PRIVATE PARTY ACCESS TO THE COMPETITION TRIBUNAL

by

Kent Roach

and

Michael Trebilcock

Faculty of Law
University of Toronto

Prepared for

Amendments Unit
Competition Bureau
Industry Canada

Hull, Quebec
Canada

May 7, 1996

PRIVATE PARTY ACCESS TO THE COMPETITION TRIBUNAL

by

Kent Roach

and

Michael Trebilcock

Faculty of Law
University of Toronto

Prepared for

Amendments Unit
Competition Bureau
Industry Canada

Hull, Quebec
Canada

May 7, 1996

PRIVATE PARTY ACCESS TO THE COMPETITION TRIBUNAL

by

Kent Roach
and
Michael Trebilcock

Faculty of Law
University of Toronto

Prepared for

Amendments Unit
Competition Bureau
Industry Canada

Hull, Quebec
Canada

Paper prepared for the Amendments Unit of the Competition Bureau. The views expressed are the authors' and not necessarily those of the Director of Investigation and Research or the Competition Bureau.

May 7, 1996

PRIVATE PARTY ACCESS TO THE COMPETITION TRIBUNAL

EXECUTIVE SUMMARY

by

Kent Roach
and
Michael Trebilcock

Faculty of Law
University of Toronto

Prepared for

Amendments Unit
Competition Bureau
Industry Canada

Hull, Quebec
Canada

Paper prepared for the Amendments Unit of the Competition Bureau. The views expressed are the authors' and not necessarily those of the Director of Investigation and Research or the Competition Bureau.

May 7, 1996

PRIVATE PARTY ACCESS TO THE COMPETITION TRIBUNAL

EXECUTIVE SUMMARY

1. The study argues that there are substantial advantages to private enforcement of public laws in general. Private enforcement can supplement public resources with private initiatives and information, which is particularly important if public resources devoted to enforcement are modest or diminishing and there is a need for jurisprudence to flesh out the general standards contained in public law. Private enforcement can also be an effective means of holding public enforcers accountable for decisions not to prosecute. Private as opposed to public enforcement can also allow plaintiffs to achieve corrective justice and seek remedies for both past and future harms. On the other hand, public enforcers may enjoy comparative advantages over private enforcers in terms of economies of scale and investigative tools. Private enforcement can result in over-deterrence if numerous private enforcers are attracted by the prospect of high rewards. Private enforcement presents a risk that it will be employed for strategic and private reasons that are in conflict with the public goals of the laws sought to be enforced. Private enforcement can also disrupt decisions not to prosecute that may be based on a coherent and defensible enforcement policy of public officials. These various advantages of public and private enforcement suggest a need for an appropriate mix of the two, with careful attention being paid to design features of a private enforcement regime such as sanctions for strategic behaviour and allowing public officials to intervene in, or in some cases even terminate, private enforcement which may disrupt prosecutorial policies.

2. U.S. anti-trust law from its beginnings has assigned a substantial role to private enforcement as a means of deterring violations of anti-trust laws. For various periods of time, the ratio of private to public enforcement actions has run as high as twenty to one and in recent years seems to have fallen into the ten to one range. In contrast, until 1976, the Canadian Competition Act and its predecessors conferred no private rights of action on aggrieved parties. In 1976, the Act was amended to provide (in s. 36) a private damage action for parties injured as a result of violations of the criminal provisions of the Act. However, this section has been rarely invoked. No private right of action presently exists under the Act or violations of the reviewable practice provisions contained in Part VIII of the *Act*. U.S. experience has limited relevance in evaluating the appropriate role for a private enforcement regime with respect to reviewable practices under the Canadian Competition Act, given major procedural differences between the U.S. and Canadian legal systems: e.g. treble damages; contingent fees; class actions; one-way cost rules; and civil juries.

3. The prominent role assigned to private enforcement under U.S. anti-trust laws has generally been justified in terms of promoting optimal deterrence of anti-trust violations. This rationale has recently been criticized, on the one hand because multiple damage awards may lead to over-enforcement and strategic behaviour by plaintiffs, and on the other hand, because a properly structured and publicly enforced fine system seems better adapted to securing optimal deterrence. The alternative rationale for private enforcement is securing corrective justice by private parties injured as a result of anti-trust violations. While this rationale for private enforcement has been assigned much less weight than the deterrence rationale in the U.S. case law and literature, it may well be the more compelling rationale for private enforcement of the reviewable practices provisions of the Competition Act, given the absence of any publicly enforceable deterrence-oriented sanctions for violations of these provisions: if greater deterrence was thought desirable, a more straightforward response would be to provide for a regime of optimally structured and publicly enforced fines. The study concludes that there is a compelling case for private enforcement of the reviewable practice provisions of the Competition Act, primarily on corrective justice grounds, but secondarily in terms of enhancing accountability of the public enforcement regime. In order to achieve an optimal mix of public and private enforcement, the study then turns to a number of design variables that require to be addressed.

4. With respect to standing to sue, a standing test based on material as opposed to direct effects is superior because it allows legitimate yet indirect claims for compensation to be made and allows a broader range of affected parties to act as private attorneys-general. If damages are not available as a remedy, there may be a case for an even broader standing test that permits public interest standing by consumer, employee and industry associations that may have a genuine and substantial interest in a matter and a superior ability to litigate than individuals who are directly or materially affected.

5. With respect to rights of intervention, parties who are directly affected by the proceedings should have a right of intervention, including a right to advance claims for compensation once liability has been established. If broader public interest intervention is allowed, the Tribunal should have discretion to limit the extent of the participatory rights. Apart from private parties affected by the matter, the Director should have full rights of intervention, including participation in discovery, the calling of evidence and the cross-examination of witnesses so as to mitigate one of the major weaknesses of private enforcement i.e. that it can disrupt coherent enforcement policies based on a prudent and reasoned exercise of prosecutorial discretion. In the case of time-sensitive transactions such as mergers, there may be a case for allowing private litigants access to the Tribunal to commence a challenge to a merger but then allow the Director to issue a stay, if he or she views this as expedient, after presenting reasons to the Tribunal, thus enhancing public accountability for the Director's decision.

