement action. Closer proximity to the violation may also mean that the costs of detecting possible violations and gathering evidence may be less for them than they would be for a public enforcer. For example, a firm or customer may be able to detect anti-competitive practices that they experience on a daily basis more easily than a public official who must regulate large sectors of the economy. Moreover, the firm or customer would be more knowledgeable about industry practices than a public enforcer.⁶¹ Contrary to the Weberian assumption that the

⁵⁹ James Musgrove assumes that private actions will result in over-deterrence when he argues:

Direct expenditures on enforcement or adjudication should be largely irrelevant to the debate as to the proper type and level of antitrust enforcement. Getting enforcement 'right' in this area will add to government revenues, almost regardless of direct cost. Getting enforcement 'wrong', however, can be expected to shrink government revenues, even if immediate direct expenses are reduced. Allowing private actions to save money, at least without some considerable study, is a penny wise, pound foolish strategy.

J.B. Musgrove, "Remedies for Reviewable Conduct: Adjusting the Balance" (1995) *Can. Comp. Record* 34 at 44 [hereinafter "Remedies"].

⁶⁰ J.R.S. Prichard & M.J. Trebilcock, "Class Actions and Private Law Enforcement" (1977) 26 *U.N.B. L.J.* 5 at 11.

⁶¹ S. Shavell, "Liability for Harm versus Regulation of Safety" (1984) 13 *J. Legal Stud.* 357 at 360: "private parties should generally enjoy an inherent advantage in knowledge" over regulators because of their knowledge of the benefits and risks of their own activities. "For a regulator to obtain comparable information would often require virtually continuous observation of parties' behaviour, and thus would be a practical impossibility." In the antitrust context, it has been observed that: "Competitors and takeover targets are ideal litigants in terms of litigation capability because they are likely to have the skill, knowledge of the industry, financial resources, legal sophistication and motivation to make a powerful case with ... speed and precision": J.F. Brodley,

public bureaucrat has greater expertise, private attorneys general may have the expertise best suited to the particular prosecution.

Adding private resources to enforcement efforts will likely increase rates of litigation and this will add to the jurisprudence defining and fleshing out the often vague and general standards contained in the public law being enforced. George Priest and Benjamin Klein have argued that individual cases can serve a public good by acting as precedents which allow others to conduct their affairs with more certainty about the relevant legal standards.⁶² Private litigation in the United States has been responsible for many of the leading antitrust precedents especially since public enforcement efforts tapered off in the early 1980s.⁶³ In determining the value of the jurisprudence produced by private enforcement, however, policy makers should be sensitive to whether rule-making and other forms of administrative regulation may be a more efficient and comprehensive means to elaborate the general standards contained in public laws.⁶⁴ Nonetheless, a concrete case decided in the context of the adversary system may produce a more tangible precedent than administrative guidelines which will often be quite flexible and preserve enforcement discretion.

The private attorney general theory is not only based on a positive vision of private initiative and comparative advantage but a recognition of possible failures in public enforcement. In somewhat crude terms, it may be better to have numerous private enforcers of public law than a handful of public attorneys general tied to elected

"Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals" (1995) 94 Mich. L. Rev. 1 at 35.

⁶² G.L. Priest & B. Klein, "The Selection of Disputes for Litigation" (1984) 13 J. Legal Stud. 1; and G.L. Priest, "Channelling Civil Litigation: A Comment on Civil Justice Reform in Ontario" in Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice* by R.A. MacDonald (Toronto: Ontario Law Reform Commission, 1995) 239.

⁶³ During the Reagan-Bush years much of government enforcement was limited to criminal bid-rigging prosecutions. ... [I]t was in the context of private litigation that the Supreme Court enunciated most of its important antitrust decisions. These private cases involved price fixing, monopolization, predatory pricing, price discrimination, dealer terminations, tying, and boycotts. Had there been no private cause of action under the antitrust laws, much of the development in antitrust doctrine during that period might never had occurred:

H. First, "Antitrust Enforcement in Japan" (1995) 64 Antitrust L. J. 137 at 179-80 [footnotes omitted].

⁶⁴ "Remedies," *supra* note 59 at 44-45: "greater access to the Tribunal will lead to greater jurisprudence" but Musgrove cautions that a better alternative is for the Bureau to issue more enforcement guidelines for reviewable conduct. This alternative "has the attractions of lower cost and more certainty of outcome. ... [D]ealing with the Bureau in respect of such conduct is likely to be a more certain and predictable exercise than going before the Tribunal. It is also much less expensive than litigation": *ibid.* at 44-45.

governments. Public enforcers may be more interested in maximizing their own budgets or political support than in enforcing the law.⁶⁵ In the product liability context, commentators have observed that countries lacking private attorneys general attracted by large damages awards “tend to compensate for the attorneys’ absence by instituting a functional equivalent: a huge government bureaucracy charged with evaluating products.”⁶⁶ Similarly, in the environmental context, the growth of private enforcement has somewhat offset declining resources devoted to public enforcement.⁶⁷ Private enforcement may be a crucial means to fill regulatory gaps created as governments downsize in response to fiscal constraints.

Even if government remains active in a regulatory field, it may not be as effective as private enforcers. Public enforcers may face perverse incentives and be more susceptible to capture by organized groups. As John Coffee argues:

[P]rivate enforcement also performs an important failsafe ... function by ... ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers or the vagaries of the budgetary process and that the legal system emits clear and consistent signals to those who might be tempted to offend. Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies. Ultimately, private enforcement helps ensure the stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature.⁶⁸

In short, private enforcement can compensate for weaknesses and fluctuations in public enforcement.

Private enforcement also serves as an important means of ensuring that public enforcers are accountable for decisions not to

⁶⁵ M.A. Cohen & P.H. Rubin, “Private Enforcement of Public Policy” (1985) 3 Yale J. Reg. 167 at 170.

⁶⁶ M. Rustad & T. Koenig, “The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers” (1993) 42 Am. U. L. Rev. 1269 at 1325.

⁶⁷ Boyer & Meidinger, *supra* note 32; and Blomquist, *supra* note 55.

⁶⁸ Coffee, *supra* note 56 at 227. Jerry Mashaw articulates a similar idea when he states:

A final hypothesis is that the legislature believes that some competition, or the threat of competition, from private enforcers may stimulate public enforcement efforts. Our general distrust of monopoly is based on the theory that monopoly produces stodginess and underproduction and that it provides incentives to appropriate benefits for the producer which under competitive conditions would go to consumers. Public officials and bureaucracies which have a monopoly position are, after all, no less subject to these unwanted behavioral characteristics than the general run of mankind.

J.L. Mashaw, “Private Enforcement of Public Regulatory Provisions: The ‘Citizen Suit’” (1975) 4 Class Action Rep. 29 at 33.

prosecute. There are numerous means to increase accountability such as reporting requirements and legislative oversight, but there are grounds to believe that private enforcement may be a particularly effective and efficient means to ensure accountability. It allows the judgment of the public official to be challenged in a way that does not impose costs on the public agency and can lead to a concrete determination of whether the government was correct in concluding that no violation had occurred. It allows critics of prosecutorial decisions not to prosecute to put their money where their mouth is and assume for themselves the role of public prosecutor.

