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Bruce H. Wildsmith

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Bruce H. Wildsmith*

An American Enforcement Model of Civil Process in a Canadian Landscape

I. *Introduction*

One general perspective from which to view the Anglo-American legal system shared by Canada is that proposed by Charles Darwin to explain the origin and diversity of biologically distinct species. Darwin's theory of evolution places emphasis upon the adjustment or adaptation over time of biological characteristics to environmental factors by the selection of genetically determined features enabling the most suited to their surroundings to better thrive — the so-called "survival of the fittest".[1] Law might usefully be thought of as bearing an analogous relationship to the social environment in which it exists and must operate. As this milieu for various reasons inevitably undergoes a process of change, a process dramatically popularized as the "death of permanence" by Alvin Toffler[2], so must the legal system in response adapt itself to the needs dictated by current conditions.[3]

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*B.Sc., Ll.B., Ll.M. (Harv.), Associate Professor, Dalhousie Law School
The author would like to thank Professor Lewis Sargentich of the Harvard Law School for his kind advice in the preparation of this paper. Many of the ideas presented herein, and much of the author's understanding of the American materials, owe their origins to him and the course he teaches at Harvard in equitable remedies. The reader should note that this paper largely speaks as of early 1978.

1. C. Darwin, *The Origin of Species by Means of Natural Selection, or, The Preservation of Favoured Races in the Struggle for Life* (4th ed. London: John Murray, 1866)

2. A. Toffler, *Future Shock* (New York: Random House, 1970)

3. The themes of the inevitability of social change and the consequent necessity for legal reforms stemming from the tension between the old ways (and the need for certainty) and the new demands (and the need for flexibility) are recurring ones in recent Canadian legal literature. See, *e.g.*, J.-G. Castel, *The Law and the Legal Profession in the Twenty-First Century* (1973), 51 Can. B. Rev. 1 and 51 Can. B. Rev. generally; J. Beetz, *Reflections on Continuity and Change in Law Reform* (1972), 22 U. Toronto L. J. 129; R. A. Samek, *A Case for Social Law Reform* (1977), 55 Can. B. Rev. 409; R. A. Samek, *Beyond the Stable State of Law* (1976), 8 Ottawa L. Rev. 549; L. R. Friedman, *Law and Social Change in an Urban Environment* (1970), 8 Osgoode Hall L. J. 347; E. D. McWhinney, *Social Revolution and Constitutional Revolution in Canada: Some Reflections on the Philosophy of Legal Change* (1966-67), 12 McGill L. J. 479; D. R. Mandelkar, *The Role of Law in Social Change* (1970), 8 Osgoode Hall L. J. 355

Part of the environment in which Canadian processes must operate is the reality of Canada's proximity to, and ties with, the United States. Inevitably, economic, political, cultural, and indeed, all social developments in that country influence similar developments in this country. As features of American society are, for better or worse, adopted in this country, so features of the American legal system arising from frictions in that society bear watching. The rational Canadian lawyer turns increasingly to relevant American precedent for support,[4] the rational legislator examines American statutory schemes for solutions to society's problems and likewise the rational student of civil process must pay heed to American developments. The greater complexity of American society tends to mean that many kinds of problems are encountered there, and solutions adopted, before a similar problem arises here. This time-gap offers Canadians the opportunity to evaluate the American responses.[5]

The purpose of this article is to introduce to the Canadian reader, and apply in the Canadian context, an American development currently receiving the attention of academic lawyers in that country. In response to social needs, modern legislatures in the United States have enacted statutes which provide broad, public norms of conduct, whose violation results in a wrong being visited upon large segments of the public. The courts in dealing with such wrongs have, it has been suggested, acted so as to point to a newly-evolved purpose for civil process. This purpose shifts emphasis away from the traditional notion of civil process as

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4. See J. M. MacIntyre,*The Use of American Cases in Canadian Courts* (1966), 2 U.B.C.L. Rev. 478. It is no longer uncommon for Canadian courts at all levels to consider American cases. See, *e.g., Thorson* v. *A.-G. Can.*, [1975] 1 S.C.R. 138, 43 D. L. R. (3d) 1; *Haig* v. *Bamford et al.*, [1977] 1 S. C. R. 466; *Morgentaler* v. *The Queen*, [1976] 1 S.C.R. 616; *Seafarer's International Union of Canada et al.* v. *Baltic Shipping Co. et al.* (1975), 61 D.L.R. (3d) 530 (Fed. Ct.); *Stein* v. *City of Winnipeg* (1974), 48 D. L. R. (3d) 223 (Man. C. A.); *Farnham et al.* v. *Fingold et al.*, [1973] 2 O. R. 132 (C. A.); *Sulyok et al.* v. *Carroll et al.* (1977), 73 D. L. R. (3d) 417 (N.S.S.C.); *Stubbe et al.* v. *P. F. Collier & Sons Ltd* (1977), 74 D. L. R. (3d) 605 (B. C. S. C.); *R* v. *Maclean* (1974), 27 C. R. N. S. 31 (N.S. Co. Ct.) Even *Green* v. *Charterhouse Group Canada Ltd. et al.* (1973), 35 D.L.R. (3d) 161 (Ont. H. Ct.), which rejects the application of Amercan law, considers its application in the first instance (at 215-17) and appears to take support from it in calculating the damages the plaintiff would have been entitled to if he had been successful (at 239-40).

5. As J. M. MacIntyre, *id.* at 490, euphemistically stated: "When we have available the distilled experience of able lawyers and judges, we should at least look at it."

providing private redress for an aggrieved plaintiff, into a model utilizing civil process to enforce the public norms of conduct. This new view will be referred to herein as the "Enforcement" model, and will be contrasted with the traditional orientation, which will usually be called the "Dispute Settlement" model or view.[6] The Enforcement view grows from an attempt to explain phenomena reflected in recent American cases.[7] These phenomena deviate sharply at times from the formal notions of the purpose of civil procedures. An Enforcement model not only serves a positive purpose by capturing in a descriptive way what has transpired, but also acts as a normative tool in suggesting an orientation which has implications for the content of rules in various doctrinal areas. This article will attempt to show that Canadian developments contain the seeds of the Enforcement model[8] and to illustrate, largely through American examples, some of the implications of its further flowering. It must be confessed at the outset, however, that Canadian Enforcement phenomena are meagre. I will address in an abbreviated fashion the possible reasons for this paucity.

The structure of this article will revolve around specific doctrinal areas, preceded by a composite description of the two contrasting models. The Dispute Settlement versus Enforcement debate largely plays itself out in three broad, interrelated areas, namely, over the ramifications of class actions, the use of complex injunctive relief

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6. This terminology was originated by Professor Lewis Sargentich of Harvard. I will generally use the word "Enforcement" herein when making reference to this model, but will sometimes refer to the "Dispute Settlement" model or view as the "traditional" or "formal" one.

7. In terms of jurisprudential orientation, the models contrasted herein might best be thought of as a product of the "realist" movement. A realist may be thought of as "one who, no matter what his ideological or philosophical views, believes that it is important regularly to focus attention on the law in action at any given time and to try to decide . . . what is seen." Cited by J. U. Lewis, *American Realism Versus the Royal Tennis Tradition in Jurisprudence* (1974), 22 Chitty's L. J. 225 at 226 from W. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicloson, 1973) at 435, note 14

8. To examine all Canadian cases found in all the report series, even over a limited time period, in order to ascertain the state of Canadian Enforcement phenomena would be unrealistic. Instead, upon the assumptions that such phenomena, if present, will be reflected in recent decisions and that the Dominion Law Reports contain representative cases showing Canadian judicial activity, I used as an empirical base for this paper the Third Series of the Dominion Law Reports (D. L. R. (3d)), which begin in 1969 and at the time of research was into its 79th volume (early 1978). Additionally, subject indexes and other standard reference tools were used in relation to the specific topics discussed herein.

and the extent to which intervention by third parties will be permitted. I will touch upon the Enforcement lines drawn in the United States in these areas, and reflect upon the state of Canadian phenomena. Special emphasis will be placed upon class actions, which should prove timely in light of the recent First Stage amendments to the *Combines Investigation Act*[9], which included a specific provision for private damage actions, and in light of Parliament's present debate over Bill C-13, the government's Second Stage amendments, which propose to provide a special class action rule upon a rationale which is, in part, explicitly Enforcement. Finally, by way of conclusion, I suggest some reasons for the comparative modesty of Canadian Enforcement phenomena.

II. *The Contrasting Models*

American academic lawyers have recognized that litigation which snaps the bounds of traditional notions of civil adjudication is current phenomena in their courts[10]. Such cases are usually complex, but they represent something more fundamentally radical than a multiplication of issues, witnesses, documents, length and even parties. They are cases which cannot be explained in terms of a

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9. Stats. Can. 1974-75-76, c. 76, s. 12 [amending R.S.C. 1970, c. C-23 and reating new s. 31.1].

10. The seminal piece recognizing the new use of civil process is A. Chayes, *The Role of the Judge in Public Law Litigation* (1976), 89 Harv. L. Rev. 1281, where he contrasts "The Received Tradition" with "The Public Law Litigation Model". The latter he indicates to bear the following attributes: the scope of the law suit is shaped primarily by the court and the parties; the fact inquiry is predictive and legislative; relief is forward looking, fashioned *ad hoc* on flexible and broadly remedial lines, often having important consequences for many persons including absentees; the remedy is negotiated; the administration of the decree requires the continuing participation of the court; the judge is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome; the subject matter of the law suit is a grievance about the operation of public policy. Also of significance is an earlier article contrasting "The Conflict Resolution Model" with "The Behaviour Modification Model": K. E. Scott, *Two Models of the Civil Process* (1975), 27 Stan. L. Rev. 937. The Behaviour Modification model focuses upon the defendant, rather than the plaintiff, and sees civil process as a means of altering behaviour by imposing upon the defendant the costs of his activity with a view to the effect of this imposition upon future conduct. See also, *e.g.* S. H. Rifkind, *Are We Asking Too Much of Our Courts* (1976), 70 F. R. D. 96 at 101 where he contrasts the court's traditional function as "Dispute-resolvers" with his perception of its new role as "Problem-solvers". Similar observations are found in relation to constitutional adjudication. See A. Cox, *infra*, note 128

Dispute-Settling purpose for civil process. They are cases often of wide social impact and cast the court into a new judicial role. While illustrations provided in later sections of this article make concrete the concepts proposed, it is useful to bear in mind from the outset a composite picture of each model.

The term "Dispute Settlement" is used to describe the traditional, formal notions surrounding civil adjudication. Characteristically, this model focuses upon the plaintiff and his complaint or grievance. His standing is seen as based upon his private stake and personal interest in the outcome. The central vision is of a civil lawsuit as a means of resolving or settling a private, personal dispute between private parties. The lawsuit tends to be bi-polar with the plaintiff and defendant's interests diametrically opposed. These parties assume the burden of introducing evidence and are seen as generally entitled to control the joinder of other parties and the scope of inquiry. The court waits for plaintiffs who are concerened enough to bring their disputes to it, and then acts only to the extent called upon by the parties. The judge watches, as a passive, neutral arbiter, an historical inquiry conducted by the parties into a fairly specific, self-contained, past event.[11] Intermeddlers are frowned upon. Relief tends to be on a "winner-takes-all" basis. If granted, it will be narrow and specific, logically derived from the nature of the right breached and showing a decided preference for monetary compensation. The court will avoid unnecessary intrusiveness or entanglement into the defendant's affairs, and the parties are expected to rearrange their affairs in accordance with the court's decision without further court supervision or involvement. Absentees from the lawsuit are not bound; one must have his day in court before being formally affected by the suit. Concerns about ensuring compliance by the defendant with norms of legal conduct are seen as the province of

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11. The currency of this model of judicial behaviour in Canadian jurisprudence is exemplified by *Phillips et al.* v. *Ford Motor Co. of Canada Ltd. et al.* (1971), 18 D. L. R. (3d) 641 (Ont. C. A.) at 661-63 where Evans, J. A. for the majority sets out the traditional role of a judge under the adversary system and strongly criticizes the trial judge for acting as a "research director". Apparently the trial judge, concluding that a brake failure was the cause of the automobile accident but that the plaintiffs' theory of the cause of the failure was not adequate, conducted his own inquiry into the brake failure. For a comment on this case and the issue generally, see H. W. Silverman, *The Trial Judge: Pilot, Participant, or Umpire?* (1973), 11 Alta. L. Rev. 40. See also J. de N. Kennedy, *Burdens of a Judge* (1964-65), 13 Chitty's L. J. 252

criminal and administrative law, perhaps of government initiated civil suits, but certainly not of the citizen initiated law suit.

In contrast, the Enforcement model is characterized by an emphasis upon the defendant's wrongful conduct and a concern that this conduct conform to legal norms. The norms involved in these kinds of suits tend to be set by statute as part of a broad legislative scheme enacted for the benefit of a large segment of the public, typically in such areas as civil and human rights, consumer and environmental protection and competition laws. Their violation thus usually affects a group of people and the legal action is based upon a collective wrong. The breach tends to be in the form of a complex, systematic policy or practice upon the part of the defendant, which is usually a corporate entity. The lawsuit largely deals with the operation of such statutorily declared public policy. Because of the group nature of the wrong, concern is had for more than just the plaintiff's particular position. Often an object of the lawsuit is to return to the defendant the costs of his wrongful conduct, the small claim class action being a prime mechanism. While the Enforcement model does not negate the valuable distributive effects of compensation reaching the plaintiff, it would not halt the civil process when difficulties are encountered with achieving the compensatory objective. Since emphasis is placed upon bringing the defendant into compliance with the norms of proper conduct, including correcting the effects of past wrongs and preventing future repetition, specific affirmative relief is often necessitated. This relief tends to take the form of a complex injunction which reorders and restructures the defendant's conduct. Such an order is intrusive and often requires a preceding deep inquiry into the defendant's conduct and affairs. The indeterminant nature of this inquiry, together with the greater interest of the public in the outcome, often dictate that the Court not rely soley upon the parties' evidence but exhibit some interference in the adversarial contest to ensure sufficient facts come forward. A greater concern for the accuracy of the fact-finding process is evident. The fact that the wrong addressed and the relief granted are broad, and that many persons are affected by the decree, means the court has a heightened concern for absentees. This manifests itself in a liberal attitude toward intervention, and less control by the original parties over party structure and management of the lawsuit. Multiparty lawsuits result in which an array of interests are represented, such that the process

tends toward the legislative model of decision making[12]. The partly prospective nature of the relief adds a predictive, future-oriented aspect to the fact-finding inquiry and means that once the decree is made, the Court will likely play a greater role in supervising and overseeing its operation. The breadth of the inter-related facts scrutinized by the court allows the detailed provisions of the decree to be fashioned in many legally satisfactory ways. Hence negotiated orders are likely, with the court participating together with parties in the negotiations. Perhaps the implicit premise upon which the Enforcement model is built is that, while the plaintiff may be harmed by the defendent's wrongful violation of norms of public conduct, the real damage is done to the public interest. And the judicial process, above all else, must protect the public interest[13].

By way of caveat, it should be emphasized that the models discussed herein are, like all models, conceptual. In attempting to capture all of a complex world, they no doubt fall short of the target. For example, most modern rules of civil procedure mark a departure from the old formalism to a functional view of procedure. Functionalism fails, however, to explain the central features of Enforcement. Also, being new and being based upon underlying phenomena not yet fully developed, the Enforcement model itself is not fully articulated. The contents of the model must still be regarded as open-ended, amorphous, and somewhat tentative. Further, it should not be thought that the debate between the two models is very explicit in judicial decisions, nor that all cases which can be best explained in Enforcement terms exhibit all Enforcement attributes. The model is described in a general fashion and gradations may exist in particular cases from a weak Enforcement rationale to one approaching its full flowering. It should also be emphasized that while the models are contrasting and often competing, they are by no means mutually exclusive. Enforcement does not extirpate a Dispute-Settling function. Traditional, private

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12. This feature of Enforcement cases harkens back to the "many centered" or "polycentric" tasks which Lon Fuller felt unsuited to adjudication: *Collective Bargaining and the Arbitrator*, [1963] Wis. L. Rev. 32; *The Forms and Limits of Adjudication (1978), 92 Harv. L.* Rev. 353, at 394-404.

13. This hints at the invasion by civil process into the realm of criminal law and suggests, as a basis for criticism of the Enforcement model, the fact that the model sanctions the infliction of serious consequences upon the defendant without the safeguards central to the criminal process. One response to this criticism, albeit not dispositive of the issue, is that even traditional civil lawsuits may visit serious consequences upon a defendant without such safeguards.

lawsuits will continue to occupy much of a court's time, and such litigation does at times have an Enforcement effect. Similarly, adoption of an Enforcement view does not preclude the application of aspects of the Dispute Settlement model. Indeed, Dispute Settlement is largely subsumed by Enforcement. For example, in the context of a claim for damages, the Enforcement view emphasizes returning to the defendant the full measure of the loss inflicted by him upon others. There is no reason, though, to jettison the Dispute Settlement's compensatory objective if this can be accomplished. Despite such shortcomings, however, the perspective the models bring to understanding the world makes the contrast worthwhile.