6. In order to prevent or discourage frivolous or improperly motivated private actions, the study argues for a mandatory summary judgement procedure. A mandatory summary judgement procedure could also serve as a convenient cut-off for the application of loser-pay cost rules and be integrated with a case management regime.

7. With respect to limitation periods, the study argues for a general and straightforward limitation period, such as three years from when damages were suffered, but subject to judicial discretion to extend the period in exceptional cases.

8. Along with a mandatory summary judgement procedure, cost awards can also be used to deter frivolous and strategic litigation. However, they also present a risk of deterring meritorious litigation, especially if a plaintiff is not able or likely to obtain damage awards or even the costs of litigation. The study argues that the conventional loser-pay rule may be the appropriate rule to apply to the preliminary stages of litigation up to and including the mandatory summary judgement procedure, but once a case has passed summary judgement, there may be good reasons, depending on the legal context, for applying a variety of no-way and one-way cost rules.

9. As to the remedies available on an application by a private plaintiff, these are likely to determine the efficacy of the private enforcement regime. Preventing the Competition Tribunal from awarding interim relief or damages will make litigation less attractive and may produce countervailing pressures to expand common law actions to include conduct that can be assessed as a reviewable practice. However, there is a risk that private plaintiffs will seek interim relief for strategic reasons and that such relief may restrain pro-competitive behaviour. This risk may justify preserving the Director's exclusive monopoly over requests for interim relief, at least in the merger context. On the other hand, the doctrine for granting interim relief, at least in other contexts, can be tightened and plaintiffs can be required to undertake to pay damages that respondents suffer because of the grant of interim relief that is subsequently overturned. If interim relief is not available, respondents may have to pay damages, at least for injuries they inflict during the litigation process. More generally, damages can both compensate private applicants for harms caused by reviewable practices and give them an incentive to bring an action, especially if a no-way cost rule is employed. Compliance orders will remain an important remedy, but the Tribunal should take great care in ensuring that plaintiffs do not obtain orders that go beyond the purposes of the Act. Settlements and consent orders will also play an important role, but again the Tribunal will need to be vigilant in supervising settlements and issuing consent orders because settlements between private parties cannot be assumed to accord with the purposes of the Act in the same way as settlements with the Director.

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

TABLE OF CONTENTS

INTRODUCTION

The private enforcement of competition law is a controversial subject. Much of this controversy stems from the extensive reliance placed on private enforcement in the United States through the use of the treble damage remedy in the Clayton Act.[1] Nevertheless, private enforcement in Canada has also been controversial even though the Canadian experience so far has been limited to single damages for criminal competition offenses or the failure to comply with an order of the Competition Tribunal.[2] This study has been commissioned by the Competition Bureau to examine whether there should be a role for private enforcement in relation to the existing non-criminal reviewable matters under Part VIII of the Competition Act[3] and to examine the appropriate procedural regime to govern and control private access to the Competition Tribunal. This question, however, engages the larger question of the role of private enforcement of public laws in general and competition law in particular.

The first part of this study will examine the strengths and weaknesses of private enforcement of the law from a variety of theoretical and practical perspectives. Compared to Canada, the United States places greater reliance on private enforcement not only of antitrust laws, but also of securities, environmental and other regulations. This can be explained by a number of factors including less restrictive costs and attorney fee policies in American courts and an unwillingness to devote extensive resources or monopoly power to public enforcement. In turn, Canadian unease about private enforcement of the law reflects a preference for public control and accountability over prosecutorial policy. This faith in a monopoly of public prosecution, however, may be eroding given concerns about the resources devoted to public prosecutions, limits on accountability for enforcement

---

1 15 U.S.C.A.# 15. Approximately 90% of antitrust cases are brought by private plaintiffs. Herbert Hovenkamp Federal Antitrust Policy The Law of Competition and its Practice (St. Paul: West, 1994) at p.542.

2 Competition Act R.S. 1985 c.C-34 s.36. This provision was introduced in 1975 S.C. 1975 c.C-2 and its constitutionality as a means to enforce competition law pursuant to federal jurisdiction to regulate trade and commerce was only affirmed in City National Leasing Ltd. v. General Motors of Canada Ltd. [1989] 1 S.C.R. 641 at 684. The Supreme Court concluded that the damage remedy was "one of the arsenal of remedies created by the Act to discourage anti-competitive practices...Together or apart, the civil, administrative and criminal actions provide a deterrent against the breach of the competitive policies set out in the Act."

3 R.S.C. 1985 2nd Supp. c.19. These matters include: refusal to deal (s.75); consignment selling (s.76); exclusive dealing, tied selling and market restrictions (s.77); abuse of dominant position (ss.78-79); delivered pricing (ss.80-81); compliance with foreign judgments and laws (ss.82-83); refusal to supply by a foreign supplier (s.84); specialization agreements (ss.85-90) and mergers (ss.91-103). They could also include civil misleading advertising. See Competition Act Amendments June 1995 Discussion Paper, Bureau of Competition Policy, at pp.15-17. Note that under s.86 of the Competition Act any person may apply to the Competition Tribunal to register a specialization agreement.

policy and a growing sense that in a complex, pluralistic society, governments can no longer claim to be the sole representatives of the public interest. Given the current desire to rethink the delivery of many governmental services in Canada, including prosecutorial policies, it is a particularly opportune time to assess the strengths and weaknesses of private enforcement of public laws.