An alternative to private enforcement is to allow the public to seek some form of administrative or judicial review of an agency's decision not to prosecute. For example, six members of the public may petition the Director of the Canadian Competition Policy Bureau to commence an inquiry.⁶⁹ Richard Stewart and Cass Sunstein have termed such mechanisms rights of initiation. Although they are critical of judicial creation of private rights of action,⁷⁰ Stewart and Sunstein see them as superior to private rights of initiation as an accountability mechanism because:

A weak initiation right—which is all the courts will usually afford—places a substantial burden on the plaintiff to demonstrate that the agency's inaction was unreasonable. Moreover, 'victory' may consist merely of a remand for a better explanation of the agency's decision not to act. There are also institutional advantages. A private right of action does not require courts to monitor the use of public enforcement resources, nor does it require the agency to divert those limited resources to the defence of initiation suits. Moreover, private rights of action impose a budget discipline on plaintiffs more stringent than in initiation cases. Private rights of action permit private parties to enforce a statute beyond the level permitted by an agency's limited budget only if they believe that the benefits of additional enforcement outweigh its costs. This method of making enforcement decisions may be desirable, since private litigants—who are often closer to local controversies than are public officials—may know more about the costs and benefits of particular enforcement initiatives. Finally, since private right of action cases tend to be more narrowly focused than initiation suits, the right of action may better reflect differing preferences for collective goods.⁷¹

⁶⁹ *Competition Act*, *supra* note 2, s. 9.

⁷⁰ They oppose judicially created private rights of action on the basis that such rights "could disrupt legislative judgements concerning appropriate enforcement levels, undermine legislative decisions to entrust regulatory decisions to centralized, specialized and politically accountable bodies, and impose undue burdens on the courts": R.B. Stewart & C.R. Sunstein, "Public Programs and Private Rights" (1982) 95 Harv. L. Rev. 1195 at 1290.

⁷¹ *Ibid.* at 1289-90.

Private rights of action can be an efficient and manageable form of promoting accountability among public enforcers particularly for low visibility decisions not to commence enforcement actions.

In summary, the case for private attorneys general is based positively on the advantages of giving a multiplicity of individuals and groups an opportunity to enforce and elaborate public standards and obtain corrective justice and negatively on the dangers of exclusive reliance on public enforcement.

E. The Weaknesses of Private Attorneys General

Public enforcement retains many comparative advantages over private enforcement that should make any policymaker cautious about abolishing public enforcement or using the availability of private enforcement as an excuse for taking significant resources away from public enforcement. Although generally sympathetic to private enforcement as a supplement to public enforcement, Robert Prichard, for example, acknowledges: “[n]umerous factors favour public enforcement: the economies of scale in some types of investigation, the superior investigative tools, the absence of problems of appropriability, and the simplicity and flexibility of the fine all represent efficiency advantages of public enforcement.”⁷²

The comparative advantages that public enforcers enjoy over private enforcers, especially if balanced with an understanding of the weaknesses of public enforcement, only speak to the need for the correct balance between public and private enforcement. Determining the right mixture of public and private enforcement will be a complex, ongoing process, but one that can be achieved by altering the resources available to public enforcers and the incentives available to private enforcers. Nonetheless, there are some arguments for why enforcement should remain a monopoly of public officials. These arguments focus on the harm that private enforcement efforts may cause to public enforcement policy and the costs that may be imposed on those subject to strategically motivated and unmeritorious private enforcement efforts. These arguments against allowing any private enforcement will now be examined.

⁷² J.R.S. Prichard, “Private Enforcement and Class Actions” in J.R.S. Prichard, W.T. Stanbury & T.A. Wilson, eds., *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths, 1979) 217 at 237.

One concern with private enforcement is the danger of over-deterrence stressed by Posner and others.⁷³ Private enforcement is less coordinated than public enforcement. Even if they can shape the incentives for private enforcement, policymakers cannot confidently predict the level of private enforcement. Posner's warnings are particularly important in a context where the rewards of private enforcement substantially outweigh the costs of enforcement and where multiple plaintiffs can assume the role of a private attorney general in any single case. The risk of over-deterrence is less if the rewards are more modest and can be adjusted should the supply of private enforcement prove excessive.

Another weakness of private enforcement is that whenever private initiative and resources are used for public ends, there is a danger of strategic behaviour. Such behaviour will mean that the private objectives of the plaintiff will supplant the public purposes of the statute sought to be enforced. As Joseph Brodley has argued, this danger is particularly high in the antitrust field because the most likely plaintiffs are frequently competitors or takeover targets of defendants.⁷⁴ These plaintiffs have the greatest incentive to take enforcement actions and they may also have the best information about the case. Nonetheless, they are also likely to employ private enforcement measures for strategic ends even if they do not have a pro-competitive case. Brodley argues that the dangers of strategic, non public-regarding behaviour do not justify an abandonment of private enforcement,⁷⁵ but require careful management of the procedures available to litigants. It needs to be added that strategic behaviour can also affect public enforcement regimes where private parties with private contractual or semi-contractual grievances (*e.g.*, distributors against suppliers) will pressure public enforcement agencies to take up these grievances at public expense, even though no broader public interest is implicated. Nonetheless, the risk of strategic behaviour is an important weakness of private enforcement.

Another weakness of private enforcement may be the disruption of public enforcement policies. Private enforcement serves as a check

⁷³ Landes & Posner, *supra* note 46.

⁷⁴ See generally Brodley, *supra* note 61. In the Canadian context see P.K. Gorecki, *The Administration and Enforcement of Competition Policy in Canada, 1960 to 1975: An Application of Performance Measurement* (Ottawa: Consumer and Corporate Affairs Canada, 1979) at 240.

⁷⁵ Brodley, *supra* note 61 at 45: "[l]itigants in antitrust cases, like other economic actors, seek to benefit themselves, not to promote social welfare No litigant's personal agenda will correspond fully with the social agenda."

on prosecutorial discretion and in particular, the decision not to prosecute. If the public prosecutor is an expert with a mandate to regulate a particular field of endeavour, then his or her decision not to prosecute may be based on a reasoned decision that it is in the public interest not to prosecute.⁷⁶ The use of private attorneys general to enforce public laws can be criticized as a privatization of law enforcement which should be the exclusive preserve of democratically accountable officials. Robert Blomquist, for example, has argued:

[t]he only intrinsic constraint on a private suitor seeking to use penal laws for private ends is whether the costs of litigation outweigh its potential benefit to him. In contrast, government prosecutors, when deciding to enforce a penal law are presumed to be substantially motivated by public interest considerations. Public prosecutors, therefore, are expected to select and pursue cases on the basis of informed, dispassionate judgment about the harmful social significance of the conduct being challenged.⁷⁷

Jerry Mashaw also notes that private enforcement can undermine prosecutorial discretion but believes that the only “cause for real concern” is that it might result in inconsistent treatment of similarly situated offenders. “That private parties should want to add resources to those currently available, take on hard cases, or swim against local political currents when seeking to enforce nationally established or approved rules of conduct is no cause for alarm.”⁷⁸ As will be examined in Part V, below, there are means to reconcile private enforcement with

⁷⁶ Of course, the decision not to prosecute could also be motivated by many other factors including ignorance of the possible violation, lack of resources or non-public-regarding motives such as corruption. As Prichard notes in Pritchard, Stanbury & Wilson, eds., *supra* note 72, 217 at 239, the factors that are considered when exercising prosecutorial discretion “are open to abuse but they are equally open to considerations that are in the public interest.” He notes that in the competition law context, exclusive public enforcement:

allows the agency to make continuous marginal adjustments in policy without engaging the costs of obtaining legislative change and having the policy altered. The variations in enforcement strategy can therefore allow efficient and desirable flexibility in the development of public policy. ... Many competition offences are defined in general terms partly because much of business behaviour involves concurrently both anti-competitive and efficiency producing aspects. The trade-off of the two is not a simple judgment and may, in some cases, be as much a question of economic policy as one of law enforcement.