Resting close to the heart of the reason for the rise of Enforcement phenomena is, as I have indicated, the increasing tendency for legislatures to enact broad schemes for the benefit of large groups, if not of society as a whole. Hence, it is important to recognize that, neglecting constitutional litigation, which is not nearly of so great an import in Canada as in the United States, the Enforcement view emphasizes the implementation of this legislative policy. Because the statutory enactments are general and uncertain in their application, because legislative policies sometimes conflict, and because the breadth of the wrong addressed forces decisions which have public and political impacts, a creative judicial role is essential. But the underlying basis for the court's action should be thought of as firmly rooted in policies adopted by the legislative process. The norms being enforced are statutorily created by the political process; for the courts, they are exogenously given. Thus, one should not view the Enforcement model as usurping the supremacy of Parliament or as speaking to a preference for judicial policy making as opposed to political poloicy making, albeit judges must "legislate" to fill the interstices[14]. The legitimacy of this use of the civil process might be seen as resting upon delegation from the legislative branch, which is free to change the policies being implemented or restrict the open-ended framework within which the judicial branch operates[15].

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14. See, *e.g.*, P. Weiler, *Legal Values and Judicial Decision-Making* (1970), 48 Can. B. Rev. 1; L. P. Pigeon, *The Human Element in the Judicial Process* (1970), 8 Alta. L. Rev. 301; O. V. Gray, *Judicial Legislation: Judicial Constructs and Societal Facts* (1973), 31 U. Toronto Fac. L. Rev. 75
15. A. Chayes, *supra*, note 10 at 1314

III. *Class Actions*

> The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires.[16]

A class action might usefully be thought of as a procedural device originally intended to address the problem of numerosity. A number of persons, usually plaintiffs but sometimes defendants[17], too numerous to practically join individually, are in a similar position vis-à-vis the opposing party. The class device arose in the mists of equity's distant past[18], and with the fusion of law and equity became part of the rules of civil procedure administered by common law courts. The rule, usually titled in Canada as a "representative action", is deceptively simple. It typically[19] provides that where

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16. *Taff Vale Railway Co.* v. *Amalgated Society of Railway Servants,* [1901] A. C. 426 (H. L.) (*Per* Lord Lindley at 442-43, in relation to class actions)

17. My discussion will deal only with plaintiff classes. Defendant classes are authorized by the typical rule dealing with representative actions: see *infra*, note 19. For examples of defendant classes and some of the issues surrounding them see: *Heath Steele Mines Ltd.* v. *Kelly and Astle* (1977), 16 N. B. R. (2d) 517 (S. C., Q. B. D.) (difficulty over class composition and different defences); *Mintuck* v. *Valley River Band No. 63A et al.* (1977), 75 D. L. R. (3d) 589 (Man. C. A.) (Indian band required to defend by chief and council as representatives); *Prince Albert Pulp Co. Ltd* v. *Evanishen et al.* (1975), 58 D. L. R. (3d) 8 (Sask. C. A.) (action for injunction to prevent picketing by company against two individuals representing all union members); *Interprovincial Steel and Pipe Corp. Ltd.* v. *Shaw et al.*, [1975] 1 W. R. R. 659 (Sask. Q. B.) (one person may represent members of trade union if he "will fairly and honestly try the right"); *National Bolt and Nut Corp. et al.* v. *McDermott et al.* (1974), 51 D. L. R. (3d) 191 (Ont. H. Ct., Div. Ct.) (officers of union to defend as representing members); *Research Corp.* v. *Pfister Assoc. Growers Inc.* (1969), 301 F. Supp. 497 (N.D. Ill.) (unwillingness of defendant to represent class); *U.S.*. v. *American Optical Co.* (1951), 97 F. Supp. 66 (N.D. Ill) (greater necessity to notify members of defendant class to ensure fair and adequate group representation); *Dale Electronics, Inc.* v. *R. C. L. Electronics, Inc.* (1971), 53 F. R. D. 531 (D. N. H.) (defendant class members out of jurisdiction). See generally H. H. Elliott, *Class Actions* (1975), Lectures L. S. U. C. 41 at 49-53; D. J. Sherbaniuk, *Actions By and Against Trade Unions in Contract and Tort* (1958), 12 U. Toronto L. J. 151 at 154-74.

18. See J. A. Kazanjian, *Class Actions in Canada* (1973), 11 Osgoode Hall L. J. 397 at 399-413

19. For a typical rule, see Rule 75 of the Rules of Practice of Ontario, which provides:

> "Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all."

All provinces and the Federal Court of Canada (R. 1711) have a similar rule except

"numerous persons"[20] have the "same interest"[21] (or a "common interest", which has been interpreted to mean the same thing[22]), one or more persons may sue for the benefit of all. Despite its open-ended nature, the rule has received comparatively little use and very little judicial gloss[23]. It appears that only within the present decade has the Canadian legal profession become conscious of the potential of this device. Indeed, so little attention has been paid to it that a leading Canadian textbook on civil procedure, published in 1970, now is in error in instructing Canadian lawyers, as it does, that class actions are not available in respect of claims for damages or for injunctions[24]. In contrast, the American federal rule[25], which is more detailed and restrictively specifies the situations in which the class tool is to be used, has served as a catalyst to an innovative and expansive use of this device, more of

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Quebec which has enacted special legislation (See CCH Canadian Sales and Credit Law Guide s. 15-680, p. 3181).

20. In *Goodfellow* v. *Knight et al.* (1977), 2 Alta. L.R. (2d) 17 (S.C.) doubt is expressed that this requirement is met where one partner sues on behalf of himself and two other partners.

21. See *Shaw, infra*, note 34 and accompanying text; *Cobbold, infra,* note 34 at 631 [D. L. R.] ("a class action is appropriate if it can be shown that success for the plaintiff means success for the other members of the class, especially where the same measure of success applies equally to all"); *Drohan et al.* v. *Sangamo Co. Ltd.*, [1972] 3 O. R. 399 (H. Ct.) (where at 402 "same interest" is defined "as referring not to a relationship but solely to an interest in the result of the action . . . [There] must be a common interest in the sense that all persons represented will gain some relief though possibly in different proportions and perhaps in different degrees"); *Blackie et al.* v. *Postmaster-General* (1975), 61 D. L. R. (3d) 566 (Fed. Ct.) (since all members of union not letter carriers, relief sought not beneficial to all members of letter carriers union and all members of class do not have a common interest); *McMillan et al.* v. *Yandell et al.* (1971), 22 D. L. R. (3d) 398 (Ont. H. Ct.) (dissent within class); *Alden* v. *Gaglardi et al.* (1970), 15 D. L. R. (3d) 380 (B.C.S.C.) (injunctive relief beneficial to all of class); *Kroman's Electric Ltd.* v. *Schultes et al.* (1970), 11 D. L. R. (3d) 425 (Ont. H. Ct.) (mechanic's lien claimant representing unsecured creditors); *Shack* v. *Matthews Construction Co. Ltd.* (1962), 33 D. L. R. (2d) 97 (Ont. C. A.) (all shareholders must have an "identical interest in the result of the action"); *A. E. Osler & Co.* v. *Solman*, [1926] 4 D. L. R. 345 (Ont. C. A.), at 349.

22. *Goodfellow, supra,* note 20; *Shaw, infra,* note 34

23. A collection of Canadian cases dealing with class actions may be found in 1 *Holmested and Gale on The Judicature Act of Ontario and Rules of Practice (Annotated)* (Toronto: The Carswell Co. Ltd., 1968) 706-23 and Cum. Suppl. (1977) 175-78

24. W. B. Williston and R. J. Rolls, 1 *The Law of Civil Procedure* (Toronto: Butterworth & Co. (Canada) Ltd., 1970), at 203

25. Federal Rules of Civil Procedure, Rule 23. See generally Advisory Committee's Note, *Proposed Amendments to Rules of Civil Procedure for the United States District Courts* (1966), 39 F. R. D. 73 at 98-107

which will be said throughout this section. While the American rule is not free from its problems, the experience with it makes apparent the missing limbs of the Canadian rule, which have not been judicially grafted into place despite the free role for creativity it leaves open.

The purpose of a class rule is ostensibly to allow a group of people to sue where it would be too cumbersome and impractical to have each joined as a named party in the same suit. But why not require each prospective plaintiff to sue himself in a separate suit? Under a strict Dispute Settlement model such would be required. Each plaintiff, it would be said, if he has sufficient personal interest, ought to bring his own suit, over which he has control, for the resolution of his private, individual grievance. Some emphasis would also be placed upon the defendant's interest in personally confronting someone who makes a claim against him. If an individual plaintiff does not care enough to come forward with his claim, the judicial process ought not to be concerned about him either.

The American analysis (upon which the 1966 revision to the Federal Rules of Civil Procedures is based) would answer this question functionally. A functionalist would advance three prime reasons. First, from the standpoint of economy, it is likely an inefficient use of resources to have each plaintiff finance his own lawsuit and to have society absorb the cost of tying up scarce judicial personnel and facilities to hear the same, or virtually the same, evidence over and over again[26]. Secondly, piecemal adjudication can have an unfair impact upon the defendant. He might lose more as a result of separate suits than he would from a single suit. For example, if one of many similarly situated plaintiffs

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26. Canadian materials tend to consider only this economy rationale. See, e.g. *Naken et al.* v. *General Motors of Canada et al.* (1977), 17 O.R. (2d) 193 (Ont. H. Ct.) (Div. Ct.) at 198 where Griffiths, J. describes the rule as one to avoid "multiplicity of actions" or joining "all members of the class as party plaintiffs"; *Ward.* v. *Benson* (1902), 3 O.R. 199 (H. Ct.). See also H. H. Elliott, *supra*, note 17 at 41; J. A. Kazanjian, *supra*, note 18 at 413, 436; G. F. McFadyen, *Consumer Class Actions* (1973), 2 Queen's L.J. 50 at 51. Some suggestion of a reason going beyond convenience is made in N. J. Williams, *infra*, note 43 at 2: "The class action procedure can . . . also avoid the embarrassment that inconsistent findings in separate proceedings could cause"; R. R. Reid, Commentary, *Naken* v. *General Motors of Canada Ltd.: A Stumbling-Block to Canadian Consumer Class Actions* (1978), 3 Can. Bus. L. J. 78 at 79-80. For a more detailed discussion of economic efficiency concerns, see K. W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest* (1975), 4 J. Legal Studies 47 at 49-54.

sues and the defendant wins, a second plaintiff could still sue the same defendant since the previous suit does not bind absentees. Even if the defendant wins again, the process could be carried out *ad nauseam* until the class is exhausted, all the while placing the defendant in jeopardy of an unfavourable verdict. If at any stage a plaintiff should win, all other plantiffs who have not litigated their claims might be able to rely upon this victory by way of estoppel to take judgement against the defendant. The class action restores mutality of estoppel — if the defendant succeeds against the class, all the class members are bound. Similarly, if injunctive relief is granted in each of several suits in a complex situation, inconsistent obligations may be placed upon the defendant[27]. The third point is significant. An atomic law suit could have an unfair impact upon absentees who might have received some protection through being class members in a class suit. While these absentees are not formally bound, it might be that an outcome unfavourable to a plaintiff in the initial unitary suit would, as a practical matter, be dispositive of their interests. A court, particularly the same judge, would be reluctant to decide an absentee's case, when brought upon substantially similar evidence and raising the same issues, in a different way than it decided the first. Or, it might happen that, in the course of dealing with the first case, the court resolved an uncertain question of law in relation to which the absentee, in his case, would suffer a *stare decisis* fallout without having had the opportunity to make representations.

Once a Dispute Settler has accepted economic efficiency as a justification for permitting class suits, functional concerns flow naturally since they are, after all, only a commitment to ensuring the procedure operates efficiently and fairly. Is a class suit, however, just a mechanism for achieving economy and avoiding unfairness by bringing together into one proceeding a collection of individual suits? Is it merely a massive joinder or consolidation or aggregation technique? The experience with class suits, it is submitted, shows that is does serve a further purpose and that there is a further reason why we should not simply require each prospective plaintiff to bring his own suit.

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27. Note that this argument, unfairness to the defendant, while persuasive in suggesting why there should be a class suit theoretically, seems to be undercut in practice, where it is rare to see a defendant urging a plaintiff class suit on this basis. Defendants usually oppose class maintenance and seem prepared to take the risk of unitary adjudication.

This additional purpose and reason is illuminated by considering class damage claims. The stage for introducing the new orientation is set by looking at a debate which arises in Canadian cases as to the extent to which damages are available to a plaintiff class. This issue has been a preoccupation of our courts. As earlier discussion would predict, a Dispute Settlement orientation would see the question of damages as a private, personal matter between the injured party and the defendant. It is seen as an individual question and the prospective plaintiff, it is said, ought to bring his grievance directly to the court himself, where the defendant will have the opportunity to meet this claimant and ensure the validity of this particular person's claim. This strict view of damages as, *a priori*, too individual a question for class treatment stems from the still influential anaysis of Fletcher Moulton, L. J. in *Markt & Co. Ltd.* v. *Knight Steamship Co., Ltd.*, who simply stated that ". . . [N]o representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff . . . ."[28] Even in recent years some have uncritically accepted this statement.[29]

On the other hand, very recent cases have espoused the view that the mere fact the class action sounds in damages is not fatal. Instead the court must ask itself "whether the damages are to be assessed personally for each person sought to be represented or are in the nature of general damages for the class as a whole"[30]; the former is not permitted while the latter is the proper subject of a class suit.[31]

While lip-service continues to be paid to this distinction, its artificiality has led courts to seek ways to circumvent it. The least

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28. [1910] 2 K. B. 1021 at 1040-41

29. See, e.g. *supra*, note 24; H. H. Elliott, *supra*, note 17; *Drohan*, *supra*., note 21 at 402; *Wallace* v. *Fraser Companies et al.* (1973), 8 N.B.R. (2d) 455 (S.C., Q.B.D.) at 464

30. *Goodfellow*, *supra*, note 20 at 22

31. Thus, in *Northdown Drywall & Construction Ltd. and Simone* v. *Austin Co. Ltd. et al.* (1975), 59 D.L.R. (3d) 55 (Ont. H. Ct. Div. Ct.) where a class action was brought on behalf of all union local members alleging a loss of the benefit of employment, it was held that a claim for lost wages was improper, since the sum claimed was an accumulation of personal claims, but that a claim to check-offs for ordinary union purposes and for pension, welfare and supplemental unemployment benefits was proper. The latter was a claim for damages done to the class as a class. See also *Murphy* v. *Webbwood Mobile Home Estates Ltd.* (1978), 19 O.R. (2d) 300 (H. Ct.) where separate contracts between tenants and their landlord prevented the maintenance of a class claim to recover excess amounts paid to the landlord for water charges and taxes.

distortion is caused by the so-called "fund" test, which looks to see if the amount of the defendants' wrongful gain can be neatly calculated to form a "fund" which can then be distributed *pro rata*.[32]

The logical extension of this reasoning is to uphold the class action where the "fund" can be calculated through the defendant, but distribution requires the calculation of entitlement to each class member to be done individually.[33] More will be said, *infra,* about this notion of collectively calculating damages for later distribution.

The next step in the Canadian progression is to allow the class action to proceed where a collective calculation of a fund is only possible through aggregating individual claims.[34]

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32. In *Naken, supra,* note 26 at 198 Griffiths, J. spoke of a "fund" in which all members of the class have a common interest and called the existence of the fund a "notional concept". He did not feel, however that a claim for $1,000 on behalf of all owners of 1971-1972 Firenza motor vehicles met the test, largely because the $1,000 claims were "losses personal to each purchaser". *Farnham* v. *Fingold,* [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.), though, would seemingly meet the test. There a chambers motion to strike out the statement of claim was dismissed. The case involved a claim by minority shareholders for damages from a controlling group on the grounds that the members of the controlling group had made an improper profit on the sale of their shares. The class action was allowed to proceed. What was sought by the plaintiffs was the gross amount of premium over market price received by the controlling shareholders, with this amount to be distributed *pro rata* and the Appeal Court left it to the trial judge to decide if this claim was proper.

33. In a class action on behalf of hotel employees *Shabinsky* v. *Horwitz et al.* (1971), 32 D.L.R. (3d) 318 (Ont. H. Ct.), the court made a declaration that certain service charges which had been added by a hotel to customers' bills, and kept by it, were held in trust for the plaintiff class, and ordered the amount of the fund (approximately $20,000) to be paid into court. Instead of a *pro rata* distribution, however, the court directed the money to be distributed individually by the Master. See also *Westinghouse Canada Ltd.* v. *Buchar et al.* (1975), 59 D.L.R. (3d) 641 (Ont. C.A.) where a class action was maintained on behalf of all creditors to create a fund by setting aside a fraudulent conveyance, with the fund so created to be divided as prescribed by Ontario's *Creditors' Relief Act*.