The second part of this study will elaborate our critical evaluation of private enforcement of the law by examining the case for and against private enforcement of competition law with special attention to practices such as mergers, refusal to deal, vertical restrictions and abuse of dominant position which are at present reviewable under Part VIII of the Competition Act at the Director's sole initiative, as well as civil misleading advertising provisions which might be included as reviewable matters in the future. The competition law context affords an excellent opportunity to examine both the strengths and weaknesses of private enforcement of the law. Some of the main weaknesses of private enforcement of the law, for example the risk of private actors hijacking the enforcement process for their own strategic ends; disrupting carefully calibrated public enforcement policies based on prosecutorial discretion; and delaying time sensitive matters, are particularly prominent in the competition field. On the other hand, the potential of private enforcement, namely achieving corrective justice; harnessing private initiative, resources and information to the public end of law enforcement; and increasing accountability for public enforcement policy remains great. This section will also examine what matters within competition law are most amenable to private enforcement and what matters will produce the greatest danger of strategic behaviour by competitors which is unlikely to support the public policies that animate competition law.

The third and final part of this study will examine many of the design and incentive issues that arise in structuring the role for private enforcement in Canadian competition law. Topics examined will include the basis for standing to initiate private enforcement measures, the role that the Director of Investigation and Research should play in relation to private enforcement measures including powers to intervene or to stay private actions and the remedies that should be available including whether interim remedies and damages should be available in an action brought by a private party. Procedures to deal with frivolous claims and cost awards, as well as mechanisms for discovery and case management, will also be discussed. The discussion of procedural detail in this section will be informed by both a sense of the advantages and weaknesses of private enforcement of competition law discussed in earlier sections as well as a critical awareness of important differences between the procedural, remedial and cost rules which govern litigation in Canada and the United States and in specialized administrative tribunals such as the Competition Tribunal and the ordinary civil courts. The goal will be to outline design features which maximize the potential for effective and efficient private enforcement of competition law while minimizing the risks of strategic behaviour that could delay and hinder legal and competitive behaviour.

I. THE PRIVATE ENFORCEMENT OF PUBLIC LAWS

There has been a traditional tendency to assume that laws designed to produce public benefits should be enforced by public authorities while laws designed to regulate the interactions of private actors should be enforced by private actors. This has always been an oversimplification given the dominant role that private prosecutions played in the criminal law well into the nineteenth century.[4] Even today when vast resources are devoted to public prosecution of crimes, the criminal law can still be enforced by private prosecutions.[5] Although public prosecutors can take over or stay private prosecutions, the Supreme Court has recognized that the ability of a private individual to present a case to a judicial official can increase the prosecutor's accountability.[6] Another important form of public law, constitutional law, depends almost entirely on private enforcement. Canadian courts have granted public interest standing to those not directly affected by the impugned laws in order to better protect the "fundamental right of the public to government in accordance with the law."[7] Environmental and consumer protection laws are

---

4 This, of course, led to some abuses of the criminal process such as the use of private prosecutions as a form of blackmail. At the same time, public prosecutors with a monopoly of prosecutorial powers may be vulnerable to charges of favouritism. "In short, experience has shown that both an extensive system of private prosecution and a monopoly in criminal enforcement are susceptible to abuse. What is needed is the appropriate mix of public and private enforcement that will fit the particular times and its social needs, together with adequate systems of accountability to prevent abuse." Boyer and Meidinger "Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Law" (1985) 34 Buffalo L.Rev. 833 at 956-7.

5 The Supreme Court has stated that "the right of an ordinary citizen, the victim of a criminal offence, to lay an information against the offender" is a "fundamental precept" of the criminal justice system and has overturned attempts to vest exclusive prosecutorial policy over young offenders to provincial authorities. A.G. of Quebec v. Lechasseur (1981) 63 C.C.C.(2d) 301 at 307 (S.C.C.). See generally, Fred Kaufman "The Role of the Private Prosecutor: A Critical Analysis of the Complainant's Position in Criminal Cases" (1960) 7 McGill L.J. 102; Peter Burns "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L.J. 269; Phillip Stenning Appearing for the Crown (Cowansville: Brown, 1986) ch.12; Law Reform Commission of Canada Private Prosecutions Working Paper 52 (Ottawa, Law Reform Commission of Canada, 1986).

6 R. v. Dowson (1983) 7 C.C.C.(3d) 527 at 535-536 (S.C.C.). See generally J.Ll.J.Edwards The Attorney General, Politics and the Public Interest (London: Sweet & Maxwell, 1984) ch.6.

7 Thorson v. Attorney General of Canada (No.2) (1974) 43 D.L.R.(3d) 1 at 19 (S.C.C.) This case has been expanded to allow public interest standing when the legality as opposed to the constitutionality of governmental actions is challenged. Canada (Minister of Finance) v. Finlay (1986) 33 D.L.R.(4th) 321 (S.C.C.). Recently, the courts have restricted public interest standing especially when there is a directly affected person who could bring a similar challenge. See generally Kent Roach Constitutional Remedies in Canada (Aurora; Canada Law Book, 1994) ch.5. In a very recent case, R. v. Edwards (1996) 104 C.C.C.(3d) 136, the Supreme Court denied an accused standing to argue that evidence should not be admitted on the basis that the search and seizure rights of a third party had been violated when it was obtained. American courts have reached similar conclusions even though it may only be the accused and not the third party who has the incentive to challenge the constitutionality of the search and seizure. See Daniel Meltzer

enforced through a mixture of private and public enforcement.[8] Thus private enforcement is an established feature of many areas of public law.

The initial case for private enforcement is quite strong. The private enforcement of public laws can act as a check on the monopoly power of enforcement that public authorities would otherwise enjoy. A private individual who has suffered a violation may be in a better position and have better information to enforce public laws than a public official. It is the aggrieved person not the public official who has the greatest incentive to seek corrective justice in the form of damages or other remedies.

Nevertheless, the assumption that public laws should be administered by public officials has persisted. This has particularly been true in Canada where governments often appear to be the only actors with the resources and accountability structures necessary to develop effective prosecution policies. Private actors may in many cases not have the desire, resources, or expertise to enforce public laws. Those that do may seek to appropriate the enforcement powers and remedies ordinarily available only to public officials in order to advance their own strategic ends.