⁷⁷ Blomquist, *supra* note 55 at 371. He stresses “the detrimental impact that citizen suits can have on the informal administrative process of give and take, where sound regulatory standards require time, judgment, and efficient adjustment based on a number of bargained-for practical considerations”: *ibid.* at 404. Blomquist does not categorically reject private enforcement but suggests it should be limited to those directly affected by the impugned activity and their remedies should generally be limited to those required to make them whole as opposed to those necessary to punish and deter. His criticisms are directed at private attorneys general in the environmental context who have wide standing rights and can request criminal penalties rather than private attorneys general in the antitrust context who have more restricted powers: *ibid.* at 389-90.

⁷⁸ Mashaw, *supra* note 68 at 34.

the positive values served by public enforcement policies based on prosecutorial discretion. These include allowing the public prosecutor to intervene and make known its views about the merits of a particular private enforcement activity and even to take over or stay the private action.

There are other, more instrumental, critiques of the private attorney general theory. Although supportive of private enforcement in general, Coffee has been critical of how it is practised in the United States in both the antitrust and securities contexts. Drawing upon empirical data which suggest that private attorneys general often seek damages in the wake of a successful public prosecution,⁷⁹ he has colourfully concluded that present incentive structures “result in a system-wide misallocation of effort under which the private attorney general restricts his role to that of a vulture feeding on the carrion left by public enforcers and seldom stalks his own prey.”⁸⁰

This unflattering picture is aggravated by the fact that numerous private litigants may seek to claim damages after a successful public prosecution. The incentive of private attorneys general to follow and free ride on public investigations and enforcement efforts can diminish their promise as a supplement to public resources.

Other commentators have expressed concerns not so much that private attorneys general will follow public enforcement measures but rather that they will pursue objectives that are not in harmony with public enforcement policy. Barry Boyer and Errol Meidinger, for example, have commented:

With both public and private enforcers active in a regulatory field, there is a very real possibility that they will be working at cross purposes. If regulated parties who are similarly situated receive different treatment depending on whether public and private enforcers win the race to the courthouse, then the fairness of the regulatory program is open to question.⁸¹

⁷⁹ B.S. DuVal Jr., “The Class Action as an Antitrust Enforcement Decree: The Chicago Experience (II)” [1976] A. B. Found. Res. J. 1273; and M.P. Dooley, “Enforcement of Insider Trading Restrictions” (1980) 66 Va. L. Rev. 1. More recent data discussed in Kapner & Snyder, *supra* note 12, suggest, however, that the percentage of follow-on cases has declined significantly in American antitrust law.

⁸⁰ Coffee, *supra* note 56 at 238. One study of class actions classified lawyers as social advocates or legal mercenaries and suggested that the latter “typically do little research prior to initiating a lawsuit, spend little time mobilizing the class to pursue its interests and seek relatively narrow remedies through litigation”: Garth, Nagel & Plager, *supra* note 50 at 389. Social advocates, in contrast, spend more time developing a case, but their efforts are frequently underwritten by governmental subsidization.

⁸¹ Boyer & Meidinger, *supra* note 32 at 839.

This concern, like Coffee's concern about the misallocation of enforcement resources, can be addressed by giving public officials prior notice or the authority to veto or take over cases commenced by private attorneys general.

Private attorneys general, like public officials, may also face perverse incentives. Coffee notes that a private litigant, especially when the lawyer is the *de facto* private attorney general, can easily be bought off by a nominal settlement which includes generous attorney fees. Similarly, a competitor who brings an action against another firm might have an incentive to enter into a collusive settlement with its adversary that will have anti-competitive effects. Perverse incentives created by the private attorney general system do not necessarily suggest that the system is intrinsically flawed, but underline the need for careful design and monitoring of the enforcement system. In particular, less lucrative financial awards might diminish some of these perverse incentives while also eliminating some of the desirable incentives that would motivate private attorneys general to devote their own resources to investigation and enforcement of public standards. Various procedures can also be designed to minimize the risk that strategic behaviour by private attorneys general will impose unwarranted costs on defendants and the public at large.

F. *Summary*

This section has surveyed the strengths and weaknesses of private enforcement of public laws in general. Private enforcement can supplement public resources with private initiative and information. This is particularly compelling if the public resources devoted to enforcement are modest or diminishing and there is a need for jurisprudence to flesh out the general standards contained in the public law. A private enforcer may be in a better position to detect and prosecute some violations than a public enforcer with a more general mandate and less specialized expertise. Private enforcement can also be an effective and efficient means of holding public enforcers accountable for decisions not to prosecute. Finally, private as opposed to public enforcement can allow plaintiffs to achieve corrective justice and seek remedies for both past and future harms.

Public enforcers may enjoy comparative advantages over private enforcers in terms of economies of scale and investigative tools. Nonetheless, these advantages suggest the need for an appropriate mixture of public and private enforcement. There are, however, some

arguments as to why allowing any private enforcement might be harmful. One argument is that private enforcement could result in over-deterrence if numerous private enforcers are attracted to high rewards. All private enforcement presents a risk that it will be employed for strategic and private reasons that may conflict with the public goals of the legislation sought to be enforced. Finally, private enforcement can disrupt decisions not to prosecute that may be based on a coherent and defensible enforcement policy of public officials. Most of the weaknesses of private enforcement can be addressed by procedural features such as sanctions for strategic behaviour and allowing public officials to intervene or even terminate private enforcement which disrupts prosecutorial policies. Various procedural remedies for the weaknesses of private enforcement will be discussed in Part V, below. The next part will examine the strengths and weaknesses of private enforcement specifically in the competition law context.

IV. THEORETICAL DEBATES OVER PRIVATE ANTITRUST ENFORCEMENT

A. Penalties for Antitrust Violations

Beginning in the 1970s, a long-standing political and scholarly consensus that had previously supported the mixed enforcement regime in the United States has given way to vigorous scholarly and political debate about the appropriateness of the American enforcement regime (as opposed to the substantive provisions of United States antitrust law, which have engendered their own set of debates). Since most of the scholarly literature on private antitrust enforcement focuses on the American experience, we will begin by reviewing these debates and then attempt to derive some implications from them for policy options with respect to the enforcement of the Canadian *Competition Act*, in particular the reviewable practices addressed in Part VIII of the *Act*.

In the first systematic treatment of the policy implications of alternative antitrust penalties, Kenneth Elzinga and William Breit in their 1976 book⁸² posed the question of the optimal enforcement of antitrust laws. In theory, they argued that the marginal social benefits of enforcement decline as more cases are brought with respect to less serious or more debatable practices, while the marginal social costs of

⁸² *Antitrust Penalties*, *supra* note 4.

enforcement rise with increasing levels of enforcement. Thus, in an ideal world public and private resources would be invested in enforcement activity up to the point where the marginal cost of enforcement is equated with the marginal benefits of enforcement—not less and not more. Stated differently, the policy objective should be to minimize the costs resulting from harmful conduct and the costs incurred in reducing it.⁸³ This implies less than perfect or complete enforcement of antitrust laws. The authors acknowledge (as do Neil Finkelstein and Jack Quinn in a Canadian context)⁸⁴ that it is impossible to determine whether existing levels of enforcement are at, below, or above this level. In the nature of things, this would require detailed information on the underlying incidence of antitrust violations, and not merely those that have attracted formal enforcement activity. This information is unknown, and almost by definition unknowable.