34. This position is implicit in *Cobbold et al.* v. *Time Canada Ltd.* (1976), 1 C.P.C. 274, 71 D.L.R. (3d) 629 (Ont. H. Ct.) where a class action by the subscribers to Time Magazine's Canadian edition was maintained against the publisher when the Canadian edition was discontinued. The plaintiffs wanted either to receive the American edition for a time period equal to the unexpired portion of their Canadian subscriptions or damages based upon the price difference between the two editions during the unexpired portion of the subscription terms. In refusing to strike out the action, Stark, J. recognized that the contract of each class member was identical with the other members, except for the subscription dates. And in refusing to strike the damage claim, he must have been prepared to allow damages to be calculated if necessary by summing each subscriber's individual claim, although this might be done without individual proof from the defendant's records.

What underlies the debate over damages is the question of the extent to which class actions are proper where all the questions involved are not common to the whole class. What has been hinted at by the cases is that the strongest economy rationale is not necessary to maintain a class suit — all the questions need not be fully common to the class. The presence of individual questions strikes at the heart of Dispute Settlement. These cases further faintly hint that the justification for tolerating individual questions over the objections posed by the Dispute Settlement model may not simply be economy but rather a concern for deterring the defendant, a concern for enforcing the norms of proper conduct violated by the wrongdoer.

The Canadian cases underlying the preceding analysis do little more than set the stage for Enforcement activities. A full Enforcement view of a class damage action would not be concerned about the personal aspects of damage claims but would rather focus upon ensuring that the proper measure of damages inflicted by the defendant's conduct are returned to him. It is the extraction from the defendant rather than the compensation to the plaintiff which is important. The object is deterrence.[35]

Examining class suits from a deterrence orientation provides new insights into some current problems with respect to their use, and serves to provide a coherence to phenomena which depart from traditional norms. Thus, upholding class suits involving individual questions helps to promote deterrence. One important feature of a

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The same kind of position is explicitly the essence of *Shaw et al.* v. *Real Estate Board of Greater Vancouver* (1973), 36 D.L.R. (3d) 250 (B.C.C.A.) which must be regarded as the highwater mark for Canadian class damage actions. Involved was a claim by a class of listing salesmen for the return of a part of their real estate commissions which had been illegally paid to the Board. Obviously each class member will have paid different amounts to the Board and the amount to be paid back by the Board can only be determined by accumulating each salesman's individual claim. The illegality of the defendant's conduct appears to motivate the court (at 254-55).

35. One of the more explicit judicial endorsements of this objective is found in *Dolgow* v.*Anderson* (1968), 43 F.R.D. 472 (E.D.N.Y.) at 487 where District Judge Weinstein stated:

> "The Rule 23 class action has much the same prophylactic function in the field of securities regulation that the shareholder derivative suit has in the area of general corporate law. In addition to seeking to compensate those directly injured, the federal securities laws are designed to deter corporate officials and insiders from engaging in the kind of machinations alleged to have taken place here . . . By making real the threat of exposure and civil liability, the class action also serves to effectuate this objective."

class suit is that it allows class members to remain passive. The more that is required from passive members, the less likely it is that they will act. Under Dispute Settlement's compensatory objective we would see little reason to be worried about compensating someone who was not even concerned enough himself to seek redress. However, if our objective is to make the wrongdoer pay the external costs his illegal activity imposes, then we would want payment to be extracted for the passive as well as active class member. The more common questions that can be resolved, the more likely a class member with a passive disposition will act when something is unavoidably required of him.

The preference for maintaining class member passivity is reflected in the way some courts have handled problems which have confronted them. The collective calculation of damages is one example. Customarily damages are calculated by individual assessments with the plaintiff assuming the burden of proving his claim. Where there are several claimants, the individual damage awards are summed together and the defendant must pay this total to the plaintiffs. However, damages for the class can be calculated in a collective fashion in many instances without regard to indivudal entitlements. In the case of an overcharge by a stockbroker as in the famous *Eisen*[36] litigation, a formalist would see it as essential that each of the many thousands of individuals trading shares come to court to confront the defendant and prove at least the amount of his loss. They would argue that only through summing the results of these individual proofs could the court determine the amount of damages that the defendant would have to pay. Tyler, J., on the other hand, avoided this unmanageable procedure by proposing to calculate the gross award from business and official records.[37] Perhaps some of the earlier mentioned Canadian cases were groping towards this result.[38]

While it might be argued that this collective calculation injects an

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36. *Eisen* v. *Carlisle & Jacquelin et al.* (1971), 52 F. R. D. 253 (S. D. N. Y.); reversed (1973), 479 F. 2d 1005 (2nd Cir.)

37. *Id.* at 261-62: "In approaching this question [computation of damages], it is recognized that an exact computation is not required; it is sufficient, of course, if there is relevant data from which the jury can make a just and reasonable estimate of the damage . . . In this case, I am satisfied that gross damages may be fairly estimated without having individual claims filed by each class member. The sources for such a computation will include at least the following: defendants own records, [certain other records not emanating from the plaintiffs] . . ."

38. See *supra,* notes 32-33

element of approximation into the results, a Dispute Settler could not object too strenuously if the system was reasonably accurate since its real effect is simply to minimize transaction costs, a fairly traditional goal of civil procedure. A more fundamental objection is that collective calculation increases the gross award over what would have been the case through individual assesments since some class members would not have come forward. It may not be possible or practical to identify or locate some members to give them notice. Of those who received notice, some would remain passive because of lack of understanding or a lack of interest. If the defendant is to pay more than he would under procedures based on a compensatory objective, something more than Dispute Settlement notions are required to justify this collective calculation of gross damages.

This analysis carries forward into a more controversial area, namely the distribution of the gross damages once calculated. In an easy case, such as one would expect *Cobbold*[39] to be, the defendant could have complete computerized records, such as subscription information, and it would be a relatively simple matter to have the defendant from this information make up cheques and mail them to class members, whose passivity could be preserved to the end. In other cases, it may be possible to avoid requiring much initiative from class members by setting up informal, flexible methods for the submission of claims, such as to a claims committee rather than to the court, and using simple affidavits or signed statements. In all likelihood, however, after these procedures are exhausted, there will remain, for various reasons, an undistributed surplus from the collective estimate of gross damages. While any overhead for the suit not already collected from the defendant could be further deducted, what happens to any remainder still left?

A traditionalist would emphasize the idea that the defendant is only obligated to pay those who prove their claim, and hence this surplus ought to go back to the defendant. The Enforcer would emphatically reject this solution since it would leave the defendant with part of the fruits of his wrong. No Canadian court seems to have grappled with this problem, but some American courts have. While the votes are not all in, schemes have been used to distribute the surplus in a manner which benefits a group approximating the plaintiff class.[40] This is usually referred to as non-congruent or

39. *Supra*, note 34

40. See, *e.g. Daar* v. *Yellow Cab Co.* (1967), 63 Cal. Reptr. 724, 433 P. 2d 732 (S.C.) (State as *amicus curiae* argues, but court does not decide, that unclaimed

"fluid" recovery since some people benefit who are not part of the class and so would have had no claim against the defendant. Sometimes the money is simply escheated to the state to benefit all citizens. How can distribution of part of the award to people without a claim against the defendant be jusitifed under a Dispute Settlement model of civil process?

Thus far I have been discussing class damage actions without any overt distinction between small and large claims. Consider for a moment a situation like *Cobbold*[41], perhaps the only true Canadian small claim example. There the amount of the alternative damage claim was the difference in the annual subscription rates of the American and the Canadian editions of Time Magazine. Since these rates were $30 and $18 respectively, most class members would have a stake in the suit in the neighbourhood of $12. Obviously, if the suit had been struck out as a class action, not many subscribers would have sued individually. A single individual suit might have been treated by the Canadian publisher as a "test case", but it could just as easily have refused to do so. Under a Dispute Settlement model, reliance is placed upon an individual plaintiff having a sufficient stake in a claim that he will actively seek judicial resolution. Indeed, it disciplines lawyers who "chase ambulances", seeking to act as entrepreneurs and foment litigation where none would have otherwise taken place. How, under a Dispute Settlement Model, do we justify a procedure which would allow the use of scarce judicial resources to deal with a suit where none would have otherwise been brought?[42]

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remainder from gross amount of taxicab overcharges should go to it; this case was settled with the settlement funds going to reduce taxi fares); *Bebchik* v. *Public Utilties Commission* (1963), 318 F. 2d 187 (D. C. Cir. en banc) (overcharged by public transit company ordered to be used for the benefit of all transit users since it was not feasible to make refunds to all individuals overcharged); *State of West Virginia* v. *Chas. Pfizer & Co.* (1971), 440 F. 2d 1079 (2nd Cir.) (court approved consent decree directing unclaimed funds to be paid to the state through its Attorney-General). See also the *Hart - Scott - Rodino Antitrust Improvement Act of 1976*, 90 Stat. 1383, which authorizes damages to be estimated in the aggregate without proof of individual claims and to be distributed either as "the district court in its discretion may authorize" or to "the State as general revenues" by way of a deemed civil penalty; Note, *Damage Distribution in Class Actions: The Cy Pres Remedy* (1972), 39 U. Chi. L. Rev. 448. *See contra, Eisen, supra,* note 36 (disapproving Tyler, J.'s scheme of "fluid recovery", which would have used unclaimed residue to benefit all odd-lot traders by reducing the odd-lot charges; the U.S.S.C. in upholding the Second Circuit at (1974), 94 S. Ct. 2140 made no comment about the propriety of "fluid recovery").

41. *Supra*, note 34

42. This kind of effect upon traditional notions was recognized by M. J. Trebilock,

The importance of an Enforcement rationale to Canadian class damage actions is masked by the limited judicial developments to date. Scholars are advocating consumer class actions,[43] law reform bodies are studying new class action provisons[44] and Parliament is considering a bill which uses the class device as an enforcement tool.[45]

Bill C-13 proposes to include a class action provision directly within new amendments to the anti-combines legislation. This class action provision is linked to the specific authorization, in the 1975 amendments to the *Combines Investigation Act*[46] of a private damages remedy. Historically, competition policy in Canada has been based upon a criminally oriented Act justified under Parliament's criminal law power.[47] A shift to civil procedures began as a result of the recommendations of a report prepared in 1969 by the Economic Council of Canada,[48] as the Government had requested in 1966. When legislation flowing from the impetus of this report was finally passed in 1975, it contained, as a new section 31.1 to the Act, a provision allowing for the recovery of damages[49]

Private Law Remedies for Misleading Adveristing (1972), 22 U. Toronto L. J. 1 at 27. See also T. J. Weithers, *Amended Rule 23: A Defendant's Point of View* (1969), 10 B.C. Ind. and Com. L. Rev. 515 at 525: "It provides a new device for bringing before the court great numbers of passive litigants who would otherwise have remained silent."

43. See, *e.g.*, N. J. Williams, *Consumer Class Actions in Canada — Some Proposals for Reform* (1975), 13 Osgoode Hall L.J. 1 (who explicitly incorporates Enforcement rationale at 63); M. J. Trebilock, *id.*; G. F. McFadyen, *supra,* note 26.

44. According to personal communication from Professor Neil J. Williams, of the Osgoode Hall Law School, the law reform commissions of both Ontario and British Columbia, as well as the Ontario Civil Procedure Revision Committee are studying class action reforms. As well, Quebec has enacted new legislation: see *supra,* note 19.

45. Since writing this section (1978), Parliament has been twice dissolved and Bill C-13 has died on the Order Paper. However, the Honourable André Ouellet, the present Minister of Consumer and Corporate Affairs, has affirmed the Liberal Governments intention to reintroduce the Bill.

46. *Supra,* note 9.

47. See generally B. C. McDonald, *Constitutional Aspects of Canadian Anti-Combines Law Enforcement* (1969), 47 Can. B. Rev. 160, esp. at 172-88.

48. *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969), at 107 *et seq* . . .

49. It should be noted that s. 55 in the initial proposal to Parliament, Bill C-256 introduced June 29, 1971, would have allowed double damages to be recovered rather than actual damages as finally enacted. See W. T. Stanbury, *Penalties and Remedies Under the Combines Investigation Act 1889-1976* (1976), 14 Osgoode Hall L. J. 571 at 603-06, 619-20 (who argues for double damages as well as class actions to make the civil remedy effective).

by a private party injured as a result of a violation of the Act or a failure to comply with an order of the Restrictive Trade Practices Commission or a court under the Act.[50] At the same time that this provision was being channelled through Parliament as part of the so-called "First Stage" amendments, a two-part study was being conducted on the legal and economic aspects of using a class action provision in conjunction with the damages remedy.[51] Both authors, from the standpoint of their respective disciplines, endorsed a class action provision; both emphasized in their reasoning an Enforcement rationale.[52]

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50. A problem appears to exist over whether the inclusion of a private civil cause of action in this legislation is constitutional. The better view seems to be that it is constitutionally permissible: see P. W. Hogg and W. Grover, *The Constitutionality of the Competition Bill* (1976), 1 Can. Bus. L. J. 197; B. C. McDonald, *supra*, note 47 esp. at 225-35; A. S. Brent, *An Act to Amend the Combines Investigation Act* (1974-76), 40 Sask. L. Rev. 106 at 114-16; F. F. Henderson, *Recent Development in Competition Law; The Limits of the Federal Criminal Law Power*, [1978] L.S.U.C. Lectures 109. See *semple MacDonald v. Vapor Canada Ltd.* (1976), 22 C.P.R. (2d) 1 (S.C.C.), per Laskin, C.J. at 12-13; Comment (P. W. Hogg) (1976), 54 Can. B. Rev. 361 at 363-65. See *contra* S.G.M. Grange, *The Constitutionality of Federal Intervention in the Marketplace — The Competition Case* (Montreal: C. D. Howe Research Institute, 1975) esp. at 35-38; C. J. M. Flavell, *Canadian Competiton Law: A Business Guide* (Montreal: McGraw-Hill Ryerson, 1979) at 15-31.

51. N. J. Williams and J. Whybrow, *A Proposal for Class Actions Under Competiton Policy Leglislation* (Ottawa: Information Canada, 1976).

52. Professor Williams, presenting the legal persepctive, discusses the function of a damages award in a section of his paper entiteld "Damages Award and Enforcement of Competition Policy", and states as follows at p. 40:

> "The remedy has a further sigificance as potentially it is an auxiliary means of enforcing the combines legislation itself. In Canada so far this activity has been the responsibility of government almost entirely [footnote omitted], with the government investigating violations and prosecuting offenders in criminal proceedings. Now the private civil damages plaintiff will participate in the enforcement activity since a damages award for a substantial amount will have the same deterrent value as a criminal find [sic]. A civil action that results in a damages liability sufficient to deter offenders can thus substitute for a criminal prosecution as a measure for securing the observance of the competition laws."

The deterrence-enforcement rationale appears elsewhere in his paper as well at pp. 47, 63. Jennifer Whybrow, presenting the economists' viewpoint, recognizes deterrence as a goal of anti-combines enforcement and the role of the civil damages — class action combination in acting as a deterrent by increasing the risk to firms of "incurring substantial monetary penalties." [at 237; also 208-09] Indeed, so strong is the emphasis on using civil proceedings as an enforcement tool that the report recommends a "substitute action" procedure, under which the Director of Investigation and Research could sue the wrongdoer civilly to recover, and pay into the public revenue, damages where the court has refused to allow a private suit upon unmanageability grounds. [at 141-43]

The Williams-Whybrow study was endorsed by the Department of Consumer and Corporate Affairs in its Second State Proposals[53] and Bill C-42, incorporating the class and substitute actions provisions as a new section 39.1 to the *Combines Investigation Act,* was introduced by the Minister of Consumer and Corporate Affairs and received first reading on March 16, 1977.[54]

Bill C-13 was introduced to replace Bill C-42 by the Minister of Consumer and Corporate Affairs Warren Allmand and received first reading on November 18, 1977.[55] The Bill endorses an

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53. *Proposals for a New Competition Policy for Canada* (Ottawa: Queen's Printer, 1977).

54. The House of Common's Standing Committee on Finance, Tade and Economic Affairs examined the Bill, and made several recommendations, the prime ones with respect to the Enforcement rationale being as follows:

1. Recommendation 87 would require the class representative to demonstrate that "a representative cross-section of the class is interested in having the action proceed". Requiring a kind of positive opting-in by a number of class members, especially if this were to become a numbers game, would both increase the representative plaintiff's initial expense and destroy the passivity so very important to a class member's position. Such a requirement would substantially undermine the utility of the class device in all but a small number, large claim situation.
2. Following a curious piece of reasoning, the Committee in Recommendation 90 would require the administrative official, as a prerequisite to a substitute action, to show that the amount of any judgment which he obtains "may reasonably be expected to become available to some or all of the members of the class." The Committee recognizes that if the substitute action were not allowed where the individual's loss is small, the "wrongdoer would thus be enabled to profit by his wrongdoing at the expense of the victim." Pursuit of this logic, according to the Committee, means that the substitute action provision is unsound in not accomplishing the objective of redress. It seems the Committee would prefer to see the wrongdoer profit if redress cannot be achieved rather than have the funds go into the public revenue.
3. Recommendation 92 would limit the already enacted damage provison (s. 31.1) to the recovery of loss or damage which the wrong-doer "ought to have realized was likely to result from such conflict or failure". It seems strange in light of the Committee's aversion to placing an economic burden upon the consumer to find it departing from the standard of actual loss or damage.