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

At the same time Canadian attitudes towards private enforcement may be changing in the opposite direction because of a variety of factors. Canadian faith in governments has been sorely tested in recent years and private enforcement can increase the accountability of public officials. It can also serve as a failsafe mechanism should public enforcement fall below optimal or acceptable levels. Anglo-Canadian cost rules such as the loser-pay principle and restrictions on damage awards and contingency fees may prevent some of the excesses of the American experience with private enforcement. In addition, a growing lack of consensus about what is in the public interest in Canadian society makes exclusive public enforcement more problematic and suggests that private individuals and groups be allowed an opportunity to advance their claims that they act in the public

---

"Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General" (1988) 88 Colum.L.Rev. 247.

8 See for example Environmental Bill of Rights S.O. 1993 c.28 Part VI.

interest. Finally in times of fiscal restraint, the prospect of attracting private resources to the enterprise of enforcing public laws is appealing.

A. The Political Theory of Private Enforcement

Theorists of the liberal state starting with Thomas Hobbes have taken an unfavourable view of private enforcement of public laws. For Hobbes, the state of nature which existed before the development of the state relied exclusively on private enforcement of the law. Primarily for that reason, "the life of man [was] solitary, poor, nasty, brutish, and short".[9] Individuals acting in their rational self-interest will willingly trade the ability to enforce law for a public monopoly over violence which will make their lives richer and longer. A public monopoly over enforcement is necessary to induce each person to divert their resources from self-protection and self-help to more productive activities. The re-introduction of private enforcement of public law troubles those influenced by liberal state of nature theorists, even though the enforcement of private law has long depended on individual self-help.

Acceptance of exclusive public enforcement of the law has been augmented by other developments in political theory. Rousseau added the romantic concept of the general will to Hobbes' more utilitarian defence of the modern state.[10] Public enforcement was not simply more efficient, but also a more genuine expression of public policy. The modern state soon created its own argument for exclusive reliance on public enforcement. Weber for example suggested that more developed societies would regularize their policies through the mechanism of bureaucratic rationality.[11] Full-time professional prosecutors subject to hierarchical control were better situated to implement rational prosecutorial policies than private individuals who would not be subject to bureaucratic control and might be motivated by irrational motivations such as the desire for vengeance. Unlike the part-time private prosecutor, a full-time public prosecutor could develop specialized expertise.

There are theoretical arguments in favour of private enforcement of public laws. Some commentators drawing on retributive theories have argued that private enforcement is justified if the litigant is vindicating pre-existing natural rights, but is not justified if it is based on legislation that attempts to maximize welfare.[12]

---

9 C.B.MacPherson ed. Hobbes Leviathan ch.13 at p.186 (Middlesex: Penguin, 1968)

10 J.J. Rousseau The Social Contract (Cranston ed: Middlesex: Penguin, 1968)

11 Max Weber Economy and Society (Berkeley: University of California Press,1968) vol.II.chs.8 and 11.

12 J.R.S. Prichard and Alan Brudner "Tort Liability for Breach of Statute: A Natural Rights Perspective" (1983) 2 Law and Philosophy 89 at 100.

Much modern legislation, however, is concerned with both social welfare and individual rights. Expanded notions of entitlement and rights to citizen participation will increase the range of laws that can be subject to private enforcement. Private enforcement can be seen as a participatory activity which allows individuals and groups to compete over increasingly pluralistic understandings of the public interest. A growing sense of the deep pluralism of public ends creates scepticism about the ability of electoral and legislative politics to be the only forum for mediating competing interests. Private enforcement, for example in the environmental field, allows individuals and groups with a sense of grievance a direct opportunity to make enforcement claims in court.

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

An important but largely negative justification for private enforcement is governmental failure, particularly capture and public choice theories of governance.[13] If public enforcers cannot be relied upon to enforce laws vigorously against regulated sectors, then it is necessary to replace or supplement their efforts with private enforcers. Greater numbers of private enforcers can less easily be lobbied or co-opted than a discrete number of public enforcement officials.

B. The Law and Economics of Private Enforcement

The optimal use of private enforcement of public laws has been a matter of contention in the law and economics literature. Following his pioneering work stressing the need for high penalties to compensate for low probabilities of detection[14], Gary Becker with George Stigler argued that deterrence could be as effectively achieved if private individuals enforced the law by competing for the high damages that would follow from demonstrating that a defendant was liable.[15] Reflecting the tendency to justify private enforcement as a response to

---

13 Mancur Olson, The Logic of Collective Action Public Goods and the Theory of Goods (Cambridge: Harvard University Press, 1965); Michael Trebilcock et al. The Choice of Governing Instrument (Ottawa: Economic Council of Canada, 1982); Daniel Farber and Phillip Frickey Law and Public Choice: A Critical Introduction (Chicago: University of Chicago Press, 1991).

14 Gary Becker, "Crime and Punishment: An Economic Approach" (1968) 76 J. Pol.Econ. 169.

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

governmental failure, Becker and Stigler were concerned with the possibility of malfeasance or inaction among public regulators. They argued that it was better to reward private enforcers "by a 'piece-rate' or a 'bounty'" instead of the fixed salary paid to public enforcers. They concluded:

> Society is more likely to use fines equal to damages divided by the probability of conviction to punish offenders if it must pay this amount to successful enforcers. Although private enforcement of rules need not change the rules, we predict that they would gain currency and relevance because enforcement would then be much more efficient and transparent.[16]

Becker and Stigler acknowledged some potential problems in private enforcement. They recommended that both public and private enforcers who brought unsuccessful actions should be required to compensate the innocent defendant and "the concept of double jeopardy would need elaboration"[17], given anticipated competition among private enforcers.