Elzinga and Breit argued in their book that the four principal sanctions available for antitrust violations *i.e.*, fines; incarceration; treble damages; and structural remedies, all present their own problems, but appropriately structured fines are a more effective deterrent than any other type of sanction. With respect to incarceration, they point to the traditional reluctance of American courts to jail antitrust violators, in part because in large corporations it is often difficult to identify with confidence individuals in senior management who were ultimately responsible for initiating the offending practice. Incarceration is also a socially costly sanction. In the case of structural remedies, such as divestiture, which have also been infrequently used, there are problems in fashioning remedies that do not forfeit economies of scale and scope; administrative problems in unscrambling assets once combined; and problems of determining to whom divestiture should occur in order to promote a more pro-competitive outcome. With respect to treble damages, they argue that such damages engender three sets of social costs: first, perverse incentive effects, where plaintiffs have an incentive not to adopt precautions to avoid or minimize the impact of antitrust violations on them, given the windfall that treble damages often represent; second, misinformation effects where plaintiffs have a strong incentive to misrepresent pro-competitive or competitively neutral behaviour as anti-competitive in order to realize the gains from a treble

⁸³ *Economic Critique*, *supra* note 46 at 5.

⁸⁴ N. Finkelstein & J. Quinn, "Reevaluating the Role of Private Enforcement and Private Party Access to the Competition Tribunal" (Paper presented at the University of Toronto Faculty of Law, 8 December 1995) [unpublished].

damages award; and third, reparation (transaction) costs that are entailed both in determining liability and fixing quantum.

The authors argue that while, historically, fines for antitrust violations in the United States have been trivial, and thus have entailed suboptimal deterrence, a properly structured fine regime is the most efficient form of deterrence. They argue that antitrust violations should be penalized by a mandatory fine of 25 per cent of a firm's pre-tax profits for every year of anti-competitive activity. Given this mandatory fine, public enforcement authorities can then increase or decrease the amount of monopolistic activity by altering the amount of resources invested in detecting and convicting violators. Indeed, since publication of the authors' study, fines for many antitrust violations in both the United States (reflected in the U.S. Sentencing Guidelines) and Canada have increased dramatically. They argue that public agencies have an advantage in investigating antitrust violations in that they have at their disposal investigatory powers that would entail significant potential for abuse if extended to private actors and that casual evidence suggests that most important developments in antitrust law has occurred in government suits. Private parties under their regime would still have an incentive to inform public agencies of alleged violations, given that the cost of providing such information is so low. With respect to the argument that equity demands that victims of antitrust violations be compensated, they point out that determining the identity of those damaged by anti-competitive behaviour and the extent of the damages is analogous to the problem in public finance theory of determining the incidence and burden of a tax. In both contexts, monopoly overcharges, depending on elasticities of demand and supply in input and output markets, will be shifted in varying degrees backwards to suppliers, employees, and shareholders or forward to direct and indirect purchasers, as well as inducing inefficient substitution effects (deadweight losses) that will be next to impossible to measure with any degree of accuracy and at reasonable cost in any compensation-based regime. In a later paper,⁸⁵ they refer to a comment by Posner to similar effect:

Everybody's economic welfare is bound up with everybody else's. Why stop with the ultimate consumer? If he is forced to pay a high price for a product, demand for other products will fall, and this may hurt the suppliers of those products, and the suppliers' suppliers and so on ad infinitum.⁸⁶

⁸⁵ W. Breit & K.G. Elzinga, "Private Antitrust Enforcement: The New Learning" (1985) 28 *J.L. & Econ.* 405 [hereinafter "Private Enforcement"].

⁸⁶ *Ibid.* at 415.

They emphasize in this later paper that deterrence and compensatory rationales for private rights of action imply quite different research and policy agendas. This is a crucially important issue throughout the debates over private antitrust enforcement and warrants further comment.

B. *Deterrence and Private Enforcement*

With respect to the deterrence rationale for private enforcement, as with public enforcement, the optimal sanction is a product of the probability of successful action and the sanction in that event, yielding an appropriate expected cost of violation. However, with private enforcement (unlike public enforcement), these two variables cannot easily be set independently. If a high sanction is predicated on a low probability of enforcement, this sanction will encourage excessive enforcement activity by private parties motivated by the incentive to capture the high sanction.⁸⁷ With public enforcement, resources can be fixed at a constant level. Moreover, with a mixed and uncoordinated system of public and private enforcement, it is impossible to set the sanction and probability of enforcement in a systematic way.⁸⁸

These problems have led some commentators to propose decoupling the amount that the defendant pays and the amount that the plaintiff receives, in order to avoid incentives to invest in socially excessive levels of enforcement.⁸⁹ However, disagreement persists as to whether, under a decoupling approach plaintiffs should always receive less than defendants pay, or whether there may be some forms of antitrust violations entailing large-scale harm that require substantial investments in investigative and enforcement resources where private enforcement is unlikely to occur unless the plaintiff receives more than the defendant pays.⁹⁰ Where decoupling involves defendants paying more than plaintiffs receive, there are legitimate concerns over collusive and socially suboptimal settlements that may compromise deterrence objectives. Other proposals entail the detrebling of damages for readily observable violations (e.g., mergers, tying, exclusive dealing, refusals to

⁸⁷ See Landes and Posner, *supra* note 46; *Economic Critique*, *supra* note 46.

⁸⁸ See *Economic Critique*, *supra* note 46 at 27; "Overview," *supra* note 51; and "Private Enforcement," *supra* note 85.

⁸⁹ See *Economic Critique*, *supra* note 46 at 27.

⁹⁰ See "Detrebling," *supra* note 48.

deal), or for most suits by rivals, where the probability of detection is high, and retaining treble damages only for non-readily observable violations (*e.g.*, price fixing).⁹¹

On a deterrence rationale for private antitrust enforcement, even if the problem of the multiplier could be resolved so as to induce a socially optimal level of investment in antitrust enforcement activity, there is still the question of how to determine the damages to which the multiplier is to be applied.

Two basic choices are available: first, to set the basic damage equal to the gains to the party who has engaged in anti-competitive violations; or second, to set the basic penalty equal to the harm caused by that activity. With respect to the first option, it is important to distinguish two classes of cases: those where downstream parties have suffered a monopolistic overcharge; and those where competitors are complaining of exclusionary practices. In the first class of case, to remove all gains from the violator from engaging in monopolistic practices may discourage the pursuit of practices that result in greater gains to it and others than harm to society (*e.g.*, a merger which yields some price increases but also enables the realization of even greater cost efficiencies).

To allow recovery of the full monopoly overcharge may also ignore the costs incurred by the monopolist in obtaining monopoly power. These difficulties suggest that it might be preferable to define the basic damages so as to reflect harm to society rather than gains to the monopolist.⁹² In this case, the optimal damages measure is arguably the sum of the deadweight loss triangle (reflecting inefficient substitution effects) and the profit rectangle (relative to the competitive price), which will force a potential monopolist to compare any cost savings from the activity with the deadweight loss triangle.⁹³ In this respect, compensating parties only for the monopoly overcharge will under-deter because it will ignore welfare losses sustained by parties who have inefficiently substituted away from the monopolized good. Where the anti-competitive practice complained of involves competitors complaining of exclusionary practices by rivals, damages sustained by plaintiffs (*e.g.*, diminished going concern value of firm, discounted foregone profits) may poorly reflect harm to society, although one could

⁹¹ See generally "Private Enforcement," *supra* note 85 at 436-42; F. Easterbrook, "Detrebling Antitrust Damages" (1985) 28 J.L. & Econ. 445; and H. Hovenkamp, "Treble Damages Reform" (1988) 33 Antitrust Bull. 233 [hereinafter "Treble Damages Reform"].