55. Unfortunately from an Enforcement perspective, this Bill entirely deletes the substitute action, "in the face of widespread criticism that such a provision would permit the Advocate to attack under civil law what he could not prove under the more stringent standards of criminal law, and that it represented in the eyes of the business community, unfairness and serious over-reaching by the government." (Backgrounder Documentation, *An Overview of the Competition Bill* (Ottawa: Dept. of Consumers and Corporate Affairs, Nov. 1977) at 7)). On the positive side, Bill C-13 does reject Recommendations 87 and 92 of the Common's Committee above-mentioned. And it continues to see class actions "as a deterrent to reinforce

Enforcement view in three ways. First, it proposes a new section 31.1 (1.1) which authorizes the Court in a private suit to grant, in addition to damages, "any other remedy or relief applied for in the proceedings, whether by way of injunction or otherwise, that the court by reason of it general jurisdiction has authority to grant." Secondly, the Bill maintains the opt-out rather than opt-in concept for class members. And finally, proposed section 39.12 (4) provides that the Court should not refuse to allow the action to be maintained as a class action on the grounds that the relief claimed is damages, that damages will have to be calculated on an individual basis for each class member, or that the relief claimed arises out of separate contracts or transactions with the defendant. Professor Williams' explanatory note in his study indicates that this provision is intended to leave the deterrent rather than compensatory objective intact and to allow the court to make the defendant responsible for the full amount of damages inflicted.[56]

Turning now from the damage action, consider a second general use for the class device whose ramifications are even more neglected in Canada, namely, where injunctive relief is sought. Injunctions are important to an Enforcement model since their effect is to directly and specificially compel compliance with the norms of proper conduct. *Chastian*[57] is perhaps the only significant Canadian case in this context. There the defendant Power Authority acted on a ground common to all members of the class of residential customers by requiring a security deposit before giving service to those considered poor credit risks. A declaration and an injunction were sought by the class, and the court, finding the practice discriminatory, granted both. The class wide injunction restrained the defendant from demanding, collecting, or keeping security deposits in respect of all residential accounts. While the representative plaintiffs suing just on their own behalf could have obtained the declaration (which may have been, but was not necessarily, sufficient),[58] any injunctive relief which they obtained

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complaince with competition legislation." (Backgrounder Documentation, *Class Actions* (Ottawa: Dept. of Consumer and Corporate Affairs, Nov. 1977) at 2.))

56. *Supra,* note 51 at 173-74

57. *Chastain et al.* v. *British Columbia Hydro and Power Authority* (1973), 32 D.L.R. (3d) 443 (B.C.S.C.)

58. Depsite its lack of compulsion, declaratory relief is commonly sought by way of class proceedings in Canada. See *e.g. Cobbold, supra,* note 34; *Blackie, supra,* note 21; *Stein* v. *City of Winnipeg, supra,* note 4; *A.-G.N.S. et al.* v. *Bedford Service Commission* (1976), 72 D. L. R. (3d) 639 (N. S. S. C., A. D.) rev'd [1977]

would normally have been narrowly tailored to their particular situation. Instead, potentially important economies were achieved in this case by obtaining an injunction of class-wide effect. Note that in a second kind of case, where the defendant is not acting through a practice or policy upon a ground common to a group, an individual suit may be sufficient to benefit all affected. For example, a single person obtaining an injunction against a nightclub extruding noise in excess of a municipal by-law necessarily benefits his noise-hating neighbours as well.

More to the point from an Enforcement orientation is a third kind of general situation involving injunctive relief. While there seem to be no Canadian examples of this use for the class device, it has arisen in the United States frequently in conjunction with complaints about discrimination in employment on the basis of race. The classic example follows the lines of *Pettway* v. *American Cast Iron Pipe company*.[59] There an attack was made on behalf of all the defendant company's black workers against the firm's promotion practices. A major part of the relief sought was to place class members into their "rightful place" — *i.e.* the position they would have been in but for the operation in the past of the discriminatory practices. If individual suits had been brought by each employee and a court sought to place each individual into his "rightful place", the narrowness of the perspective brought to bear during piecemeal litigation would have inevitably led to a conflict in the judicially awarded positions because of a failure to interrelate individual entitlements. Moreoever, a more likely outcome is that individuals would not have through their atomic suits achieved their "rightful place". This is so because the real judicial task was not to decree specific jobs but rather to restructure the promotion and job transfer practices to ease the entrance of blacks into their "rightful places". Only through the breadth of perspective possible in a class suit could the task be effectively undertaken. The class device

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2 S. C. R. 269; *Nova Scotia Board of Censors* v. *McNeil* (1975), 12 N.S.R. (2d) 35, 5 N. R. 43, 55 D. L. R. (3d) 632 (S. C. C.); *Thorson* v. *A.-G. Can., supra,* note 4; *McMillan, supra,* note 21; *Alden, supra,* note 21.

See generally A. Findlay, *Declaratory Judgement* (1961), Lectures L. S. U. C. 183; D. Mullan, *The Declaratory Judgement: Its Place as an Administrative Law Remedy in Nova Scotia* (1975), 2 Dal. L. J. 91; D. T. Warren, *The Declaratory Judgement: Reviewing Administrative Action* (1966), 44 Can. B. Rev. 610. At least one case has used the class device in connection with applications for *certiorari* and prohibition: *Easton* v. *City of Winnipeg* (1976), 69 D. L. R. (3d) 585 (Man. C. A.).

59. (1974), 494 F. 2d 211 (5th Cir.).

fosters a holistic overview by the Court. Mere economy is not the justification; it is simply that more can be accomplished in a class-wide suit than in piecemeal litigation. Complex practices can be better altered to conform with statutory norms, and legislative policies can be better enforced, through class actions.

Complex Injunctions

Injunctive relief of a complex, sophisticated, intrusive nature is a current American phenomenon. Affirmative equitable relief is granted as the circumstances warrant to bring the defendant into compliance with statutory norms, to ensure future conduct conforms with the norms by reordering and restructuring the defendant's practices, and to correct the effect of past wrongful conduct. As we have seen, such relief is often coupled with class actions, but this is not always so. To understand the breadth of this relief and to sense the nature of the phenomenon, consider several American examples from disparate fields.

Cases such as *Pettway*[60] involving discrimination upon the basis of race in the employment context provide one illustration.[61] There, the court, in the course of vindicating statutory rights created by Title VII of the *Civil Rights Act of 1964*,[62] did not cease its inquiry after finding discrimination on the basis of the way in which black workers were initially assigned to the less preferred departments within the plant. It continued in its inquiry to examine the promotion system in effect. While this system was upon its face racially neutral in recognizing seniority upon a departmental basis, it was discriminatory in impact because it locked in the effects of the past discrimination. Thus, if a black worker wished to transfer out of his department to one where the working conditions were better and the upper wage levels were potentially higher, he would have to begin in the lowest position in the new department at the starting wage rate in effect there. This might be a lower rate than he was

60. *Id.*
61. See also *U.S.* v. *Allegheny-Ludlum Industries* (1975), 517 F. 2d 826 (5th Cir.), cert. denied (1976), 96 S. Ct. 1684; *U.S. et al.* v. *United States Steel Corporation et al.* (1973), 5 E. P. D. at para. 8619 (N. D. Ala.); *Bush et al.* v. *Lone Star Steel Co. et al.* (1974), 7 E. P. D. at para. 9179 (E. D. Texas); *U.S.* v. *Georgia Power co.* (1973), 474 F. 2d 906 (5th Cir.); *Louisiana* v. *Georgia Power Co.* (1973), 474 F. 2d 906 (5th Cir.); *U.S.* v. *Bethlehem Steel Corp.* (1971), 446 F. 2d 652 (2nd Cir.); *Louisiana* v. *U.S.* (1965), 380 U.S. 145; Note, *Title VII, Seniority Discrimination and the Incumbent Negro* (1967), 80 Harv. L. Rev. 1260
62. Pub. L. No. 88-352, 78 Stat. 241

receiving in the predominantly black department. And since seniority was on a departmental basis, he would lose whatever seniority he had built up. Even if the seniority system were immediately changed to a plant-wide basis, thus bringing the company into complaince and ensuring that future promotions would be on a non-discriminatory basis, it might still leave some workers locked into a job because of the past discrimination. Hence, courts evolved and applied a "rightful place" theory in order to assist black workers to attain the position they would have occupied but for the past discrimination practiced against them. The court, in directing wide-ranging injunctive relief, ordered, for example, "advance entry", by which blacks were enabled to by-pass entry level jobs in other departments, and "red circling", under which blacks were able to maintain their old wage rate when they transferred to a lower paying job in another department, until they advanced to a job paying their old wage rate. It is easy to see the extent to which such relief goes beyond a simple prohibition of discrimination and represents a considerable intrusion into the defendant's business operation.

As a second example, consider the school desegregation cases.[63] In these cases school districts are effectively placed into a kind of judicial receivership.[64] The courts are not content either to simply prohibit further racial discrimination or to leave with the appropriate school district officials the discretion to choose what measures will be taken to bring about compliance. Rather, the courts step in to restructure the school system itself, directing such controversial steps as busing children to distant schools to provide a racial mix.[65] Not only is judicial intrusion in the school district's affairs extreme but the court must involve itself greatly in the supervision of its orders in a situation like this.

Thirdly, a case like *Cascade Natural Gas Corp.* v. *El Paso*

63. See, *e.g.* a case study of the first five years of litigation in the Montgomery school desegregation case in O. M. Fiss, *Injunctions* (Mineola, New York: The Foundation Press, Inc., 1972), at 415-81. These cases are based upon a violation of the Equal Protection Clause of the Fourteenth Amendment and are said to involve the federal court in "novel and overwhelming tasks" which subject the courts as institutions to "strains never before experienced": A. Cox, *infra,* note 128 at 77-90, esp. 86-88 [*The Role of the Supreme Court . . .*].

64. See Comment (J. Z. Johnson), *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceivorships to Implement Large Scale Institutional Change,* [1976] Wisc. L. Rev. 1161.

65. For an example of the mixed feelings surrounding "busing", see *Norwalk Core* v. *Norwalk Board of Education* (1968), 298 F. Supp. 208 (D. Conn.).

Natural Gas Co.[66] raises the issues surrounding a court order enjoining an antitrust violation and directing divestiture. When a merger which is held to be illegal has operated for a number of years, the task of allocating assets and dealing with new acquisitions (such as, in this case, new gas reserves discovered by the merged company) is difficult and, to be done properly, requires considerable information about the defendant's operations and the industry in general. To meet the objective of restoring competition to the market, the court must play a creative and an expanded role in ensuring proper factual information comes forward and in fashioning relief which is effective in creating the competitive balance.

How can these examples be squared with the traditional view of the injunctive device embraced by the Dispute Settlement paradigm? Under formal notions an injunction is seen as an extraordinary remedy,[67] not to be granted where other "adequate relief" is available. Since the focus is upon righting the position of the particular plaintiff, the payment of damages to him is usually considered sufficient. Thus, there exists a judicial preference for compensation. This notion of extraordinariness culminated in various formulae which acted to restrict the availability of injunctions: the injury must be irreparable (i.e. an injunction will only be granted where damages will not be adequate);[68] equity only grants negative relief (i.e. it would act preventively to prohibit an act but was reluctant to act restoratively to order an affirmative act to be done)[69] equity would not enjoin a crime;[70] equity would not

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66. (1967), 386 U.S. 219. See also *U.S.* v. *United Shoe Machinery Corp.* (1953), 110 F. Supp. 295 (D. Mass.), aff'd *per curiam* (1954), 347 U.S. 521 and, upon later Government petition for further relief, (1968), 391 U.S. 244.

67. See, *e.g. A.-G.* v. *Wellington Colliery Co.* (1903), 10 B. C. R. 397 (S.C.) at 403; *The City of Lethbridge* v. *The Canadian Western Natural Gas, Light, Heat and Power Co., Ltd,* [1923] S. C. R. 652, [1923] 4 D. L. R. 1055

68. See, *e.g.* T. W. Taylor, *Commentaries on Equity Jurisprudence* (Toronto: Willing and Williamson, 1875) at 297-98; *Moren* v. *Shelburne Lumber Co. et al.* (Circa 1874), Ritchie's E. D. (N. S. S. C., in Eq.); *London and Blackwell Railway Co.* v. *Cross* (1885), 31 Ch. D. 354 at 369 (*per* Lindley, L. J.); *Kerr on Injunctions* (6th ed. London: Sweet and Maxwell, 1927) at 17-18; *Wood* v. *Sutcliffe* (1851), 21 L. J. Ch. 253

69. See, *e.g.* Taylor, *id.* at 283; Kerr, *id.* at 40 *et seq.;* Hanbury and Maudsley, *Modern Equity* (10th ed. London: Stevens and Sons, 1976) at 75-77, 87-88, 90-91; *Snell's Principles of Equity* (27th ed. London: Sweet and Maxwell, 1973) at 624, 635-36, 641

70. See, *e.g. Wellington Colliery, supra,* note 67 at 404; *Robinson* v. *Adams,* [1925] 1 D. L. R. 359 (Ont. C. A.) at 364-65

make a decree it cannot supervise;[71] equity would only act to protect property rights.[72]

The preceding American illustrations negate the idea of equitable remedies as "extraordinary" and ignore the above-noted cautionary formulations.[73] There is no aversion to affirmative orders. The objective is to attain and maintain compliance with the norms of proper conduct, and the court goes beyond restraining the commission of the prohibited conduct. The complex wrong necessitates complex relief. The decree seeks through explicit directions to revise and reorder the wrong-doer's conduct so as to conform unequivocally with legal requirements. Since there are many schemes which could meet the test of proper conduct, the content to be put into the order is indeterminate, and the subject of negotiation. To do its job properly, the Court must be thoroughly familiar with the defendant's operation. Hence, a deep, judicial inquiry into the wrongdoer's affairs is mandatory. A feeling pervades that it is unwise to enjoin the defendant in a simple way and permit him to devise his own scheme. It is likely hostile to any change, and if the defendant "misjudges" what is sufficient compliance, delay will result. A preference for early and thorough compliance is a touchstone of the Enforcement approach. While protection is consequently afforded the plaintiff, the fundamental object is protection of the public interest. In addition, since the decree is often future-oriented, the Court is concerned about the on-going effects and effectiveness of its order. It will often supervise or oversee its operation, perhaps through masters, refeerees or experts. In short, the Court through affirmative directions intrudes greatly into the defendant's conduct of its affairs and becomes entangled with the parties.

It should be noted that a shift from Dispute Settlement's preference for damages to Enforcement's preference for injunctive relief marks a significant change in attitude toward the wrongful conduct being examined. When damages are found to be appropriate, one is in effect providing a licence to the defendant to

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71. See, *e.g. Canadian Western Natural Gas, supra,* note 67 at 1058 [D. L. R.]; 4.-*G.* v. *Straffordshire County Council,* [1905] 1 Ch. D. 336 at 342; Hanbury and Maudsley, *supra,* note 69 at 75

72. See, *e.g. Wellington Colliery, supra,* note 67 at 404; *Rowe* v. *Hewitt* (1906), 12 O. L. R. 13 (H. Ct.); Kerr, *supra,* note 68 at 15-16

73. See also A. Chayes, *supra,* note 10 at 1292; Note, *Developments in the Law-Injunctions* (1964-65), 78 Harv. L. Rev. 994 passim

continue with his wrongful conduct. The defendant may choose to pay the damages and continue his activity, regardless of the preferences of the victim.[74] To adopt the economist's analysis:

> Where compensatory damages are the standard remedy for a breach of legal duty, the effect of liability is not to compel compliance with law but to compel the violator to pay a price equal to the opportunity cost of the violation. If that price is lower than the value he derives from the unlawful act, then efficiency is maximized if he commits it, and the legal system encourages him to do so; if higher, efficiency requires that he not commit the act . . . . Like the market, the legal system confronts the individual with the costs of his act but leaves the decision whether to incur those costs to him.[75]

If the full cost of the external harm caused by his activities are returned to the wrongdoer, an efficient allocation of resources is promoted. On the other hand, if considerations other than efficiency are to be promoted, damages may not be appropriate. When law specifies norms of proper conduct, it is in effect creating entitlements. And while entitlements are sometimes protected by awarding damages, they are much better protected by injunctions.[76]

Canadian examples of this form of complex injunctive relief are not apparent. Amongst recent academic comments, there are few concerning injunctions. Those that exist tend to reinforce the

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74. This point was made as early as 1877 in *Krehl* v. *Burrell*, 7 Ch. D. 551 at 554 (*per* Jessel, M. R.):

> ". . . [T]he question I have to consider is, whether the Court ought to exercise the discretion given by the statue by enabling the rich man to buy the poor man's property without his consent, for that is really what it comes to. If with notice of the right belonging to the Plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich Defendant is to be entitled to build up a house of enormous proportion, at an enormous expense, and then to say in effect to the Court, 'You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right', — of course that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision."