A year later, William Landes and Richard Posner challenged the conclusion that private enforcement could be as efficient as public enforcement. They argued that if fines or damages higher than the social costs of the illegal activity were required to deter defendants, this would attract higher than optimal numbers of individuals seeking to collect such fines or damages by being private enforcers of the law and devoting their own private resources to detection and prosecution. This would increase the probability of detection beyond the low level posited by Becker and could result in over-enforcement and deterrence above socially optimal levels.[18] Public enforcers not driven by profit maximization could make better decisions about how many resources to devote to prosecution than the uncoordinated activities of private individuals competing for high fines or damages. However, this insight about the potential for over-deterrence in private enforcement does not justify a total abandonment of private enforcement. Rather it suggests that the rewards offered to private enforcers be carefully controlled to ensure that private actors do not divert more private resources than are socially optimal to the enforcement of public standards.

---

16 ibid at 15

17 ibid at 15.

18 Landes and Posner "The Private Enforcement of Law" (1975) 4 J.Legal Stud. 1 at 15. See also W.F. Schwartz Private Enforcement of the Anti-trust Laws: A Critique (Washington: American Enterprise Institute, 1981) at p.9; Richard Posner Economic Analysis of Law 4th ed (Boston: Little Brown, 1992) at p. 596 for similar conclusions.

Mitchell Polinsky subsequently challenged the Posner and Landes thesis of over-deterrence by stressing that rational private enforcers would only act in cases where the reward available was greater than the costs of enforcement. The fine or damage recovered by private enforcers would in many cases be limited by the net worth of the defendant. In cases with high enforcement costs and/or defendants with low net worth it would not be rational for potential private enforcers of the law to engage in this activity.[19] Like the Posner and Landes analysis, this insight does not justify the abandonment of private enforcement of the law. Rather it points to the complementary roles that private and public enforcement can play. Private enforcement will be of most value in those cases in which the rewards available are greater than their enforcement costs (although excessive rewards may result in over-enforcement[20]) and public enforcement is most needed in those cases where the fine or damages that can be extracted from a wrongdoing is significantly less than the costs of enforcement.

C. The Theory of Private Attorneys General

The utility of private enforcement of public laws has frequently been discussed in the United States in the context of the role of litigants as "private Attorneys General". The phrase was first used by Judge Jerome Frank when he recognized the standing of a private litigant in an administrative law case on the basis that "[s]uch persons, so authorized, are, so to speak, private Attorney Generals."[21] Frank, one of the founders of Legal Realism, took an overtly instrumental approach to the use of law and he believed that the initiative of private litigants could usefully supplement the enforcement efforts of public authorities in achieving the goals of legislation in the post-New Deal era. Since that time there has been support for the private Attorney General from many quarters. It has been noted that "liberals promote the private attorney general, in part, as an antidote to what they view as a conservative administration's reluctance to aggressively enforce various regulatory laws. Conservatives find virtue in the

---

19 He stated: "Under private enforcement, firms are willing to invest in enforcement only if they at least break even- their fine revenue must be at least as large as their enforcement costs. Under public enforcement, however, the optimal solution may result in fine revenue which is less than enforcement costs." "Private versus Public Enforcement of Fines" (1980) 9 Journal of Legal Studies 105 at 107.

20 Polinsky recognizes that private enforcement may in different circumstances result in both over and under enforcement. "If the same fine is used as under optimal public enforcement, the resulting probability of detection (generated by the self-interested choices of private enforcers) may be too high or too low. In other words, if the enforcing is done privately, there may be too much enforcement or too little enforcement. "Detrebling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement" (1986) 74 Geo.L.J. 1231 at 1234.

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

private attorney general concept because of its function in 'privatizing' law enforcement pursuant to the ideals of economic efficiency."[22]

The private Attorney General theory is based on the premise that a positive public good is secured when a private litigant vindicates a publicly endorsed standard or norm contained in a statute. A corollary assumption is that the public good is not significantly harmed when a self-appointed private Attorney General is unsuccessful because it is that person him or herself who bears the costs of the unsuccessful litigation. This is especially true outside the United States where an unsuccessful plaintiff would generally be responsible not only for its own legal costs, but a significant portion of the costs incurred by its successful adversary. The private Attorney General theory assumes that private litigants, because of their financial[23] or ideological[24] interests in the matter, will have adequate incentives to invest in investigation and litigation which because it is designed to vindicate public standards will be in the public interest.

The use of private Attorneys General has flourished in the United States in a number of contexts. It has been used to justify the creation or maintenance of private causes of actions to enforce antitrust statutes[25], securities law[26] and environmental legislation.[27] The enforcement activities of private Attorneys General are encouraged by one-way cost rules which allow successful plaintiffs who act as private Attorneys General to be indemnified for the costs of litigation[28]

---

22 Bryant Garth et al "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Actions" (1988) 61 S.Cal.L.Rev. 353 at 353.

23 Landes and Posner "The Private Enforcement of Law" (1975) 4 J.Legal Stud. 1; Polinsky "Private versus Public Enforcement of Fines" (1980) 9 J.Legal Stud. 105; Schwartz "An Overview of the Economics of Antitrust Litigation" (1980) 68 Geo.L.J. 1075.

24 Louis Jaffe "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff" (1968) 116 U.Penn.L.Rev. 1013; Abram Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harv.L.Rev. 1281; Owen Fiss "Foreword: The Forms of Justice" (1979) 93 Harv.L.Rev. 1.

25 Private actions were available since 1890, but increased rapidly in the post War era and especially since the 1960's. See Richard Posner "A Statistical Study of Antitrust Enforcement" (1970) 13 J.Law & Eco 365 at 371; Salop and White "Economic Analysis of Private Antitrust Litigation" (1986) 74 Geo.L.J. 1001.

26 J.I. Case Co. v. Borak 421 U.S. 723 (1964).

27 Robert Blomquist "Rethinking the Citizen as Prosecutor Model of Environmental Enforcement under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values" (1988) 22 Georgia L.R. 337.