⁹² See "Overview," *supra* note 51.

⁹³ See "Private Enforcement," *supra* note 85 at 410-12.

in principle set the optimal damage measure in the same fashion as in suits by downstream parties. However, to the extent that private antitrust proceedings are designed to pre-empt successful exclusionary behaviour (e.g., predation), these effects will be difficult to estimate, and in any event may not fully capture all the social costs (including costs to competitors) that exclusionary conduct engenders.⁹⁴ In short, damages suffered by plaintiffs in both classes of cases will be a poor means of reflecting either benefits realized or harms caused to society from violations.

In these debates over the optimal structure of a deterrence oriented private enforcement regime, it is important to stress that, if substantive rules could discriminate perfectly between efficient and inefficient behaviour, and courts and tribunals could apply these rules perfectly (i.e., error costs are zero), there would be little need to worry about the structure of penalties. As Frank Easterbrook remarks: "Those whose conduct is beneficial would be left alone. Others could be hanged."⁹⁵ Error costs engendered either in the framing of over-inclusive or ill-defined substantive rules or in their adjudication tend to strengthen the case for public enforcement over private enforcement, in that prosecutorial discretion, if properly exercised, can temper these costs, while private parties have no incentive to take account of the social consequences of error costs. However, this in turn implicates another dimension of the debate over public or private enforcement which is inherently intractable. That is, while it is possible to deduce some of the incentive properties of various private enforcement regimes for private parties and at least the nature if not the magnitude of the social costs and benefits that are likely to be associated with these incentive properties, public enforcement implicates the incentives operating on bureaucrats, politicians, and judges or adjudicators. However indeterminate the analysis of the efficiency properties of private enforcement regimes, we have an even less firm grasp of the incentive properties of key public sector decision makers in this area. For example, will politicians be properly motivated to enact only welfare enhancing competition laws and allocate appropriate budgets for their enforcement to the relevant public agencies? Will officials and employees in these agencies have appropriate incentives to investigate and enforce these laws, subject to budget constraints, in ways that are designed to maximize social welfare? Will judges and

⁹⁴ See "Treble Damages Reform," *supra* note 91.

⁹⁵ See Easterbrook, *supra* note 91; and M.K. Block & J.G. Sidak, "The Cost of Antitrust Deterrence: Why Not Hang a Price-Fixer Now and Then?" (1980) 68 Geo. L.J. 1131.

adjudicators charged with interpreting these laws possess the necessary incentives, information, and expertise to interpret and enforce them in ways that maximize social welfare?

James Musgrove argues that those who wish to make changes to the present enforcement regime bear the burden of proof as to why changes are necessary or desirable.⁹⁶ In our view, this misconceives the nature of the policy-making process. On almost any important public policy issue, we never know enough to be absolutely certain whether a change in policy is likely to enhance social welfare until we try it and observe the consequences. That is to say, policy making in the real world has a substantial trial and error component to it. If the burden of proof were as demanding as Musgrove argues, which would entail knowing at any given time whether the legal system is precisely at the intersection between the marginal social benefit and marginal social cost functions in antitrust enforcement (an unknowable datum), we would never have been able to justify enacting competition laws in the first place or in amending them extensively over the past two decades with a view to rendering them more effective, or in adopting the private damage remedy in section 36. In all of these cases, none of the critical information that, in an ideal world, one would want to have was available at the time that these policy changes were made.

C. Compensation and Private Enforcement

The compensation rationale for private enforcement of antitrust laws has received relatively short shrift in recent scholarly debates on antitrust enforcement. We have already noted the indeterminacy argument by Breit, Elzinga, and Posner, that trying to determine who ultimately bears a monopoly overcharge is analogous to the intractable problem in Public Finance theory of determining the ultimate incidence of a tax. We do not find this argument completely persuasive. In many tort and breach of contract actions, the ultimate incidence of an otherwise uncompensated loss is equally difficult to determine, yet this has not been regarded as a persuasive objection to the award of a compensation for tortious and contractual wrongdoing, although damage rules often incorporate doctrines such as remoteness, mitigation, and contributory negligence in order to render them more tractable and equitable in their application. In contrast to the pragmatic objections of Breit, Elzinga, and Posner to awarding compensation for

⁹⁶ See "Remedies," *supra* note 59.

antitrust violations, Warren Schwartz mounts a more principled objection:

I will say that I know of no widely espoused ground for redistributing wealth that is effectively served by providing compensation to persons injured by antitrust violations.

One must begin with the realization that disparities in outcome among individuals will inevitably occur. People are born more or less wealthy, with more or less intelligence, and prove to be more or less lucky. Which of the many causes of the disparity in outcome justify compensation? When is the outcome so unfortunate, whatever its cause, that compensation should be paid?

From neither of these perspectives do antitrust violations seem to provide a good case for compensation. The losses from antitrust violations are widely dispersed, do not represent the disappointment of strongly held expectations, and can in many cases be adapted to without severe dislocation in the lives of the persons affected. Moreover, existing welfare laws, unemployment compensation, bankruptcy laws, and a number of provisions in the tax laws provide relief from any catastrophic losses, including those that might result from an antitrust violation.

Of course, the issue is not whether compensation would be justified if it could be provided without cost. If compensation is incorporated as a goal of a private system of antitrust enforcement, the efficacy of the system is greatly impaired. There are, moreover, substantial costs, which will impede the process of providing compensation even if the goal is accepted in principle. The payment of compensation in antitrust proceedings seems both an ineffective way to achieve justice and an unjustifiable impairment of the effort to enforce the law.⁹⁷

Again, we do not find these arguments compelling. The case for compensation in other private law contexts does not rest on any notion of *distributive justice* of the kind that Schwartz outlines, but a notion of *corrective justice*,⁹⁸ whereby, irrespective of the wealth of the respective parties, where one party engages in a form of wrongdoing which violates the equal autonomy of another party, a legal obligation is recognized to correct for the consequences of that wrongdoing. This theory of corrective justice best explains why in various areas of private law (such as tort and contract law) we recognize the right of innocent parties to secure compensation from those who have wronged them, not primarily for instrumental reasons, such as deterrence, even though this may often be a socially beneficial by-product of such claims by increasing the probability of liability and hence, the expected cost of violations.

The enactment of section 36 of the *Competition Act* in 1976 (following abandonment of the earlier double damages proposal) can be interpreted as a recognition of the compensation rather than deterrence

⁹⁷ *Economic Critique*, *supra* note 46 at 31-32.

⁹⁸ See E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995).

rationale for private enforcement of our competition laws—most plausibly on a corrective justice basis. The follow-on or piggy back features of both section 36 of the *Competition Act* and section 4 of the *Clayton Act* are also more consistent with a compensation rather than deterrence rationale for private enforcement. Is there any less persuasive case for applying this rationale to the reviewable practices contained in Part VIII of the *Act*? First, it needs to be noted that mergers and monopolies at the time of the enactment of section 36 fell within the criminal provisions of the *Act* and were only transferred to the category of reviewable practices in 1986, so that for the first decade of the private damage remedy, it was designed to apply to two of the major classes of reviewable practices today. Second, and conversely, it might be argued that because the reviewable practices entail adjudication on a rule-of-reason basis, in contrast to the criminal violations that arguably entail more sharply defined forms of wrongdoing, it is inappropriate that practices which are determined after the fact in most cases to be breaches of the reviewable practice provisions should sustain claims for compensation in respect of past behaviour. The argument, in short, is that this entails a form of retroactive liability. While this argument is not without force, we do not find it dispositive. In fact, many of the practices that fall within the criminal prohibitions, at least in Canada, are not *per se* illegal.