For a similar evaluation of the choices confronting a Court but a decision allowing the defendant to continue in his wrongful activity, see *Boomer* v. *Atlantic Cement Co.* (1970), 26 N.Y. 2d 219, 257 N.E. 2d 870, 309 N.Y.S. 2d 312.

75. R. A. Posner, *Economic Analysis of Law* (2nd ed. Boston: Little, Brown and Company, 1977) at 399.

76. See G. Calabresi and A. D. Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral* (1972), 85 Harv. L. Rev. 1089.

For an early recongition of the "necessity for specific [equitable] remedies to protect interests of a public or social nature adequately" and a reaction against formal views of their availability, see H. E. Read, *Equity and Public Wrongs* (1933), 11 Can. B. Rev. 73, 158, 249, at 76.

formalistic views surrounding their use.[77] The formal verbal formulae, especially extraordinariness[78] and irreparability,[79] are given their due. A preference in Canada for narrow, specifically tailored relief is evident[80] However, the outer boundary enclosing the Dispute Settlement Model has been breached. Some of the force of the above-noted traditional formulae has been eroded.[81] And an

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77. W. B. Williston, *Injunctions* (1961), Lectures L.S.U.C. 81; K.P. Swan, *The Labour Injunction in Alberta* (1971), 9 Alta. L. Rev. 1; Note (E. N. McKelvey), *The Appropriateness of the Injunction in Labour Disputes* (1968), 18 U.N.B.L.J. 114; Note (E.L. Teed), *The Ex Parte Injunction-Use and Abuse* (1968), *Points on an Application for an Interlocutory Injunction* (1971), 29 Advocate (Van. B.A.) 71. For a less formal but nonetheless restrictive view that injunctions should be used sparingly, see B. L. Strayer, *Injunctions Against Crown Officers* (1964), 42 Can. B. Rev. 1.

78. See, *e.g. Gretzky et al.* v. *Ontario Minor Hockey Assoc. et al.* (1975), 24 C.P.R. (2d) 275 (Ont. H. Ct.) at 277; *Organizing Committee of the 1976 Olympic Games* v. *Exclusive Leather Products Corp. et al.* (1974), 20 C. P. R. (2d) 174 (Que. Super. Ct.) at 177-78

79. See, *e.g. Labelle et al.* v. *Ottawa Real Estate Board et al.* (1977), 78 D. L. R. (3d) 558 (Ont H. Ct.); *Universal City Studios Inc.* v. *309848 Ont. Ltd.* (1975), 24 C. P. R. (2d) 278 (Fed. Ct.); *Tenatronics Ltd.* v. *Hauf et al.* (1971), 23 D. L. R. (3d) 60 (Ont. H. Ct.); *Adrian Messenger Services et al.* v. *Jockey Club Ltd. et al.* (1970), 16 D. L. R. (3d) 121 (Ont. H. Ct.)

80. See, *e.g. R.* v. *Ocean Const. Supplies Ltd. et al.* (1974), 18 C. P. R. (2d) 166, 22 C. C. C. (2d) 340 (B. C. C. A.); affirming 15 C. P. R. (2d) 224 (anti-combines prohibition order granted at trial in the same wording as authorizing section of Act and on appeal additional terms sought by Crown refused); *R.* v. *F. W. Woolworth Co. Ltd.* (1974), 46 D. L. R. (3d) 345 (Ont. C. A.) at 357 (anti-combines prohibition order "must relate to the continuation or repetition of the offence for which the conviction was made"; it must "bear a proper relationship in its terms to the terms of the offence charged in the information" and deal only with the "class of goods which were the subject matter of the charge.")

81. See, *e.g. R.* v. *Browning Arms Co. of Canada Ltd.* (1974), 18 C. C. C. (2d) 298, 15 C. P. R. (2d) 97 (Ont. C. A.) (comments that the granting of a prohibition order under the *Combines Investigation Act* against repetition or continuance now takes place almost as a matter of course); *Masson* v. *The Grand Junction R. W. Co.* (1879), 26 Gr. 286 and note 289 (Ont. C. A.) (mandatory interlocutory injunction granted requiring defendant railway to erect fences as required under statute authorizing compulsory acquisition of land); *Snarr* v. *The Granite Curling and Skating Company* (1882), 1 O. R. 102 and note 107 (Ch. D.) (order directed to be drawn in a form commanding defendant to restore land to former condition rather than in the form of restraining defendant from suffering it to remain otherwise than in its former condition); *Sutton and Sutton* v. *Vanderburg,* [1946] O. R. 497, [1946] 3 D. L. R. 714 (H. Ct.) (mandatory interlocutory injunction granted directing defendant to deliver up possession of the premises to the plaintiffs); *Gross* v. *Wright,* [1923] 2 D. L. R. 171, [1923] S. C. R. 214 (mandatory injunction granted compelling removal of a wall); *Epstein et al.* v. *Reymes* (1972), 29 D. L. R. (3d) 1 (S. C. C.) at 8 (commenting that the "absence of physical injury or property damage does not affect the right to an injunction where there is conduct, not merely temporary, which materially interfers with the comfort and enjoyment of living in the locality", the Court enjoined noise caused by commerical hunting

increasing tendency to use equitable devices as Enforcement tools seems apparent. Most of these developments stem from legislative activity, providing the norms of public conduct which underline complex injunctive relief, and sometimes also in making statutory provision for enforcement through equitable relief.[82]

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activities); *Re Canadian Javelin Ltd. and Boon-Strachan Coal Co. Ltd.* (1976), 69 D. L. R. (3d) 439 (Que. Super. Ct.) (extensive court intervention and supervision of company's affairs under statutory power); *Re Peterson et al. and Kanata Investments Ltd. et al.* (1975), 60 D.L.R. (3d) 527 (B.C.S.C.) (Court orders majority shareholders to sell their interest in company and appoints receiver-manager under wide statutory power); *Re Regina and Odeon Morton Theatres Ltd. et al.* (1973), 42 D. L. R. (3d) 471 (Man. C. A.) (right of A.-G. to maintain a civil action for an injunction to restrain an illegal act which affects the public generally); *Adrian Messenger Services, supra,* note 79 (Court enforced right of entry to, and use of *pari mutuel* facilities at, a racetrack).

82. The outer limits of Canadian developments in using intrusive, affirmative equitable relief are illustrated by the following: (a) The government's unsuccessful attempt to challenge the Irving newspaper interests in New Brunswick under the monopoly provisions of the *Combines Investigation Act.* Initially K. C. Irving Ltd. was convicted of holding a monopoly position, and sentencing was deferred: 13 C. P. R. (2d) 115 (N.B.S.C.,Q.B.D.). Upon its appeal from the conviction, K. C. Irving Ltd. was successful: 11 N.B.R. (2d) 181 (N.B.S.C., A.D.). The government then appealed this decision to the Supreme Court of Canada, where K. C. Irving Ltd. again prevailed: 15 N.B.R. (2d) 450. However, before Irving's appeal was heard in the Appeal Division of the New Brunswick Supreme Court, the trial judge in a separate opinion dealt with sentencing: 61 D.L.R. (3d) 11. He made a prohibition order requiring dissolution of the monopoly he had found at trial. In so doing, he relied upon s. 30(1) of the Combines Investigation Act. The order directed the sale of two of the newspapers involved, namely, the two Moncton English language dailies. The Court also specifically retained jurisdiction to enforce the sale requirement and said that its approval of the terms of the sale was required if the Crown objected to them. The subsequent decision dealt only with the conviction and left the sentencing decision uncriticized.

(b) It appears that divestiture or dissolution of mergers and monopolies has, with the exception of this case, never been ordered. See W. T. Stanbury, *Penalties and Remedies Under the Combines Investigation Act* 1889-1976 (1976), 14 Osgoode Hall L. J. 571 at 578.

(c) *R.* v. *Canada Safeway Ltd.* (1973), 41 D.L.R. (3d) 264 (Alta. S. C.) utilized a prohibition order against a monopoly in the retail grocery business. Proceedings were taken there under s. 30 (2) of the *Combines Investigation Act,* which allowed such an order, upon information, without finding a criminal offence. (It was made clear in *R.* v. *Hemlock Park Co-operative Farm Ltd.* (1972), 24 D.L.R. (3d) 688 (S.C.C.) that a proceeding under s. 30(2) was in its nature civil, and not criminal). With the defendant's consent, an order was entered prohibiting Canada Safeway from doing certain specific acts in Calgary and Edmonton for varying periods of years, including: meeting or undercutting competitiors' prices unless it charged this price uniformly in all its stores, increasing the total square footage occupied by its stores, entering into restrictive convenants in its leasing arrangements which restricted competition in the vicinity of the leased premises, acquiring existing competitors' businesses, and engaging in market saturation advertising.

(d) *Stubbe et al.* v. *P. F. Collier and Son Ltd.* (1977), 74 D.L.R. (3d) 605

Clearly, in comparsion with the expansive American injunctive phenomena, these cases are undistinguished. Equally, what cause there may be for anticipating wider resort to injunctions to enforce norms of proper conduct must be based upon legislative activity. Amongst the statutory underpinnings which would foster wider use of complex injunctions is the proposed new s. 31.1 (1.1) of the Second Stage Amendments to the *Combines Investigation Act,* specifically authorizing, amongst other remedies, injunctions to help enforce the competition laws. Other areas which come to mind are human rights, consumer protection and environmental policy. As society becomes increasingly complex, we may expect to see even greater activity on the part of legislatures. And when such public law schemes give rise to civil causes of action,[83] we may expect to see private forces aggressively seeking enforcement through the courts.[84]

(B.C.S.C.) involved deceptive acts or practices by a door-to-door encyclopaedia sales company, contrary to British Columbia's *Trade Practices Act*, Stats. B.C. 1974, c. 96. The Court examined particular practices of the defendant's salesmen, such as: attempting to gain admittance to a house by suggesting that the purpose was to conduct a survey of the effectiveness of a television advertising campaign, falsely suggesting that the potential buyers were "qualified" to receive the benefit of special terms, suggesting that the price was merely nominal by reference to the daily cost of small items without immediately revealing the true total price, suggesting that an encyclopaedia was new when it was in fact a revised version of an older work. The Court declared these practices illegal and restrained their repetition. As well, the plaintiff "in effect, . . . asked . . . Court [to] write part of the sales presentation and order Collier to use it" (at 620). The Court held such a mandatory injunction was unnecessary in this case and expressed some doubts about whether such a mandatory direction was open to it under the section of the Act authorizing injunctive relief.

(e) *British Columbia's Human Rights Act*, Stats. B.C. 1969, c. 10 [now repealed and replaced by the *Human Rights Code of British Columbia,* Stats. B.C. 1973 (2nd Sess.), c. 119]. This statute empowered the Human Rights Commission, once it was the opinion that a person had contravened the Act, to direct the person to rectify the contravention [s. 14(6)]. *In Re Lornex Mining Corporation Ltd. and Bukwa* (1976), 69 D.L.R. (3d) 705 (B.C.S.C), "rectify" was intepreted by the Court to mean "to put or set right; to remedy" and, in the context of a finding of discrimination upon the basis of sex, the Commissioner's order to Lornex to "cease the contravention by making camp accommodation available to female employees on the same terms and conditions as male employees" was upheld by the Court.

See also I.A. Hunter, *Civil Actions for Discrimination* (1977), 55 Can. B. Rev. 106. For a similar example of a statutory scheme in vesting intrusive enforcement power in an administrative agency see Ontario's *The Environmental Protection Act, 1971,* Stats. Ont. 1971. c. 86 and *Re Canada Metal Co. Ltd. et al. and MacFarlane* (1973), 41 D.L.R. (3d) 161 (Ont. H. Ct.) (Director of Management Branch, Ministry of Environment, has the power to issue stop orders).

83. Note the attempt in *Valley Salvage Ltd. et al.* v. *Molson Brewery B.C. Ltd. et al.* (1975), 64 D.L.R. (3d) 734 (B.C.S.C.) to found a civil action upon an alleged conspiracy in breach of the *Combines Investigation Act*. See also *Transport Oil, infra.*, note 123; *Direct Lumber, infra,* note 123.

84. See, e.g. *McCann et al.* v. *The Queen et al.* where a civil action was

V. Intervention

The broad nature of the wrong addressed and the equally broad nature of the relief sought in a complex injunction setting point out another problem: the decree granted will affect many people. Legal relationships not directly under consideration in a particular suit, such as contracts between defendants and third party absentees,[85] may be affected in a practical way by the suit. Or a point of law peculiar to a particular fact situation may be decided in the first case which, by making it difficult for an absentee to get a different ruling in his case, may have a kind of *state decisis* impact upon another's legal relationship.[86] But the fallout from a complex injunction is more than this. When conduct or activities which affect many people are altered, the alteration will have a wide-ranging impact. The relationships affected may be legal ones; most often they are practical relationships. Judges are concerned about those absentees suffering this litigious fallout. Scope for expressing this concern is afforded by the injunctive device, which grant is premised upon a balancing of the interests of the public as well as the plaintiff and defendant, and which may be upon conditions. While some accommodation of the interests affected might be made in the decree, uncertainty surrounds what provisions ought to be inserted into the injuction. Outsiders may also have a legitimate interest in questions of liability as well as in those of remedy. Without some representation concerning these impacts and interests and how they can be taken into account, the judge is left to rely upon his intuition and guesswork. This suggests a broader view might be taken of

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commenced by inmates of the British Columbia Penitentiary at New Westminister for a declaration, *inter alia,* that their confinement in solitary amounted to cruel and unusual treatment or punishment contrary to s. 2(b) of the *Canadian Bill of Rights* Stats. Can. 1960, c. 44 as amended 1970-71-72, c. 38, s. 29. The Court agreed with the plaintiffs on this aspect of their case and made the declaration, even though the Plaintiffs were no longer in solitary confinement. The Court felt a declaration should be made to give practical guidance to penitentiary authorities. This is similar to the judicial reordering undertaken in the United States in relation to the operation of mental hospitals: See *Wyatt* v. *Stickney* (1972), 344 F. Supp. 373 (M.D. Ala.). See also A. Cox, *infra*, note 128 at 69, 71-73 [Proc. Mass. Hist. Soc.].

See also *Re Schmidt and Calgary Board of Education* (1975), 57 D.L.R. (3d) 746 (Alta. S.C.) where a private individual successfully appealed from a board of inquiry's dismissal of his complaint. The appellant attacked a practice authorized by the *School Act*, R.S.A. 1970, c. 329 under which he was unable to enroll his children in the public school system in Calgary because he was a Roman Catholic, without paying "non-resident" fees. The *School Act* contemplated that he would send his children to the separate Catholic school system. The provision of the *School Act* was held inoperative and the Board of Education was ordered to cease levying fees against the appellant and to refrain from similar contravention of the *Individual's Rights Protection Act*.

85. See, *e.g. U.S.* v. *Carter Products, Inc.* (1962), 211 F. Supp. 144 (S.D. N.Y.)

86. See, *e.g. Atlantis Development Corp.* v. *U.S.* (1967), 379 F. 2d. 818 (5th Cir.)

intervention by third parties in complex cases to allow a range of interests to be represented.

An example from the environmental context is provided by the well-known *Reserve Mining*[87] litigation. Involved here was an attempt by the federal authorities to abate the discharge into Lake Superior of taconite tailings left from the process of concentrating iron ore. Remedies appropriate for unlawful discharge ranged from immediate abatement, which would result in the facility being closed down, to gradual abatement, allowing the company to arrange alternate disposal methods.[88] If Reserve Mining were closed, the employment of approximately 11,000 people would be directly and indirectly affected. This resulted in eleven applications being made by various municipal units, chambers of commerce and a development association to intervene on behalf of the defendent Reserve Mining. Lord, J., in allowing the entrace of these parties, considered "it imperative for the Court to obtain the fullest possible factual understanding of the conditions in North-eastern Minnesota before rendering any judgement."[89] The intervenors were considered advisors to the Court, as in an administrative proceeding, as well as litigants. Traditional concepts of adversariness, Lord, J., believed, ought not to restrict their access to the Court. Although the intervenors had no legal interest to be protected, the economic impact of the decision gave them sufficient practical interest to justify intervention. On the other hand, the states of Wisconsin and Michigan and several environmental organizations sought successfully to intervene to be heard in relation to upholding the environmental laws. After finding, perhaps somewhat artifically, that each had a separate interest, the Court went on to conclude that exisiting parties did not represent these interests. Each party permitted to intervene had a particular viewpoint which they wished addressed, and those already parties would not adequately represent this viewpoint as their particular interest diverged somewhat. In this respect, the Court here emphasized the divergent views being put forward on the question of the specific form of abatement to be applied and the criticism which had been levelled at some of the positions taken by the government. The wider range of advocacy which would be brought as a result of the different orientations of the intervenors could prove helpful to the Court in its deliberations on this issue. Hence, intervention was allowed; a preference for multiple advocacy was demonstrated.