28 Comment "Court Awarded Attorney's Fees and Equal Access to the Courts" 122 U.Pa.L.Rev. 636. A United States Supreme Court decision that drastically reduced one way fee shifting Alyseka Pipeline Serv. Co. v. Wilderness Soc'y 421 U.S. 240 (1975) was quickly overruled by Congress in part out of a desire to encourage private Attorneys Generals and limit "the growth of the

without facing the disincentive of paying their adversary's costs should they lose. In addition, fee arrangements between a litigant and his lawyer can encourage litigation by private Attorneys General. For example, the legal fees of a private Attorney General might be collected from a common fund or paid only if the litigant is successful. Contingency fee arrangements allow the plaintiff's lawyers to be the de facto private Attorney General. Costs and fees arrangement are particularly important when private Attorneys General are motivated by ideological concerns about the public interest rather than their own financial concerns.[29]

D. The Strengths of Private Attorneys General

Private Attorneys General can supplement public enforcement. This can occur when a private Attorney General seeks a remedy for a matter that has escaped the attention of public authorities. This may frequently occur in cases where the costs of investigation are high for public enforcers but relatively low for private enforcers. Alternatively, public enforcers could be aware of the matter but decide that a public prosecution is not a rational allocation of resources. Even if a public prosecution is undertaken it may only secure a criminal or quasi-criminal conviction or perhaps an order requiring a defendant to comply with public standards. Private Attorneys General can usefully supplement public enforcement efforts by securing fuller compensation for the damages caused by non-compliance[30] and by giving the court added information that may help it to make better orders to achieve compliance in the future. Adding private resources to public enforcement efforts is effective so long as the additional resources do not result in over-deterrence.[31]

---

enforcement bureaucracy". Pub.L.No.94-559@ 2,90 Stat 2641 (1976), Senate Report No. 94-1011, 94th Congress,2d Sess., reprinted in 1976 U.S. Code Cong. & Ad, News 5908,5911 (June 29, 1976) quoted in John Coffee Jr. "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working" (1983) 42 Maryland L.R. 215 at 226.

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

30 Coffee has commented that "[a]bsent these private actions, the monetary penalties for antitrust and securities fraud plainly would be insufficient to deter. Second, it often may be more efficient for public agencies to concentrate on detection (an area where they have the comparative advantage because of their superior investigative resources) and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics." He observes that private lawyers may have often graduated from public enforcement agencies and may work harder when motivated by a profit incentive. John Coffee Jr. "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working" (1983) 42 Maryland L.R. 215 at 224-5.

31 James Musgrove assumes that private actions will result in over-deterrence when he argues: "Direct expenditures on enforcement or adjudication should be largely irrelevant to the debate as to the proper type and level of antitrust enforcement. Getting enforcement 'right' in this area will add to government revenues, almost regardless of direct cost. Getting enforcement 'wrong', however, can be expected to shrink government revenues, even if immediate direct expenses are

Private enforcement is superior to public enforcement in compensating those aggrieved by violations and achieving corrective justice.[32] Compensation is usually thought of as damages, but can include any order designed to correct the harm that the plaintiff has suffered from a violation. The virtues of private enforcement as a form of corrective justice are often discounted in American debates because of the stress placed on treble damages and other devices to encourage private enforcement in order to achieve deterrence. Public prosecutions can include some elements of compensation if orders for restitution are made.

Private enforcers may in some instances be at a comparative advantage to their public counterparts. Because they may be affected by the matter, they may have a greater incentive to take some enforcement action. Closer proximity to the violation may also mean that the costs of detecting possible violations and gathering evidence may be less for them than they would be for a public enforcer. For example, a firm or customer may be able to more easily detect anti-competitive practices that they experience on a daily basis than a public official who must monitor large sectors of the economy. Moreover, the firm or customer would be more knowledgeable about industry practices than a public enforcer.[33] Contrary to the Weberian assumption that the public bureaucrat has greater expertise, private Attorneys General may have the expertise best suited to the particular prosecution.

Adding private resources to enforcement efforts will likely increase rates of litigation and this will add to the jurisprudence defining and fleshing out the often vague and general standards contained in the public law being enforced. Priest and Klein have argued that individual cases can serve a public good by acting as precedents which allow others to conduct their affairs with more certainty about the relevant legal standards.[34] Private litigation in the United States has been

---

reduced. Allowing private actions to save money, at least without some considerable study, is a penny wise, pound foolish strategy." "Remedies for Reviewable Conduct: Adjusting the Balance" (1995) Canadian Competition Record 34 at 44.

32 J.R.S. Prichard and Michael Trebilcock "Class Actions and Private Law Enforcement" (1977) U.N.B.L.J. 5 at 11.

33 Shavell has commented that private parties "should generally enjoy an inherent advantage in knowledge" over regulators because of their knowledge of the benefits and risks of their own activities. "For a regulator to obtain comparable information would often require virtually continuous observation of parties' behaviour, and thus would be a practical impossibility." Stephen Shavell "Liability for Harm versus Regulation of Safety" (1984) 13 J.Legal Stud. 357 at 360. In the antitrust context, it has been observed that: "Competitors and takeover targets are ideal litigants in terms of litigation capability because they are likely to have the skill, knowledge of the industry, financial resources, legal sophistication and motivation to make a powerful case with...speed and precision." Joseph Brodley "Anti-trust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals" (1995) 94 Mich.L.Rev. 1 at 35.