The conspiracy provision (now section 45) requires an “undue lessening of competition,” which the Supreme Court in *R. v. Nova Scotia Pharmaceutical Society* held involved “a partial rule of reason.”⁹⁹ Other criminal offences such as predatory pricing require proof that the prices in question were “unreasonably low.”¹⁰⁰ Other offences, such as bid-rigging and fixing interest rates on deposits or loans, are more clearly *per se* illegal. Thus, the distinction between *per se* illegality and rule-of-reason review does not closely track the distinction between criminal prohibitions and administratively reviewable practices. Furthermore, in many other areas of the private law where compensation is routinely awarded for wrongdoing, rule-of-reason review, in effect, is required to determine liability. For example, in negligence actions in tort law, a failure to take reasonable care is

⁹⁹ [1992] 2 S.C.R. 606 at 650. Despite its “rule of reason” characteristics, the Court also held, at 657, that the law (then s. 32(1)(c)) was not so vague that it violated the accused’s right under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, not to be deprived of liberty or security of the person except in accordance with the principle of fundamental justice.

¹⁰⁰ *Competition Act*, *supra* note 2, s. 50(1)(c).

typically a pre-condition to liability and also typically requires fact-intensive review of the impugned conduct in question *ex post facto*. This is also the case in tort actions for nuisance, where unreasonable exercise of property rights must be proved. However, neither in the torts of negligence or nuisance, nor with respect to reviewable practices under the *Competition Act* are the courts or the Competition Tribunal making decisions in particular cases unconstrained by general legal principles—that is to say, they are not simply making up the law retrospectively out of whole cloth. Moreover, given that conduct that is found to entail a violation has caused a loss, and given that the legal system cannot make the loss go away, it is not clear why the equities require that the successful plaintiff rather than the defendant should have to bear this loss.

Thus, we conclude that, at the level of principle, the case for compensation of parties injured by reviewable practices found to violate Part VIII of the *Competition Act* is compelling, while the case for structuring private enforcement remedies in this context to serve deterrence ends is much less persuasive. We take this latter view because, if policymakers were concerned to assign a priority to deterrence with respect to reviewable practices, we accept one of the implications that emerges from the recent scholarship on private antitrust enforcement in the United States that an appropriately structured fines regime is likely to be a much more efficient form of deterrence than any other form of sanction, public or private. Moreover, the American experience suggests serious conceptual difficulties in designing a private enforcement regime that simultaneously serves both deterrence and compensation rationales.

Asking a single policy instrument to serve multiple objectives is often a prescription for policy incoherence. The fact that legislators in Canada have not seen fit to attach any public sanctions to reviewable practices, other than the possibility of preventing their continuance, suggests that it would be a deep second-best response to the case for deterrence to attempt to offset this decision through deterrence-oriented private remedies. However, given this decision to eschew deterrence objectives with respect to reviewable practices—in sharp contrast to American antitrust law, where such practices may attract both publicly enforced fines and privately enforced treble damage awards—it seems to us that, at a minimum, legitimately aggrieved victims of practices found to be anti-competitive under Part VIII of the *Competition Act* ought to receive compensation for their injuries. In our view, this argues for extending section 36 of the *Act* to reviewable practices, but vesting in the tribunal, rather than the courts, the right to award compensation to

private parties in the event that it finds a practice to violate the *Act*, in addition to adopting orders designed to ensure the discontinuance of the practice in future.

We are aware, of course, that the Competition Policy Bureau in its *Discussion Paper* on proposed *Competition Act* amendments of June 1995 proposes only that private parties be entitled to apply directly to the tribunal for injunctive (not compensatory) relief with respect to reviewable practices that fall within Part VIII and that, even in this case, mergers should probably be excluded from this regime. We note in this respect that section 16 of the *Clayton Act* has provided private parties with access to this form of relief from the courts since 1914 (with no exception for mergers) and that this issue is regarded as so peripheral to debates over private enforcement of antitrust laws in the United States that it warrants a mere footnote in Elzinga and Breit's widely cited book on the topic,¹⁰¹ and less than a page in Herbert Hovenkamp's extensive treatment of the subject.¹⁰² The case for at least this degree of private access to the Competition Tribunal seems to us to be unanswerable.

First, even injunctive relief that corrects the situation for the future engages directly the corrective justice rationale for private rights of action in respect of validated claims of wrongdoing.

Second, the Competition Policy Bureau has recently sustained significant cuts to its enforcement budget. Over the past three years, its operating budget has been reduced by about two million dollars and the number of full-time-equivalent personnel reduced from 274 to 241.¹⁰³ This has occurred at precisely the time when its responsibilities appear to be expanding significantly, particularly with respect to industries that were formerly publicly owned and/or closely regulated (mostly public utilities) but where a combination of privatization and/or deregulation has opened up the fact or possibility of competitive segments emerging in these industries requiring the application of general framework

¹⁰¹ *Antitrust Penalties*, *supra* note 4 at 16, note 27.

¹⁰² H. Hovenkamp, *Federal Antitrust Law Policy: The Law of Competition and its Practice* (St. Paul, Minn.: West, 1994) at 551.

¹⁰³ The Bureau of Competition Policy grew steadily in size until the early 1990s. See Director of Investigation and Research, Competition Act, *Annual Report for the year ended March 31, 1988* (Ottawa: Supply and Services Canada, 1988) at 36 ("authorized strength" of 255 person years). The 1989 *Annual Report*, at 41, listed authorized strength at 258 and the Bureau's annual budget at \$19,512,860; and the 1990 *Annual Report*, at 43, listed 261 full-time equivalent personnel. No staffing numbers were provided in the *Annual Reports* for 1991, 1992, or 1993. As of 31 March 1994, however, the Bureau had 241 full-time-equivalent personnel and an annual operating budget of \$19,326,000: Director of Investigation and Research, Competition Act, *Annual Report* (Ottawa: Supply and Services Canada, 1995) at 12. This trend was expected by the authors to continue.

competition laws rather than detailed, industry-specific regulation.¹⁰⁴ Indeed, some of the critics of the Bureau's proposal to provide private parties access to the tribunal for injunctive relief in respect of reviewable practices have been prominent amongst those advocating a substantially enlarged role for the Director in these sectors.¹⁰⁵ At a time of severe fiscal restraint, it is disingenuous to suggest, as the Competition Law section of the Canadian Bar Association did in its November 1995 submission to the Bureau on its reform proposals, that if public enforcement is inadequate additional public funding should be sought for the Bureau, when over the entire range of government functions, from welfare to unemployment to education, individuals are being asked to assume a larger responsibility for their own well-being. It is not unreasonable to ask private parties aggrieved by alleged competition law violations to do the same.