A further illustration is provided by *Hodgson and Trbovich et al.* v. *United Mine Workers of America.*[90] This decision involved

87. *U.S.* v. *Reserve Mining Co.* (1972), 56 F. R. D. 408 (D. Minn.)
88. For a similar kind of option, see *Boomer* v. *Atlantic Cement Co.*, *supra*, note 74.
89. *Supra*, note 87 at 415
90. (1972), 473 F. 2d 118 (D. C. Cir.)

motions to intervene by union members in a suit which had been brought by the Secretary of Labor against the U.M.W.A. to lift allegedly unlawful trusteeships that the U.M.W.A. had imposed upon seven districts. The members seeking intervention were from these districts, and desired to participate only in the remedial, and, if necessary, the appellate phase of the case. While the Secretary of Labour also sought effective dismantling of the trusteeships and the holding of proper elections to return local control, the Court did not believe his representation on these issues would be adequate to protect the intervenors' interests. The Court argued, in part, that the Secretary served "in a dual capacity as a public official *and* as the union members' lawyer"[91] and each function would not necessarily dictate the same approach to the conduct of the litigation. The Court concluded that intervention implements

> the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard. We think appellants are entitled to intervene in the Secretary's suit in order to assure that their interest in effective dismantling of the unlawful trusteeships in their districts is safeguarded at this particularly crucial stage of the case.[92]

Again the intervenors had no personal, legal interest, although the result of the Secretary's suit would have a *res judicata* effect.[93] The practical nature of the intervenor's interest again provides a basis for permitting intervention and increasing the advocacy orientations presented to the Court.[94]

In contrast, the Dispute Settlement model frowns upon

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91. *Id.* at 130 [Emphasis in original].
92. *Id.*
93. *Id.* at 129.
94. An important, earlier companion case to this one, decided in the Supreme Court, also illustrates the points made in this paragraph: *Trbovich* v. *United Mine Workers of America* (1972), 404 U.S. 528. This case involved intervention by the union member upon whose complaint the Secretary of Labor brought suit to set aside an union election of officers. As a result a detailed and comprehensive order was issued dealing with the supervision of a new election and the preservation of union assets. Trbovich had no standing to maintain a suit himself. See also Comment (J. A. Weinberg), *Trovich* v. *United Mine Workers of America: Move Over Mr. Secretary — A Union Member May Intervene in Suits Under Title IV of the LMRDA* (1973), 41 Geo. Wash. L. Rev. 560.
See also *Ford Motor Co.* v. *Bisanz Bros.* (1957), 249 F. 2d 22 (8th Cir.) where intervention was permitted by a business, dependant upon the use of certain railway track but without a legally protectable interest in the use, in a suit brought by surrounding property owners to enjoin the railway from maintaining the tracks.

intervenors. A premium is placed upon party control and the Court tends not to allow "meddlers" into what is seen as a private lawsuit without the parties' concurrence.[95] If the intervenors have no legal interest which would be legally affected by the action, the Court will relegate them to their own suit at a latter time when they can then have their day in Court if they wish. As for practical effects upon practical interests, the other end of the spectrum, this is not something of which the law takes cognizance. The device of intervention, it would be argued, may not be used to give someone standing who would never have otherwise been able to maintain his own suit.

It is important to underscore this last point. While the plaintiffs in *Hodgson and Trbovich* could have maintained under certain circumstances their own suit because of statutory authorization, we are generally speaking about allowing party status to those who could neither maintain their own suit against the defendant nor be subject to liability at the hands of the plaintiff. To thus allow intervention effectively strips away the cloud of privacy which encompasses the traditional lawsuit and allows the light cast by the public nature of the controversy to penetrate to the core of the proceedings. Something more than a Dispute Settlement notion of the purpose of civil litigation is needed to explain this. Again an Enforcement model provides coherence.

The Enforcement paradigm shows a preference for multiple advocacy. It seeks to enforce compliance with public policies, and in doing this, a Court needs to understand the policies and circumstances, resolve any conflict between competing policies, and take cognizance of any adverse effects of its action that can be fairly accommodated. The more unrepresented interests upon which advocacy is received, the better the informational base from which a sound judgement can be made and a sound decree structured. A breadth of representation helps resolve some of the uncertainty which surrounds a complex situation.[96]

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95. See, D. L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators* (1968), 81 Harv. L. Rev. 721 at 721.

96. See *id.* for advocacy of an approach to intervention based upon an assessment of the intervenor's interst, the adequacy of representation of that interest by existing parties, the degree to which the intervenor could contribute to the resolution of the dispute, and any prejudice which might result to the original parties. The extent of participation permitted to the intervenor would be determined on the basis of the reason why intervention was allowed.

In Canada, the Dispute Settlement view clearly holds the field.[97] Little evidence exists of a liberal use of the intervention device at the trial level[98]. There is, however, a fairly common practice by the Supreme Court of Canada to permit intervention in constitutional cases and those involving the *Canadian Bill of Rights*.[99] As this practice filters down to the provincial courts, and as the judiciary there become more comfortable with the notion, we might expect to see a wider range of interests being represented through intervention.

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97. Intervention by uninvited third parties into Canadian law suits upon their own motions is not a wide-spread phenomena. For example, Ontario's *Rules of Practice have no express provision permitting third persons to be added as co-defendants upon their own application, although intervention is sometimes allowed. See 2 Holmested and Gale, supra*, note 23 at 1113-15 and Cum. Supp. to Vol. 2 at 11-12 and *Re Damien and Ontario Human Rights Commission* (1976), 12 O. R. (2d) 262 (H. Ct., Div. Ct.) (where Ontario Racing Commission allowed to intervene in suit brought by their former employee against Human Rights Commission to force them to act upon complaint that he was discharged because he was a homosexual). On the other hand, Nova Scotia has a rule allowing intervention, *inter alia*, where a person "claims an interest in the subject matter of the proceeding": Rules of Civil Procedure, R. 8.01. See *Connor et al.* v. *MacCulloch et al.* (1974), 16 N.S.R. (2d) 172 (S.C.) (where intervention understandably refused) and *Halifax Flying Club* v. *Maritime Builders Ltd.* (1973), N.S.R. (2d) 364 (S.C.) (where intervention allowed.)

98. The strongest example which has come to my attention is *Re Attorney-General for Alberta and Gares*, (1976), 67 D.L.R. (3d) 635 (Alta. S. C.) which allowed three private entities and one public administrative board to join as party intervenors and another public administrative board to participate as *amicus curiae*. There is, of course, widespread resort to intervention by insurance companies in cases where they wish to defend their insured against the plaintiff's claims without precluding themselves from denying their own liability under the insurance contract. Such intervention, however, is statutorily authorized by provincial insurance laws. See, *e.g. The Insurance Act*, R.S.O. 1970, c. 224, s. 225 and W. D. Griffiths, *Automobile Insurance — Part III* (1962), Lectures L.S.U.C. 57 at 72-75.

Also note *Canfarge Ltd.* v. *Newman et al.* (1974), 51 D. L. R. (3d) 759 (Sask. C. A.) where an application by A.-G. Sask to intervene in and reopen an appeal was denied with the comment, at 761: "To suggest that the Attorney-General intervene any time he believes a Court has misinterpreted a provincial statute, is a proposition lacking any judicial support and one to which I cannot subscribe.".

99. See, *e.g. McNeil, supra,* note 58 (intervention by A.-G.'s for Ont., Alta., Sask., and Canada and the Canadian Civil Liberties Association); *Morgentaler* v. *The Queen* (1975), 53 D. L. R. (3d) 161 (S. C. C.) (intervention by A.-G. Can., Foundation of Women in Crisis, Canadian Civil Liberties Association, Alliance for Life, Association des Médecins du Québec, Front Commun pour le Respect de la Vie, and Foundation pour la Vie).

For an example from the provincial context where constitutional questions were raised, see *Re Official Languages Act* (1972), 5 N. B. R. (2d) 653 (N. B. S. C., A. D.) at 659 where the Mayor of Moncton was allowed to intervene, apparently to

VI. *Standing*

The American phenomena surrounding class actions, complex injunctions and intervention have served as the main catalysts to the formulation of the Enforcement model of civil process. However, this paradigm gains support from and has implications for many other aspects of procedure. I now propose to turn from the American material and look briefly at Canadian doctrine in relation to the questions of standing and non-compensatory damages.

New life was injected into the possibility of private suits by citizens to enforce compliance with the law by the recent decision of the Supreme Court in *Nova Scotia Board of Censors* v. *McNeil*.[100] This case involved the standing of a private citizen to challenge by way of declaration the constitutionality of the Nova Scotia *Theatres and Amusements Act*[101] and certain regulations thereunder. The Supreme Court, having had the benefit of two lower court opinions,[102] agreed that McNeil did have the necessary *locus standi*. The judgement of the Court, delivered by Laskin, C.J.C., while somewhat cryptic in its reasoning, seems to say that as there was an arguable case for the unconstitutionality of the provincial law and as the members of the public were "directly affected" by the law, then

> "this is enough, in light of the fact that there appears to be no other way, practically speaking, to subject the challenged Act to judicial review, to support the claim of the respondent to have the discretion of the Court exercised in his favour to give him standing."[103]

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present "the contentions of those who have questioned the legislative competence of Parliament and the legislatures in the matter of the use of languages in court proceedings."

See the comment of Chief Justice Laskin that where constitutionality is an issue in appellate adjudication "intervention is permitted to any government which is not a party" but if merely the construction and application of legislation is at issue, governments who are not parties must "be spectators, however interested they may be in the outcome." He also notes that the Supreme Court "has opened to a degree the door to intervention by responsible and interested organizations in litigation raising issues under the *Canadian Bill of Rights*": B. Laskin, *A Judge and his Constituencies* (1976-77), 7 Man. L. J. at 9, 11.

100. *Supra*, note 58

101. R. S. N. S. 1967, c. 304, as amended by Stats. N. S. 1972, c. 54

102. *Re MacNeil et al.* v. *Nova Scotia Board of Censors et al.* (1974), 9 N. S. R. (2d) 506, 46 D. L. R. (3d) 259 (N. S. S. C., in Chambers); *Re MacNeil et al.* v. *Nova Scotia Board of Censors et al.* (1974), 9 N. S. R. (2d) 483, 53 D. L. R. (3d) 259 (N. S. S. C., A.D.)

103. *Supra*, note 58 at 637 [D. L. R. (3d)]

While the decision leaves many questions still unanswered as to when the Court will exercise its discretion to grant standing,[104] it is interesting to note the emphasis given to the efforts made by McNeil to have the matter resolved in another fashion before he commenced his action. McNeil had sought a statutory appeal to the Lieutenant-Governor in Council and had requested the provincial Attorney-General to make a constitutional reference. The Court noted the unresponsive reception these efforts had met.[105] The Court appears, tacitly, to be concerned that without granting standing, a court would not have an opportunity to pass upon the impugned statute. In this light, the Court's statement that the merits of the constitutional issue should be heard at the same time that the standing issue is determined[106] takes on new meaning. As David Mullan comments:

> If the Chief Justice really intends the question of standing and the merits of a case to be always tried together, there are difficulties in seeing any continued relevance to problems of standing. It would after all be quite unusual to see a court finding a statute unconstitutional and then refusing a remedy on the basis of an absence of standing.[107]

A preference for upholding the law is likely to be operative under such conditions. In addition, the *McNeil* case, like its progenitor *Thorson*[108], is difficult to square with a Dispute Settlement model of civil adjudication.

Dispute Settlement views the plaintiff's personal stake or direct interest in the subject matter of his grievance as the pedestal upon which the dispute rests. If it is a pecuniary interest then so much the stronger the base. If, as is often the case where constitutional questions or public rights are involved, the plaintiff's interest is no different or greater than that of other members of the public, then he has no personal dispute and his grievance is not legally cognizable.

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104. For an analysis of this case (and the equally significant *Thorson, supra,* note 4) and the considerations which apparently will affect the exercise of the Court's discretion in relation to granting standing, see D. Mullan, *Standing Afer McNeil* (1976), 8 Ottawa L. Rev. 32

105. *Supra*, note 58 at 634 [D. L. R. (3d)]. The same concern for the refusal of appropriate law enforcement officials to act underlies *Thorson, supra,* note 4

106. *Id.*

107. D. Mullan, *supra*, note 104 at 42

108. *Supra*, note 4. *Thorson* was also a constitutional challenge by a citizen, in this instance of the federal government's *Official Languages Act*, R. S. C. 1970, c. 0-2

The proper protection for the public is then said to be through proceedings by the Attorney-General. It is the personal interest of the plaintiff which guarantees, it is thought, a high level of advocacy and ensures that frivolous cases that waste judicial resources are not brought. A private individual is thought unfit to provide the breadth of view necessary to represent the public interest.

The Enforcement view focuses upon the defendant and his wrongful conduct. It sees it as essential to the judicial role that the Court act to ensure that violations of the law are censured, and not sanctioned by its refusal to act. Since we have not, except in the contempt field, adopted an approach where the Court can seek out and obtain retribution from wrongdoers on its own initiative, an Enforcement orientation indicates that the Court should be hospitable to a plaintiff who brings both the wrong and the wrongdoer before it. This is especially so where the plaintiff has enough interest of whatever nature to finance his suit, to assume the prime burden of proving the wrong, to supply an energized advocacy, and to undertake the risk of costs if he loses.

Permitting a private citizen to directly challenge the constitutionality of legislation simply is not compatible with the Dispute Settlement view. He is without a personal or private dispute with the governmental authorities. Any detriment which he suffers is the same as that under which all members of the public must labour. While good policy arguments might be made to permit him access to the courts,[109] the phenomena of doing so suggests a concern on the part of the courts for enforcing constitutional requirements.

The logical extension to permitting private standing to challenge constitutionality is to permit private standing to challenge *ultra vires* action purported to be taken under admittedly constitutional legislation. Thus far the judicial response has been mixed. The

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109 At the minimum, it might be noted that in cases like *McNeil*, the protector of the right of citizens of Nova Scotia to be free from unconstitutional provincial laws is the provincial Attorney-General, who is also a cabinet member of the government whose laws are sought to be challenged. His reluctance to challenge a law supported by his government is understandable, as is his reluctance to see provincial *de facto* powers limited by judicial decision. So much is the latter the case that other provincial attornies-general intervened in *McNeil* to uphold the provincial law. Indeed, even if a provincial Attorney-General did undertake to challenge the constitutionality of a provincial statute, a plausible argument for a conflict of interest on his part might be made. Some recognition of these difficulties is reflected in *Thorson, supra,* note 4 at 146 [S .C. R.].

Ontario Court of Appeal has not permitted the extension[110] but the Manitoba Court of Appeal seems to be in favour of standing in this situation.[111]

Standing to challenge *ultra vires* action is one question; standing to enforce public rights generally is a much broader extension of the *McNeil* and *Thorson* line.[112] This latter position is tempered by the

110. In *Rosenburg* v. *Grand River Conservation Authority* (1976), 1 C.P.C. 1 (Ont. C.A.) the plaintiffs sought to sue as "members" of the Authority on behalf of all its members to restrain a proposed conveyance of land by the Authority which was alleged to be beyond its powers. Arnup, J.A., delivering the Ontario Court of Appeal's decision, characterized the action as really being brought on behalf of the public generally, since success in the suit would bring no special benefit to the plaintiffs beyond that accruing to the public generally. The proper plaintiff in such a situation was said to be the Attorney-General. The plaintiffs were denied standing, the Court concluding it had no discretion to permit standing where a challenge was made to the exercise of delegated authority. *McNeil* and *Thorson* were distinguished essentially because they involved constitutional issues and an admitted refusal by the respective Attornies-General to take action. Arnup, J. A., did, however, go on to consider the merits of the challenge and to find that the Authority acted within its statutory powers.

111. *Stein* v. *City of Winnipeg* (1974), 48 D.L.R. (3d) 223. There a private individual brought a personal and class action seeking, by way of declaration and injunction, to challenge the legality of a decision by the City of Winnipeg to commence a tree spraying program to control tree-leaf eating insects. The plaintiff contended that s. 653 of the City of Winnipeg Act, Stats. Man. 1971, c. 105, requiring an assessment of the environmental impact, had not been met. Matas, J. A., writing for a majority of the Manitoba Court of Appeal, stated that, by analogy to Thorson,

> "the right to institute Court action should not require the intervention by the provincial Attorney-General . . ."

and that if s. 653,

> "is not to be considered as a mere pious declaration then there must be inferred a correlative right, on the part of the resident, in a proper case, to have a question arising out of the sections [intended to involve citizen participation in municipal government] adjudicated by the Court." [at 236].

At this stage the case involved an application for an interlocutory injunction, which, on the balance of convenience, was refused. However, a private citizen was given standing to challenge the exercise of subordinate, delegated authority without the involvement of the Attorney-General, even though the plaintiffs suffered no harm or injury different from that suffered by the public at large. The contrast between *Rosenburg* and *Stein* might usefully be thought of as a debate between Dispute Settlement and Enforcement orientations.