34 Priest and Klein "The Selection of Disputes for Litigation" (1984) 13 J.Legal Studies 1; Priest "Channelling Civil Litigation: A Comment on Civil Justice Reform in Ontario" in Ontario Law

responsible for most of the leading antitrust precedents especially since public enforcement efforts tapered off in the early 1980's.[35] In determining the value of the jurisprudence produced by private enforcement, however, policy-makers should be sensitive to whether rule-making and other forms of administrative regulation may be a more efficient and comprehensive means to elaborate the general standards contained in public laws.[36] Nevertheless, a concrete case decided in the context of the adversary system may produce a more tangible precedent than administrative guidelines which will often be quite flexible and preserve enforcement discretion. The private Attorney General theory is not only based on a positive vision of private initiative and comparative advantage but a recognition of possible failures in public enforcement. In somewhat crude terms, it may be better to have numerous private enforcers of public law than a handful of public Attorneys General tied to elected governments. Public enforcers may be more interested in maximizing their own budgets or political support than enforcing the law.[37] In the product liability context, commentators have observed that countries lacking private Attorneys General attracted by large damage awards "tend to compensate for the attorneys' absence by instituting a functional equivalent: a huge government bureaucracy charged with evaluating products."[38] Similarly, in the environmental context, the growth of private enforcement has somewhat offset declining resources devoted to public enforcement.[39] Private enforcement may be a crucial means to fill

---

Reform Commission Study Paper on Prospects for Civil Justice (1995).

35 "During the Reagan-Bush years much of government enforcement was limited to criminal bid-rigging prosecutions...it was in the context of private litigation that the Supreme Court enunciated most of its important antitrust decisions. These private cases involved price fixing, monopolization, predatory pricing, price discrimination, dealer terminations, tying, and boycotts. Had there been no private cause of action under the antitrust laws, much of the development in antitrust doctrine during that period might never had occurred." Harry First "Antitrust Enforcement in Japan" (1995) 64 Antitrust L.J. 137 at 179-180.

36 James Musgrove notes that "greater access to the Tribunal will lead to greater jurisprudence" but cautions a better alternative is for the Bureau to issue more enforcement guidelines for reviewable conduct. This alternative "has the attractions of lower cost and more certainty of outcome...dealing with the Bureau in respect of such conduct is likely to be a more certain and predictable exercise than going before the Tribunal. It is also much less expensive than litigation." "Remedies for Reviewable Conduct: Adjusting the Balance" (1995) Canadian Competition Record 34 at 44-45.

37 Mark Cohen and Paul Rubin "Private Enforcement of Public Policy" (1985) 3 Yale J. of Reg. 167 at 170.

38 Michael Rustad and Thomas Koenig "The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers" (1993) 42 American University L.R. 1269 at 1325.

39 Boyer and Meidinger "Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Law" (1985) 34 Buffalo L.Rev. 833; Robert Blomquist "Rethinking the Citizen as Prosecutor Model of Environmental Enforcement under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values" (1988) 22 Georgia L.R. 337.

regulatory gaps created as governments down-size in response to fiscal constraints.

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

> Private enforcement also performs an important failsafe by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers or the vagaries of the budgetary process and that the legal system emits clear and consistent signals to those who might be tempted to offend. Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies. Ultimately, private enforcement helps ensure the stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature.[40]

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

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

An alternative to private enforcement is to allow the public to seek some form of administrative or judicial review of an agency's decision not to prosecute. For example, six members of the public may petition the Director to commence an

---

40 John Coffee Jr. "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working" (1983) 42 Maryland L.R. 215 at 227. Professor Jerry Mashaw articulated a similar idea when he stated: "A final hypothesis is that the legislature believes that some competition, or the threat of competition, from public enforcers may stimulate public enforcement efforts. Our general distrust of monopoly is based on the theory that monopoly produces stodginess and underproduction and that it provides incentives to appropriate benefits for the producer which under competitive conditions would go to consumers. Public officials and bureaucracies which have a monopoly position are, after all, no less subject to these unwanted behavioral characteristics than the general run of mankind." "Private Enforcement of Public Regulatory Provisions: The 'Citizen Suit'" (1975) 4 Class Action Rep.29 at 33.

inquiry.[41] Richard Stewart and Cass Sunstein have termed such mechanisms rights of initiation. Although they are critical of judicial creation of private rights of action[42], Stewart and Sunstein see them as superior to private rights of initiation as an accountability mechanism because:

> A weak initiation right - which is all the courts will usually afford - places a substantial burden on the plaintiff to demonstrate that the agency's inaction was unreasonable. Moreover, 'victory' may consist merely of a remand for a better explanation of the agency's decision not to act. There are also institutional advantages. A private right of action does not require courts to monitor the use of public enforcement resources, nor does it require the agency to divert those limited resources to the defence of initiation suits. Moreover, private rights of action impose a budget discipline on plaintiffs more stringent than in initiation cases. Private rights of action permit private parties to enforce a statute beyond the level permitted by an agency's limited budget only if they believe that the benefits of additional enforcement outweigh its costs. This method of making enforcement decisions may be desirable, since private litigants - who are often closer to local controversies than are public officials - may know more about the costs and benefits of particular enforcement initiatives. Finally, since private right of action cases tend to be more narrowly focused than initiation suits, the right of action may better reflect differing preferences for collective goods.[43]

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

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

---

41 Competition Act R.S. 1985 c.C-34 s.9.

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

43 ibid at 1289-1290.

E. The Weaknesses of Private Attorneys General

Public enforcement retains many comparative advantages to private enforcement that should make any policy-maker cautious about abolishing public enforcement or using the availability of private enforcement as an excuse for taking significant resources away from public enforcement. Although generally sympathetic to private enforcement as a supplement to public enforcement, J.R.S. Prichard for example readily acknowledges:

> Numerous factors favour public enforcement: the economies of scale in some types of investigation, the superior investigative tools, the absence of problems of appropriability, and the simplicity and flexibility of the fine all represent efficiency advantages of public enforcement.[44]

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

One concern with private enforcement is the danger of over-deterrence stressed by Posner and others.[45] Private enforcement is less co-ordinated than public enforcement. Even if they can shape the incentives for private enforcement, policy makers cannot confidently predict the level of private enforcement. Posner's warnings are particularly important in a context where the rewards of private enforcement substantially outweigh the costs of enforcement and where multiple plaintiffs can assume the role of a private Attorney General in any single case. The risk of over-deterrence is less if the rewards are more modest and can be adjusted should the supply of private enforcement be excessive.