Third, because we have so limited an understanding of the incentives operating on politicians and bureaucrats in contexts such as the present, it is inconsistent with general norms of public accountability to vest an enforcement monopoly in the Bureau and its political overseers. It is particularly incongruous to maintain the virtues of a public monopoly in the context of the enforcement of competition laws whose primary aim is to redress the adverse social consequences of private monopoly. In our view, the floodgates objection either to our proposal that both compensatory and specific relief be available to private parties with respect to reviewable practices or to the Bureau's more limited proposal for specific relief only, and attendant concerns over frivolous, vexatious, and harassing litigation and a consequent "chill" on pro-competitive or competitively neutral conduct, carries limited force. We appreciate that private enforcement mechanisms in the present context, as in other civil contexts, may be employed for privately advantageous strategic purposes that are antithetical to the social welfare objective of the legislation. We view these concerns, however, as warranting close attention to design variables that can constrain such possibilities, rather than denying private rights of enforcement altogether in all cases. These concerns are most legitimate in the case of time-sensitive mergers where delays may undermine the terms of the acquisition (in the case of stock acquisitions or capitalizations) or generate damaging forms of uncertainty for

¹⁰⁴ See Finkelstein & Quinn, *supra* note 84; and Smith, *supra* note 15.

¹⁰⁵ See L. Hunter *et al.*, "All We Are Saying, Is Give Competition A Chance—The Role of Competition Policy in Industries in Transition from Regulation to Competition" (Paper presented at the University of Toronto, Faculty of Law, 8 December 1995) [unpublished].

management, employees, suppliers, and customers of the merging parties. This suggests a case for considerable caution in making interim remedies available to private parties or, at the limit, the exclusion of mergers altogether from the private enforcement regime (as the Bureau proposes) until more experience develops with the regime. We note, however, that injunctive relief, including interim relief, is available to private parties with respect to mergers under section 16 of the *Clayton Act*¹⁰⁶ (although rarely invoked), and the Australian *Trade Practices Act* permits private parties to seek declarations and divestitures in the case of mergers (again rarely invoked), but not interim relief.

In general, the experience under section 36 of the *Competition Act*, where private parties have the incentive of securing compensation and can piggy back on prior convictions resulting from public enforcement actions, as well as the Australian experience, suggest that both our proposals and the Bureau's proposals are likely to yield a modest net increase in proceedings before the tribunal relating to reviewable practices. We recognize that some cases which the Director might otherwise have brought will instead be brought by private parties, while some new cases are likely to enter the system. American debates over the treble damages remedy have little or no relevance to proposals under debate in Canada. The combination of treble damages awards, one-way costs rules, contingent fees, expansive class action procedures, and civil jury trials describe an institutional context that is radically different from that applicable to current Canadian proposals.

Having so concluded, we recognize that there are a number of important design variables that must be addressed if our proposal is to be operationalized in an efficient and equitable manner. In short, the devil is largely in the detail. In a more extensive study of private enforcement recently completed for the Competition Policy Bureau,¹⁰⁷ we provide a detailed analysis of these issues. We merely summarize our position on a number of these issues below.

V. PROCEDURAL AND REMEDIAL ISSUES

In this part, we identify procedural and remedial features which can maximize the potential of private actions to compensate and

¹⁰⁶ *Supra* note 8.

¹⁰⁷ K. Roach & M.J. Trebilcock, *Private Party Access to the Competition Tribunal*, Prepared for the Amendments Unit, Competition Policy Bureau, Industry Canada (Hull, Que.: 7 May 1996) at 36-93 [unpublished].

regulate while minimizing the social costs of private enforcement, most notably the danger of strategic behaviour at odds with the goals of competition law and the disruption of the Director's enforcement policy. The remedies available to private plaintiffs are likely to determine the efficacy of the private enforcement regime and will be discussed below. Topics ranging from the appropriate test for standing, pre-trial procedures, and interim and final remedies are examined separately in this section, but they are all interrelated. A holistic approach which monitors and influences the behaviour of litigants at all stages of the enforcement process is necessary.

A. *Standing*

The Bureau's June 1995 *Discussion Paper* proposed that standing be granted either on the basis that a litigant would be "directly affected in their business or property" or "materially affected."¹⁰⁸ The latter phrase is preferable because it could be interpreted to grant indirect purchasers standing on the basis that they have been materially, but perhaps not directly, affected by the alleged anti-competitive behaviour. A direct injury test is underinclusive in achieving corrective justice because it prevents ultimate consumers from seeking compensation for antitrust injuries they have suffered. It is also underinclusive from a deterrence perspective because it relies exclusively on direct purchasers to act as private attorneys general even though they may be reluctant to bring actions against their suppliers. The rationale for limiting standing to direct purchasers is related almost entirely to concerns about multiple recovery of damages. A more finely tailored approach would be to allow indirect purchasers standing to bring an action, but to exercise caution in awarding damages to minimize the risk of duplicate recovery.

If damages are not available as a remedy, there may be a case for an even broader standing test that permits public interest standing by consumer, employee, and industry associations that may have a genuine and substantial interest in a matter and a superior ability to litigate than some individuals who are directly or materially affected. The requirement that a plaintiff be affected by the impugned practice makes sense if the purpose is to achieve corrective justice. If deterrence or the prevention of unjust enrichment are legitimate purposes, however, any litigant should be able to act as a private attorney general.

¹⁰⁸ *Discussion Paper*, *supra* note 1 at 23.

B. Intervention

Parties who are directly affected by private enforcement proceedings in the Competition Tribunal should have a right of intervention, including a right to advance claims for compensation, once liability has been established. For example, a direct purchaser should be able to participate in an action brought by an indirect purchaser and vice versa. This will help to reduce the risk of duplicate recovery of damages. A case can be made that broader public interest intervention should also be allowed because private prosecutors may have more limited research and investigative capabilities than public prosecutors. The tribunal, however, should have discretion to limit the extent of the participatory rights so that public interest intervention does not delay hearings and impose excessive costs on the parties.

C. The Director's Powers

One of the major weaknesses of private enforcement is that it can disrupt coherent enforcement policies based on the prudent and reasoned exercise of prosecutorial discretion. Some of the positive values of public enforcement policy can be preserved by requiring the Director to be given notice of all private enforcement actions. The Director could be given the opportunity to pre-empt the private proceeding by commencing his or her own action or negotiating a consent decree. In any event, the Director should have full rights of intervention in privately commenced actions, including participation in discovery, the calling of evidence, the cross-examination of witnesses, and perhaps even the power to appeal a decision.

In the case of time-sensitive transactions such as mergers, there may be a case for allowing private litigants access to the tribunal to commence a challenge to a merger, but allowing the Director to issue a stay of the proceedings, if he or she views this as expedient. The Director should, however, be required to present reasons for the stay, thus enhancing public accountability for the decision. Requiring the Director to give reasons for a stay also satisfies concerns that a decision not to prosecute was a product of inertia and neglect, as opposed to a considered exercise of prosecutorial discretion. The power to stay some proceedings would undermine some but not all of the value of private enforcement. A private plaintiff could still commence an action knowing that the worst that can occur is that the Director would have to explain his or her reasons on the record before entering a stay.

D. *Preventing Frivolous and Improper Private Actions*

Efficient and effective procedures to screen out frivolous and improper private actions are necessary because of the time-sensitive nature of much commercial activity and the risk of strategically motivated private actions unrelated to the legitimate purposes of competition law. In the United States, summary judgments have been awarded with increasing frequency in antitrust cases.¹⁰⁹ A mandatory summary judgment procedure can force plaintiffs not only to plead the legal requirements of a reviewable practice, but also to produce affidavit evidence to support these allegations. In turn, a respondent can be given an early opportunity to file affidavits to support its case that its activities are pro-competitive. A trial would only be necessary if there was a genuine conflict about the material facts. Such a procedure could also serve as a case management device and a convenient cut-off for the application of loser-pay costs rules.