112. Such *locus standi* is accorded in some instances. Private actions by municipal rate payers to attack public wrongs are now permitted almost as a matter of course. See, *e.g.*, *Wilin Construction Ltd.* v. *Dartmouth Hospital Commission* (1977), 75 D. L. R. (3d) 145 (N. S. S. C.) (challenge to power of municipal hospital commission to operate nursing home); *Easton* v. *City of Winnipeg* (1976), 69 D. L. R. (3d) 585 (Man. C. A.) (challenge to municipal approval of bridge); *Fraser* v. *Town of New Glascow* (1976), 76 D. L. R. (3d) 79 (N. S. S. C.) (challenge to

notion that the public rights are to be enforced by public officials, in particular, the Attorney-General. However, to allow a general preference for enforcement of public rights by public officials is not necessarily incompatible with an Enforcement model. What is important, though, is that enforcement be achieved, and this makes it important to permit private parties standing at least where an official refuses to act (or perhaps has a potential conflict.)[113] Canadian jurisprudence has neither embraced nor foreclosed this further extension along Enforcement lines of *McNeil*.[114] A decided preference, however, for action by public officials to enforce public rights is apparent.[115] Closely tied to this preference but reflecting an

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authority of town to implement fluoridation programme); *Brodie et al*, v. *City of Halifax et al.* (1974), 47 D. L. R. (3d) 454 (N. S. S. C., A. D.) (challenge to municipal authorization of redevelopment project); *Re Vladicka and board of School Trustees of Calgary School District#19* (1974), 45 D. L. R. (3d) 442 (Alta. S. C.) (challenge to action of school board trustees setting their honoraria); *Barber* v. *Calvert et al.* (1971), 17 D. L. R. (3d) 695 (Man. C. A.) (challenge to qualification of mayor to hold office by reason of certain contracts entered into between him and the town); *cf. Pask* v. *McDonald* (1974), 52 D. L. R. (3d) 762 (Sask. C. A.) (where, in an action to recover money paid to the mayor pursuant to an allegedly invalid resolution, it was held that the rate-payer-plaintiff must prove a request to the municipality to bring or join in action, and its refusal, before he has standing). Consider also private actions by property owners to challenge building permits issued in their zone. (*L'Association des Proprietaires des Jardins Tache Inc. et al.* v. *Les Entreprises Dasken Inc. et al.* (1971), 26 D. L. R. (3d) 79 (S. C. C.) and shareholder derivative actions (See S. M. Beck, *The Shareholders' Derivative Action* (1974), 52 Can. B. Rev. 159).

113. See *supra,* note 109

114. See W. A. Bogart, Comment, *Public Interest — Lucus Standi — Right of Private Citizen to Litigate Questions Involving Public Interest — Power of Court to Review Decision of Attorney General* (1978), 56 Can. B. Rev. 331 (prediciting that the influence of the strong statement of the House of Lords in *Gouriet* v. *Union of Post Office Workers,* [1977] 3 All E.R. 70 will restrict *McNeil* and *Thorson* to the constitutional context.)

115. It is clear that the A.-G. as protector of public rights is entitled to an injunction where a public statute is flouted: *A.-G. Ont.* v. *Garbarchuk et al.* (1975), 11 O. R. (2d) 607, 67 D. L. R. (3d) 31 (Ont. H. Ct., Div. Ct.).

The classic Canadian statement relating to private action stems from Duff, J. in *Smith* v. *A.-G. Ontario,* [1924] S. C. R. 331, [1924] 3 D. L. R. 189, at 337 [S. C. R.]:

> "An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act."

See *Hickey et al.* v. *Electric Reduction Co. of Canada Ltd.* (1970), 21 D. L. R. (3d) 368 (Nfld. S. C.) (where fishermen whose livelihood was imparied by discharge of poisonous material were denied standing as nuisance created was a public one and not peculiar to them; the A.-G. is proper person to protect the common interest of the public). See also *Thorson, supra*, note 4 at 150 [S. C. R.];

intermediate position is the availability of relator actions.[116] In this context it must be remembered that the decision to enforce public rights or not is ultimately that of the Attorney-General. A refusal on his part to act appears not to be usually reviewable by the Courts.[117]

Of even greater consequence to an Enforcement view is the standing of someone privately affected by a violation of a public statute to enforce compliance. That is, in the case of a wrong affecting the public generally, an Enforcer might be indifferent between a suit commenced by the Attorney-General as protector of the public interest into which a private party might intervene and a private citizen's suit into which the Attorney-General might intervene. Where, however, particular individuals or groups are injured in their private capacities by a violation of a norm of public conduct, it is important to an Enforcement view that they be able to maintain a suit to enforce the norm through their personalized advocacy. While clearly the proposition that such individuals have standing is a correct statement of the law relating to public wrongs created by the common law, problems might be raised where the wrong is based on statutorily created wrongs. One might correctly expect that where norms are specified by legislation but remedies are not, those for whose benefit the statute is enacted may protest when a violation affects them.[118] But when conduct is prescribed or proscribed upon pain of penal consequences or some other remedy is specified, did the legislature intend to exclude private civil remedies?

Moose Jaw Merchandisers Ltd. v. *Westport Enterprises Ltd.* (1971), 23 D. L. R. (3d) 21 (Sask. C. A.); W. Estey, *Public Nuisance and Standing to Sue* (1972), 10 Osgoode Hall L. J. 563 at 566-75; D. Mullan *The Declaratory Judgement: Its Place as an Administrative Law Remedy in Nova Scotia* (1975-76), 2 Dal. L. J. 91 at 100 *et seq.*; J. Swaigen and E. Block *Standing for Citizens: An Idea Whose Time Has Come* 1976), 10 Gazette L. S. U. C. 352.

An aberrant case where a private individual obtained an injunction to enforce a public right without having a private interest or involving the A.-G. is *Wright* v. *The City of Sydney* (1944), 18 M. P. R. 20 (N. S. S. C.). See Comment (P. R. Jordon), *Action by Private Person to Establish a Public Right* (1945), 23 Can. B. Rev. 520 (who notes an appeal to N. S. S. C., A.D. was dismissed, and on further appeal, the S. C. C. dimissed for want of jurisdiction).

116. See, *e.g A.-G.* v. *Bergan* (1896), 29 N. S. R. 135 (C.A.); *Merritt* v. *Chesley*, (1888) Tru. 324; *Williams and Wilson Ltd.* v. *Toronto and A.-G. Ont.*, [1946] O. R. 309, [1946] 4 D. L. R. 278; *A.-G.* v. *Crayford Urban District Council*, [1962] Ch. 575 (C. A.).

117. See *Gouriet, supra,* note 114, at 83 and W. A. Bogart, *supra,* note 114 at 341-45

118. This is the so-called "second-class" from *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 28 L. J. (C. P.) 242 at 246, 6 C. B. (N. S.) 336 at 356.

A Dispute Settlement orientation would tend to see statutory remedies as exclusive. The legislature has given the plaintiffs rights which they would not have had at common law and has, it would be said, placed limits upon those rights by virture of the means which it has made available for their enforcement. If the parliamentarians had intended to give the plaintiffs a civil right of action, they would have said so when setting up the remedies they did. On the other hand, an Enforcement view of civil process, concentrating upon bringing about the defendant's compliance, would not be particularly concerned about how compliance was achieved so long as the method was effective. An injured private party ought to bring a more effective, energized advocacy to bear. Where damages are a question, public means of enforcement such as by way of a criminal fine, might not effectively return to the wrongdoer the full measure of the external harm his activity has caused. And perhaps the wrong was of such a private nature that public injunctive relief would not be available. If the mechanisms provided by the legislature prove ineffective in any particular case, a *per se* rule excluding a private damage and/or injunction suit would be objectionable.

Thus decisions like *International Brotherhood of Electrical Workers, Local Union 2085 et al* v. *Winnipeg Builders' Exchange et al*[119] provide an important base for further Enforcement developments. This case concerned a work stoppage in violation of both a collective agreement and the Manitoba *Labour Relations Act*.[120] Involved was an interlocutory injunction granted *ex parte* and then continued to trial. Despite the fact that the project underlying the dispute had been completed and the injunction was spent, the Supreme Court heard the case on its merits because "a question of law of great and nation-wide importance was involved as to which there was a difference of opinion in the Courts below . . ."[121] In holding that the grant of an injunction was proper, even though it in effect resulted in the enforcement of a contract for personal services not otherwise specifically enforceable, the Court, speaking through Cartwright, J., stated:

> In my view the purposes of the *Labour Relations Act* would be in large measure defeated if the Court were to say that it is powerless to restrain the continuation of a strike engaged in in direct violation of a collective agreement binding on the striking

119. [1976] S. C. R. 628
120. R. S. M. 1954, c. 132
121. *Supra*, note 119 at 636

> employees and in breach of the express provisions of the Act. . . . It is true that an employer whose operations are brought to a standstill by an illegal strike or a union whose employees are rendered idle by an illegal lockout may bring an action for damages or seek to invoke the penal provisions of the *Labour Relations Act* but the inevitable delay in reaching a final adjudication in such procedures would have the result that any really effective remedy was denied to the injured party.[122]

While the ability of a private party to so enforce public legislation in the face of alternative statutory remedies depends upon a circumstance by circumstance analysis, this Enforcement view of the use of civil procedure is not an isolated instance.[123]

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122. *Supra*, note 119 at 640-41

123. See, *e.g. Cunningham et al.* v. *Moore* (1972), 31 D. L. R. (3d) 149 (Ont. H. Ct.) (where Holland, J., in holding that a breach of the statutory duties created by Ontario's *Landlord and Tenant Act*, R. S. O. 1970, c. 236 gave rise to a civil cause of action, despite other specific remedies being made available by the Act, stated at 151: "If a duty is imposed by statute then *prima facie* the plaintiff is entitled to succeed upon showing a breach of that statutory duty resulting in injury or damage to the plaintiff."); *Stewart* v. *Park Manor Motors* (1968), 66 D. L. R. (2d) 143 (Ont. C. A.) (where it was held that a duty to pay employees vacation pay under the *Hours of Work and Vacations with Pay Act*, R. S. O. 1960, c. 181 gave rise to a civil cause of action in damages by an employee, despite the specific remedies being made available by the Act); *Tomko* v. *Labour Relations Board (Nova Scotia) et al.* (1975), 69 D. L. R. (3d) 250 (S. C. C.) at 256-58 (where, in the course of upholding the constitutionality of the issuance of a cease and desist order by a labour relations board, a court's power to issue an injunction against an unlawful strike was recognized and *Winnipeg Builders' Exchange* was approved); *The Hamilton and Milton Rod Co.* v. *Raspberry* (1887), 13 O. R. 466 (Ch. D.) (where an injunction was granted restraining defendant from passing the plaintiff's tollgate without paying tolls although such act by the defendant constituted a statutory offence for which a statutory remedy by way of penalty was provided); *Grabarchuk, supra*, note 115 (A.-G. entitled to injunction to secure compliance with statue even though statue provided remedy for breach); *A.-G.* v. *Chaudry et al.*, [1971] 1 W. L. R. 1614 (C. A.) (*per* Lord Denning, M. R. at 1624: "Whenever Parliament has enacted a law and given a particular remedy for the breach of it, such remedy being in an inferior court, nevertheless the High Court always has reserve power to enforce the law so enacted by way of an injunction or declaration or other suitable remedy. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient so to do.");

R. K. Paterson, *A Role For Civil Liability in Canadian Securities Regulation? — Remedies for Breach of the Take-Over Bid Disclosure Requirements of the Securities Act 1967* (1978), 12 U. B. C. L. Rev. 32. See also *Stevens* v. *Chown*, [1901] 1 Ch. 894 at 905 (*per* Farwell, J.); *A.-G.* v. *Sharp*, [1931] 1 Ch. 121 (C. A.); *Duchess of Argyll* v. *Duke of Argyll*, [1967] 1 Ch. 302; *A.-G.* v. *Bastow*, [1957] 1 Q. B. 514, [1957] 1 All E. R. 497; *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; *A.-G.* v. *Ashbourne Recreation Ground Co.*, [1903] 1 Ch. 101; *Insitute of Chartered Accountants of Manitoba* v. *Bellamy*, [1926] 4 D. L. R. 230; *Snell's Principles of Equity, supra*, note 69 at 627-28.

VII. *Damages*

From a formal perspective, damages are seen solely as a means of compensating the plaintiff for his loss from wrongful conduct. The plaintiff is entitled to no more or no less than actual damages, as best they can be calculated, for this is the measure of the plaintiff's grievance which the Court seeks to resolve. The defendant is obligated, under this view, to pay to the plaintiff no more than the amount of loss he has inflicted upon him.

As has been emphasized, Enforcement is not overly concerned about compensation but rather seeks to secure from the defendant the full measure of the harm he inflicts in an effort to bring the defendant into compliance and ensure he does so in the future. In economic terms, it forces the defendant to internalize the external costs he imposes in order that his private decision-making include the true social costs, thus leading to an efficient allocation of resources. Compensation is a distributional concern rather than one of efficiency, and is not the stuff of which Enforcement is made.

While most rules relating to damages emphasize compensation to the plaintiff, two important rules diverge from these notions and extract from the defendant money over and above what compensation requires. Under the collateral benefit rule welfare payments paid under statutory authority, unemployment insurance benefits, private insurance payments and *ex gratia* payments received by the plaintiff as a result of his injury should not be deducted from his claim for damages for personal injury and loss of earnings in determining what amount the defendant should pay.[124] Under the

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But see *Transport Oil Ltd.* v. *Imperial Oil Ltd. et al.*, [1935] O. R. 215, [1935] 2 D. L. R. 500 (Ont. C. A.) (where breach of a duty created by the *Combines Investigation Act* was held not to give rise to a private right of action); *Direct Lumber Co. Ltd.* v. *Western Plywood Co. Ltd.*, [1926] S. C. R. 646, 35 D. L. R. (2d) 1 (where a breach of sections of the *Criminal Code* was held not to give rise to an action in damages); *Valley Salvage, infra,* note 83 (expressing doubt about whether a conspiracy to violate the *Combines Investigation Act* can form the basis of a civil cause of action); *Beattie et al. v. Governors of Acadia University et al.* (1976), 72 D. L. R. (3d) 718 (N. S. S. C., A. D.) (where, in a civil action alleging discrimination because of "race . . . ethnic or national origin", contrary to the *Human Rights Act*, Stats. N.S. 1969, c. 11, by virtue of being denied the right to play on a university basketball team, doubt was expressed about the availability of a declaration where a tribunal was especially charged with the administration of the Act.)

124. The leading Canadian case on collateral benefits is *Boarelli* v. *Flannigan*, (1973), 36 D.L.R. (3d) 4, a decision of the Ontario Court of Appeal. Dubin, J. A.'s analysis begins with a recognition of the underlying formal notions: that personal injury damage awards are not to be "punitive"; that they are not to be a

rules surrounding punitive or exemplary damages, more than the plaintiff's loss is paid to him to punish the defendant for his outrageous conduct.[125]

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reward; that they are to be compensatory only; and that "all that the defendant is obligated to repay is the actual loss suffered by the plaintiff, but no more than his loss." [at 7.] The latter statement, he believes, has never been the law, and he concludes the payments in question were not deductible. The Court emphasizes that there is no reason to allow the tortfeasor to obtain any advantage from these payments and that "over-compensation" to the plaintiff is of no concern to a defendant otherwise liable in damages [at 9, 14]. *Boarelli* has generally been followed in Canada. See *e.g. Wren* v. *Superintendent of Insurance (No. 2)* (1977), 75 D. L. R. (3d) 567 (Ont. H. Ct.); *Zinck* v. *Anderson and Anderson* (1975), 20 N.S.R. (2d) 445 (S. C.) at 455. Academic commentary on the rule largely precede *Boarelli* and include: G. Adair, *Collateral Sources in Damage Assessment* (1967), 15 Chitty's L. J. 122; K. D. Cooper, *A Collateral Benefits Principle* (1971), 49 Can. B. Rev. 501 (the principle proposed therein was rejected in *Boarelli, supra,* at 11); E. L. Haines, *Fatal Accident Damages — Deductions for Contingencies and Collateral Benefits* (1973), Lectures L. S. U. C. 27. See most recently W. H. Charles, *Justice in Personal Injury Awards: The Continuing Search for Guidelines* at 74-82, contained in *Studies in Canadian Tort Law* (L. Klar ed. Toronto: Butterworth & Co. (Canada) Ltd., 1977) at 37.

125. Exemplary or punitive damages are not new: *Huckle* v. *Money* (1763), 2 Wils. 205. In a contemporary article, S. L. Robins, *Exemplary and Nominal Damages* (1961), Lectures L. S. U. C., 13, the author notes at the outset that the traditional purpose of the law of damages is to compensate the plaintiff and place him in the position he would have been in but for the wrongdoer's conduct. Exemplary damages, he indicates, are not awarded with a compensatory objective in mind. Rather, the "deterrent effect is stressed [footnote omitted], that is by 'punishing' the defendant he and other potential wrongdoers will be deterred from further offences." [at 15] They are akin to a criminal fine and express the Court's outrage at the defendant's reprehensible conduct. Or, to adopt an economist's analysis, since the probability of a wrongdoer paying damages is less than one, more than the actual costs of the undersired conduct must be imposed to properly deter. See R. A. Posner, *supra,* note 75 at 142-43. While the availability of exemplary damages was restricted in England by the House of Lords in *Rookes* v. *Barnard,* [1964] A. C. 1129, many Canadian jurisdictions have not followed it. See *e.g. Gouzenko* v. *Lefolii* (1967), 63 D.L.R. (2d) 217 (Ont. C.A.); *Unrau* v. *Barrowman* (1966), 59 D.L.R. (2d) 168 (Sask. Q.B.); *McKinnon* v. *F.W. Woolworth Co. Ltd. et al.* (1968), 70 D.L.R. (2d) 280 (Alta. S.C., A.D.); *Fraser* v. *Wilson et al.* 1969), 6 D.L.R. (3d) 531 (Man. Q.B.); *University of New Brunswick* v. *Strax* (1968), 1 N. B. R. (2d) 112 (S.C.). See *contra Banks* v. *Campbell* (1973), 14 N. S. R. (2d) 73 (S. C.); *Eagle Motors (1958) Ltd.* v. *Makaoff* (1970), 17 D.L.R. (3d) 222 (B.C.C.A)

For an analysis of *Rookes* v. *Bernard,* see G. H. L. Fridman, *Punitive Damages in Tort* (1970), 48 Can. B. Rev. 373; also R. B. Buglass. *Some Thoughts on Exemplary Damages* (1969), 34 Sask. L. Rev. 325; J. J. Atrens, *Intentional Interference with the Person* at 408 *et seq.,* contained in *Studies in Canadian Tort Law* (A. M. Linden ed. Toronto: Butterworth & Co. (Canada) Ltd., 1968) at 378; M. A. Catzman, *Exemplary Damages: The Decline, Fall and Resurrection of Rookes v. Bernard* (1973), Lectures L. S. U. C. 41.

To allow a plaintiff to recover more than his actual loss is to depart from traditional notions of damage assessment. It is submitted that the Enforcement model is helpful in showing why these notions have been introduced into civil damage suits. By extracting from the defendant the full measure of the costs of his activity it is more likely to bring his conduct into conformity with legally imposed norms.[126]

IX. *Conclusion: The Modesty of the Canadian Enforcement Phenomena*

This article has introduced an Enforcement model of civil process and has indicated an increasing tendency to resort to the civil courts as a means of dealing with problems often having a wide social import, in which the public or a significant portion of it have an interest. The cases deal with the operation of legislatively-declared public policy. Yet it must be confessed that while the judiciary have recognized and exercised a role beyond traditional Dispute Settlement notions, the development of Canadian Enforcement phenomena has been modest in comparison with the American experience. The threads of an Enforcement model exist in Canada, but why has a fuller cloth not been woven?

The answer to this question is complex, and no more than a

Even in *Rooks* v. *Bernard,* Lord Devlin, with whom all the other law lords concurred in relation to exemplary damages, acknowledges, at 1221, that the object of damages is to compensate and the object of exemplary damages is to punish and deter, and goes on to state, at 1226, that:

> ". . . an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal."

126. This point was acknowledged in H. McGregor, *Compensation Versus Punishment in Damages Awards* (1965), 28 Mod. L. Rev. 629 at 632. There, in relation to a more restrictive British position heralded by *British Transport Commission* v. *Gourley*, [1956] A. C. 185 (H. L.) it is stated:

> "Why, as a matter of policy rather than causation, should the court prefer one solution [lightening the burden on the defendant] to the other [over-compensating the plaintiff]? The answer of the earlier law — holding the third party's action collateral and too remote — was based on the argument that the defendant deserves to pay, as he is the tortfeaser and wrongdoer, and that as between the plaintiff and defendant any windfall should go to the plaintiff. The new view has laid bare the fallacy in this argument — that this whole approach runs contrary to the basic idea that damages are compensatory and not punitive."

For the economic justification, see R. A. Posner, *supra*, note 75 at 152-53.

glimpse at some factors will be attempted. It is, however, important to consider this question since the answers will reflect also on another legitimate concern, namely, are the hurdles to development so great as to make further Enforcement phenomena unlikely? Although the hurdles are not insignificant, they do seem surmountable.

Mr. Justice Bora Laskin (as he then was), in commenting on the greater involvement of the American courts in the formulation of social policy, gave two reasons which are equally applicable to the thesis expressed herein.[127] The first is the unique role created for the American courts by their constitutionally entrenched Bill of Rights. When the judiciary, as the final arbiter, must uphold against all legislative activity such majestic but open-ended concepts as "life, liberty, or property", "due process" and "equal protection of the laws," a deep sense of power, independence and responsibility for upholding norms must become part of the judicial personality. The Courts will naturally evolve whatever auxiliary powers, procedures and remedies prove to be necessary to carry out this function. The Courts must not await some kind of prior legislative mandate or approval. (While I have deliberately steered clear of emphasizing the operation of Enforcement phenomena in American constitutional litigation, it nevertheless so operates.)[128] It seems likely that the conception of its role as upholder of legal norms, once shaped in the judicial mind by experience with constitutional adjudication, would spill over into other litigation.

By contrast, the role of Canadian courts in constitutional matters has been more limited. Our basic constitutional document, the *British North America Act*,[129] does not explicitly enshrine fundamental freedoms and rights, but essentially deals with the distribution of powers between federal and provincial governments.[130] Initial judicial attitudes toward constitutional

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127. B. Laskin, *The Function of Law* (1973), 11 Alta. L. Rev. 118 at 120.

128. See A. Cox, *The New Dimensions of Constitutional Adjudication* (1976), 88 Proc. Mass. Hist. Soc. 60; A. Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976) *passim; supra,* note 63 and accompanying text.

129. (1867), 30 & 31 Vict., c. 3 (U.K.) (R.S.C. 1970, Appendix II, Document No. 5)

130. This is not to deny that the courts have available to them and have used interpretation devices to effect a constitutional protection of civil liberties. See W. S. Tarnopolsky, The *Supreme Court and Civil Liberties* (1976), 14 Alta. L. Rev. 58 at 60-81.

litigation in Canada were moulded by the reality, until 1949, of the Judicial Committee of the Privy Council in London as the highest court on constitutional matters.[131] The Privy Council's conception of the limits of constitutional adjudication must have been influenced by the long experience in England with a Parliament unfettered by written constitutional bounds.[132] In addition, the Canadian judiciary's exposure to the notion of limits upon federal legislative powers through the *Canadian Bill of Rights*[133] has been limited to a relatively short period (the *Bill of Rights* was enacted in 1960.) Is it any wonder that, working under these institutional and historical handicaps, the comparatively inexperienced Canadian judiciary has not evolved or embraced the kind of active role played by American courts?

Mr. Justice Laskin secondly points to what might be summarized as the lack of a legislatively-provided framework within which the courts can play a broad role[134]: the legislative branch must "provide

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131. See generally G. P. Browne, *The Judicial Committee and the British North America Act, An Analysis of the Interpretative Scheme for the Distribution of Legislative Powers* (Toronto: University of Toronto Press, 1967)

132. The Privy Council did strike down legislation. See, *e.g.* F. R. Scott, *The Privy Council and Mr. Bennett's 'New Deal' Legislation* contained in his *Essays on the Constitution, Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977). However, they did not, where it might have been appropriate, preface their decisions with a consideration of the civil rights issues involved. The Privy Council acted to distribute legislative power on the assumption that full authority to enact any kind of legislation was within the competence of the combined federal and provincial powers. See W. S. Tarnopolsky, *supra,* note 130 at 62-64 and *The Canadian Bill of Rights* (2nd ed. Toronto: McClelland and Stewart, 1975), at 29-31

133. *Supra,* note 84

134. *Supra,* note 127. Laskin, C. J. C.'s comments are concerned with the role of courts in forming social policy. He recognizes in addition to a legislative base for this role, the use of common law methods to evolve appropriate social policy. It appears that Canadian scholars have similarily focused their attention, perhaps unduly, upon recognizing and/or advocating a law-making and/or social policy oriented model of judicial behaviour, as contrasted to the traditional model involving the application of pre-existing ascertainable law to "the facts". See, *e.g.* P. Weiler, *Two Models of Judicial Decision-Making* (1968), 46 Can. B. Rev. 406; P. Weiler, *Legal Values and Judicial Decision-Making* (1970), 48 Can. B. Rev. 1; B. Laskin, *The Role and Functions of Final Appelate Courts: The Supreme Court of Canada* (1975), 53 Can. B. Rev. 469 at 477-81; R. A. Samek, *The Dynamic Model of the Judicial Process and the Ratio Decidendi of a Case* (1964), 42 Can. B. Rev. 433 (contrasting a static model based upon closed rules with a model recognizing rules as open-textured and indeterminate); F. Vaughan, *The Canadian Courts and Public Policy Making: The Case of Justice Emmett M. Hall* (1973-74), 38 Sask. L. Rev. 357; J. U. Lewis, *supra,* note 7 (advocating Llewellyn's "Grand Style" rather than the prevalent "Formal Style"); P. Russell, *Judicial Power in*

the fodder upon which judicial action is sustained."[135] I have emphasized the need for broad legislative schemes as a basis for the operation of Enforcement phenomena. I have also recognized, outside of constitutional questions themselves, the supremacy of the legislative branch. Legislatures must act to provide the norms of public conduct and must allow the courts to play a role in enforcing the norms by civil process. I have suggested the advent of legislation providing norms in areas such as human rights, environmental and consumer protection and competition policy. What is also significant, is the proclivity of the legislative branch to rely for enforcement upon a combination of criminal penalties and administrative agencies.[136] It seems that governmental regulation and the use by legislatures of specialized tribunals for enforcement have not been adversely received by the public in Canada.[137]

In addition to inexperience stemming from the lack of clear constitutional and legislative fodder for the judiciary to act upon,

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Canada's Political Culture contained in *Courts and Trials: A Multidiciplinary Approach* (M. L. Friedland ed. Toronto: University of Toronto Press, 1975) at 75

135. B. Laskin, *id.*

136. See, *e.g.* I. A. Hunter, *supra,* note 81 and W. S. Tarnopolsky, *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada* (1968), 46 Can. B. Rev. 565 (emphasizing the use of administrative agencies to enforce human rights legislation); M. J. Trebilcork, *Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose* (1975), 13 Osgoode Hall L. J. 619 (recognizing the pervasive influence of regulatory agencies and the significant impact their decisions have on consumer's interests); D. P. Emond, *Participation and the Environment: A Strategy for Democratizing Canada's Environmental Protection Laws* (1975), 13 Osgoode Hall L. J. 783 (discussing, *inter alia*, the fact that most Canadian environmental protection laws rely for their enforcement upon administrative agencies); I. M. Christie, *The Nature of the Laywer's Role in the Administrative Process* (1971), Lectures L. S. U. C. 1 (who states, at 2: "Administrative decision making, either by tribunal or administrative official, is the hallmark of . . . broad schemes of social legislation") and (1971), Lectures L.S.U.C. generally; S. Wexler, *Non-Judicial Decision-Making* (1975), 13 Osgoode Hall L. J. 839 (who states, at 839: "Most of the decisions which affect a person's legal rights and duties are not made in courts. They are made in other institutions and only the tiniest fraction of them are either in theory reviewable or in fact reviewed by courts."); J. M. Hendry, *Some Observations on the Canadian Regulatory Agency* (1976), 3 Dal. L. J. 3 (who states, at 22: "By traditional definition, the legislature makes the law, the executive (administrative) enforces the law and the judiciary interprets it").

137. J. Willis, *Administrative Law in Canada* (1961), 39 Can. B. Rev. 251 at 253:

> "Administrative law has never raised in Canada the storms of public controversy that it did in England and the United States. The reason may be that Canada has never been, is not and never could be a *laissez-faire* state; it depends for its continued national existence on government action and Canadians have had to accept government regulation as one of the facts of life."

one can legitimately point to Canadian inexperience resulting from a smaller population and correspondingly less litigation. The reduced volume of activity must be a factor in accounting for the meagre Canadian Enforcement phenomena.

Not only are Canadians accustomed to turning, at least initially, to administrative officials and tribunals to enforce their rights in such areas as consumer and environmental protection and human rights, but they have embraced another institution to intercede when the grievances are with governmental bureaucracies, namely, the ombudsman.[138] This institution, while often functioning where no legal basis of complaint exists, no doubt also serves to divert attention away from courts as a possible avenue of redress when a grievance cognizable by courts of law exists.[139] When citizens turn to an ombudsman rather than the courts to supervise administrative excesses, the judiciary is deprived of further exposure to a role enforcing statutorily prescribed conduct.

Consider as well the role of contingency fees and the lawyer as entrepreneur.[140] Until recently Canadian jurisdictions have generally condemned contingency fees, although signs of a thawing in attitude are present.[141] Such a system of renumeration is not only common in the United States, but forms the backbone of the small claim class action. An individual with a small financial stake in the outcome of a suit, unless highly motivated, has little incentive to maintain an action as a representative, and for the benefit, of a large number of people who make no financial contribution to the

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138. See A. E. Maloney, *The Function of the Ombudsman's Office* (1976), 10 Gazette L.S.U.C. 110, who indicates ombudsmen exist in eight provinces as well as at the Federal level.

Not only are there such governmentally appointed ombudsmen, but a lawyer from Quebec, Robert Cooper, is "The Ombudsman" on a popular investigative television program produced by the Canadian Broadcasting Corporation.

139. See A. E. Maloney, *id.* at 112, who indicates that while courts no doubt "play a vital role in the correction of abuses of government . . . litgation can still be expensive, exasperating and also protracted and slow." See also A. B. Weir, *The Legislative Ombudsman* (1976), 14 Alta. L. Rev. 256; K. A. Friedmann, *The Alberta Ombudsman* (1970), 20 U. Toronto L. J. 48; A. Bexelius, *The Swedish Ombudsman* (1967), 17 U. Toronto L. J. 170; G. Sawer, *The Ombudsman Comes to Alberta* (1968), 6 Alta. L. Rev. 95; C.-A. Sheppard, *An Ombudsman for Canada* (1964), 10 McGill L. J. 291; K. Thorson, *What About An Ombudsman* (1963), 28 Sask. L. Rev. 169.

140. See generally B. K. Arlidge, *Contingency Fees* (1974), 6 Ottawa L. Rev. 374; W. B. Williston, *The Contingent Fee in Canada* (1968), 6 Alta. L. Rev. 184.

141. For example, contingency fees are permitted in Nova Scotia.See Civil Procedure Rules, R. 63.17 — 63.22.

proceedings. This is especially so when the suit involves significant initial outlays for such things as retention of counsel, investigation, the expense of notice and the posting of security. The financial incentive really lies with counsel, and if success is met with a handsome fee, counsel may be willing to assume the risk of failure and to invest his time and his money to finance the suit. To disallow this role to counsel is to place a brake upon this form of class action. Bill C-13, while not going the contingency fee route, at least restricts liability for costs and spreads the burden by allowing reasonable solicitor and client costs to be taxed as a first charge against the gross damages awarded the class.[142]

The preceding compilation of factors has served to suggest why the development of Enforcement phenomena in Canada has been retarded.[143] What of the future? The amendments to the *Combines Investigation Act*, both actual and proposed, may be helpful both in their own right and in serving as a legislative model for future amendments and enactments in other areas. Other signs of a relaxation of Dispute Settlement requirements have been highlighted herein. Despite such causes for optimism by proponents of an Enforcement model, it does seem likely that the cumulative weight of these factors means that further Enforcement activities will be slow in developing. In the meantime, the American experience can at least serve to broaden our horizons and stimulate our thinking.

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142. Proposed s. 39.18

143. In addition to the lack of an assertive judicial tradition stemming from such institutional considerations as the foregoing, regard might be had to the conservative outlook of the Canadian legal profession. It may be that even without institutional limits, this subjective factor would inhibit the kind of advocacy required and the judicial receptiveness needed to foster Enforcement phenomena. This conservatism is often associated with the socio-economic background, and the standing in the community, of lawyers, as well as the role of law in maintaining the *status quo*. But a meaningful Canadian-American comparison is difficult to do on the basis of such criteria. That a greater Canadian conservatism exists, however, is made manifest, more objectively, by the lack of a significant public interest orientation in Canada. Where in this country do we find the kind of "public interest" advocacy exhibited in the United States by public interest law firms, public interest research groups, Nader's Raiders, or such organizations as the Natural Resource Defence Council. See, *e.g.* A. Cox, *supra*, note 128 at 64, 67 [Proc. Mass. Hist. Soc.]; *N. R. D. C.* v. *Train* (1975), 396 F. Supp. 1386 (D. C. D. C.); *N. R. D. C.* v. *Costle* (1977), 10 E. R. C. 1625 (D. C. Cir). Some such advocacy does exist, but it is truly insignificant compared to the highly organized, institutionalized American network of public interest oriented activities. The failure of the Canadian legal profession to develop such institutions may be a good index of a general convervatism which seriously undermines Enforcement developments.