E. *Costs Rules*

Along with a mandatory summary judgment procedure, cost awards can also deter frivolous and strategic litigation provided that the strategic benefits do not outweigh the risks of an adverse cost award. However, loser-pay cost rules also present a risk of deterring meritorious but innovative litigation, especially if a plaintiff litigates on behalf of a diffuse group or is not able to obtain a damages award or the costs of litigation. The conventional loser-pays rule may be the appropriate rule to apply to the preliminary stages of litigation up to and including the mandatory summary judgment procedure, but once a case has passed summary judgment, there may be good reasons, depending on the legal context, for applying a variety of no-way and one-way cost rules.

¹⁰⁹ S. Calkins, "Summary Judgment, Motions to Dismiss and Other Examples of Equilibrating Techniques in the Antitrust System" (1986) 74 *Geo. L.J.* 1065 at 1130-31; S.D. Helsel, "Note—Preventing Predatory Abuses in Litigation Between Business Competitors" (1995) 36 *Wm. & Mary L. Rev.* 1135; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 at 763-64 (1984); *Matsushita Electric v. Zenith Radio*, 106 S. Ct. 1348 at 1357 (1986); and *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*, 113 S. Ct. 2578 at 2598 (1993).

F. Discovery

Private litigants will have to rely on discovery because they will not have the same investigative powers as the Director. Nonetheless, discovery can be abused to prolong a case for strategic reasons, to gain access to confidential information, and to impose unwarranted costs on a party.¹¹⁰ For this reason, it may be necessary to require the parties at an early stage to list the documents they rely upon and to assign a member of the tribunal to supervise the discovery process as part of a case management process.

G. Limitation Periods

A clearly worded general limitation period, such as three years from when damages were suffered, but subject to judicial discretion to extend the period in exceptional cases, is necessary.¹¹¹ Private enforcement which follows on from public enforcement can partially be controlled by either extending or not extending the limitation period for the time consumed by the Director's enforcement efforts. Follow-on litigation could result in over-deterrence, but still be required to achieve corrective justice.

H. Supervising Settlements

There is a danger that settlements between private parties may not always advance the broader purposes of the *Act* and competition policy. In particular, settlements may be collusive and have anti-competitive effects. The tribunal already reviews consent agreements to which the Director has agreed,¹¹² and a similar review may be warranted for settlements of actions between private parties.

¹¹⁰ J.R. Withrow & R.P. Larm, "The 'Big' Antitrust Case: 25 Years of Sisyphean Labor" (1976) 62 Cornell L. Rev. 1 at 26-28; M.M. Blecher & C.E. Carlo, "Toward More Effective Handling of Complex Antitrust Cases" [1980] Utah L. Rev. 727 at 748; and Finkelstein & Quinn, *supra* note 84 at 29.

¹¹¹ Australian Law Reform Commission, *Compliance with the Trade Practices Act, 1974*, vol. 2 (Report No. 68) (Sydney: The Commission, 1994) at 61.

¹¹² In *Director of Investigation and Research v. Palm Dairies Ltd.* (1986), 12 C.P.R. (2d) 540 at 547 (Comp. Trib.), Reed J. stated that "when the Tribunal is asked to issue a consent order it is incumbent on it to *satisfy itself* that the order will be effective to accomplish, with due regard to the circumstances of the case, the objectives of the Act" [emphasis in original].

I. *Interim Remedies*

Preventing the Competition Tribunal from awarding interim relief will make litigation less attractive and may produce countervailing pressures to expand common law actions to include conduct that can be assessed as a reviewable practice. However, there is a risk that private plaintiffs will seek interim relief for strategic reasons and that such relief may restrain pro-competitive behaviour. This risk may justify preserving the Director's exclusive monopoly over requests for interim relief, at least in the merger context. On the other hand, the doctrine for granting interim relief, at least in other contexts, can be tightened¹¹³ and plaintiffs can be required to undertake to pay damages that respondents suffer because of the grant of interim relief that is subsequently overturned. If interim relief is not available, respondents may have to pay damages, at least for injuries they inflict during the litigation process.

J. *Damages*

From the perspective of corrective justice, treble or double damages are an unjustified windfall to the plaintiff. As discussed in Part IV, above, the fine is a better instrument of deterrence if only because the resources devoted to public enforcement can be more carefully controlled than those devoted to private enforcement. Single damages can both compensate private applicants for harms caused by reviewable practices and give them an incentive to bring an action. The calculation of single damages can be complex, especially if the plaintiff must establish an antitrust injury that would not have been suffered by the results of normal competition.¹¹⁴ The tribunal will have to take steps to prevent duplicate recovery from a respondent of losses that fall along a chain of distribution.

K. *Compliance Orders*

Compliance orders are aimed at preventing further violations and ensuring compliance in the future, not repairing past violations.

¹¹³ See for example *Competition Act*, *supra* note 2, ss. 33, 100.

¹¹⁴ B.C. McDonald, "Private Actions and the Combines Investigation Act" in Prichard, Stanbury & Wilson, eds., *supra* note 72, 195 at 208-09; and J.B. Musgrove, "Civil Actions and the Competition Act" (1994) 16 *Advocates' Q.* 94 at 110.

They will remain an important remedy under private enforcement, but the tribunal should ensure that plaintiffs do not obtain orders that go beyond the purposes of the *Act* or impose unnecessary costs on respondents. Settlements and consent orders will also play an important role, but again the tribunal will need to be vigilant in supervising settlements and issuing consent orders because settlements between private parties cannot be assumed to accord with the purposes of the *Act*.

L. *Choice of Forum*

While we have principally examined the strengths and weaknesses of private enforcement of competition law with particular attention to the reviewable practices contained in Part VIII of the *Competition Act*, many of the design issues identified above may also be relevant to private actions which are presently allowed under section 36 of the *Act* with respect to criminal competition offenses and failures to comply with an order of the Competition Tribunal. Should private parties be allowed access to the tribunal with respect to reviewable matters, there may also be a case for allowing or even requiring private parties to utilize the same procedure for section 36 claims. In any event, some attention should be given to integrating, or at least harmonizing, features of the private enforcement regime with respect to criminal offences and our proposed private enforcement regime with respect to reviewable practices.

Restrictions placed on private enforcement in the tribunal, such as the present prosecutorial monopoly of the Director, or even restrictions on remedies available under a new regime of private enforcement before the tribunal, may produce a countervailing demand to expand common law actions and remedies in the ordinary courts. From the perspective of competition law policy, it may be better to allow and even require all private enforcement before an expert Tribunal with specialized procedural rules rather than forcing it into the ordinary courts.

VI. CONCLUSION

The case for allowing private party access to the Competition Tribunal is compelling. Plaintiffs can seek corrective justice in the tribunal and, in so doing, supplement the enforcement resources of the

Director and promote accountability for the Director's decisions not to proceed with reviewable matters. The major weaknesses of private enforcement, namely its ability to disrupt the Director's enforcement policy and to allow private litigants to impose strategic costs on others, can be addressed by careful design of the private right of action, as our proposals in Part V attempt to demonstrate. Public debates could more productively focus on these design issues rather than abstract, ideological, or self-serving arguments about whether private enforcement of competition laws is desirable or undesirable *per se*. On this issue in the end, it is difficult, if not impossible, to defend a public monopoly on the enforcement of laws whose central *raison d'être* is redressing the evils of private monopoly.