Another weakness of private enforcement is that whenever private initiative and resources are used for public ends, there is a danger of strategic behaviour. Such behaviour will mean that the private objects of the plaintiff will supplant the public

---

44 J.R.S. Prichard "Private Enforcement and Class Actions" in Prichard, Stanbury and Wilson eds. Canadian Competition Policy: Essays in Law and Economics (Toronto: Butterworths, 1979) at p. 237.

45 Landes and Posner "The Private Enforcement of Law" (1975) 4 J.Legal Stud. 1.

purposes of the statute sought to be enforced. As Joseph Brodley has argued, this danger of strategic behaviour is particularly high in the antitrust field because the most likely plaintiffs are frequently competitors or take-over targets of defendants.[46] These plaintiffs have the greatest incentive to take enforcement actions and they may also have the best information about the case. Nevertheless, they are also likely to employ private enforcement measures for strategic ends even if they do not have a pro-competitive case. Brodley argues that the dangers of strategic, non public-regarding behaviour do not justify an abandonment of private enforcement[47] but rather require careful management of the procedures available to litigants. Nevertheless, the risk of strategic behaviour is an important weakness of private enforcement.

Another weakness of private enforcement may be the disruption of public enforcement policies. Private enforcement serves as a check on prosecutorial discretion and in particular the decision not to prosecute. If the public prosecutor is an expert with a mandate to regulate a particular field of endeavour, than his or her decision not to prosecute may be based on a reasoned decision that it is in the public interest not to prosecute.[48] The use of private Attorneys General to enforce public laws can be criticized as a privatization of law enforcement which should be the exclusive preserve of democratically accountable officials. Blomquist for example has argued:

> The only intrinsic constraint on a private suitor seeking to use penal laws for private ends is whether the costs of litigation outweigh its potential benefit to

---

46 Joseph Brodley "Anti-trust Standing in Private Merger Cases: Reconciling Private Initiatives and Public Enforcement Goals" (1995) 94 Mich.L.Rev. 1. In the Canadian context see Paul Goreki The Administration and Enforcement of Competition Policy in Canada, 1960 to 1975 (Ottawa: Consumer and Corporate Affairs, 1979) at p.240.

47 He notes that "litigants in antitrust cases, like other economic actors, seek to benefit themselves, not to promote social welfare...no litigant's personal agenda will correspond fully with the social agenda." ibid at p.45.

48 Of course, the decision not to prosecute could also be motivated by many other factors including ignorance of the possible violation, lack of resources or non-public regarding motives such as corruption. As Prichard notes the factors that are considered when exercising prosecutorial discretion "are open to abuse but they are equally open to considerations that are in the public interest." He notes in the competition law context, exclusive public enforcement: "allows the agency to make continuous marginal adjustments in policy without engaging the costs of obtaining legislative change and having the policy altered. The variations in enforcement strategy can therefore allow efficient and desirable flexibility in the development of public policy...Many competition offences are defined in general terms partly because much of business behaviour involves concurrently both anti-competitive and efficiency producing aspects. The trade-off of the two is not a simple judgment and may, in some cases, be as much a question of economic policy as one of law enforcement." J.R.S.Prichard "Private Enforcement and Class Actions" in Prichard et al eds. Canadian Competition Policy: Essays in Law and Economics (Toronto: Buttersworth, 1979) at p.239.

> him. In contrast, government prosecutors, when deciding to enforce a penal law are presumed to be substantially motivated by public interest considerations. Public prosecutors, therefore, are expected to select and pursue cases on the basis of informed, dispassionate judgment about the harmful social significance of the conduct being challenged.[49]

Jerry Mashaw also notes that private enforcement can undermine prosecutorial discretion but believes that the only "real cause for concern" is that it might result in inconsistent treatment of similarly situated offenders. "That private parties should want to add resources to those currently available, take on hard cases, or swim against local political currents when seeking to enforce nationally established or approved rules of conduct is no cause for alarm."[50] As will be examined in the third section, there are means to reconcile private enforcement with the positive values served by public enforcement policies based on prosecutorial discretion. These include allowing the public prosecutor to intervene and make known its views about the merits of a particular private enforcement activity and even to take over or stay the private action.

There are other more instrumental critiques of the private Attorney General theory. Although supportive of private enforcement in general, Professor Coffee has been quite critical of how it is practised in the United States in both the antitrust and securities context. Drawing on empirical data which suggests that private Attorney Generals often seek damages in the wake of a successful public prosecution[51], he has colourfully concluded that present incentive structures:

> result in a system-wide misallocation of effort under which the private attorney general restricts his role to that of a vulture feeding on the carrion

---

49 Robert Blomquist "Rethinking the Citizen as Prosecutor Model of Environmental Enforcement under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values" (1988) 22 Georgia L.R. 337 at 371. He stresses "the detrimental impact that citizen suits can have on the informal administrative process of give and take, where sound regulatory standards require time, judgment, and efficient adjustment based on a number of bargained-for practical considerations." ibid at 404. Blomquist does not categorically reject private enforcement but suggests it should be limited to those directly affected by the impugned activity and their remedies should generally be limited to those required to make them whole as opposed to those necessary to punish and deter. His criticisms are directed at private Attorneys General in the environmental context who have wide standing rights and can request criminal penalties rather than private Attorneys General in the anti-trust context who have more restricted powers. ibid at 389-90.

50 "Private Enforcement of Public Regulatory Provisions: The 'Citizen Suit'" (1975) 4 Class Action Rep.29 at 34.

51 Benjamin Du Val "The Class Action as an Antitrust Enforcement Decree: The Chicago Experience Part II" [1976] A.B.Found.Res.J. 1273; Dooley "Enforcement of Insider Trading Restrictions" (1980) 66 Va.L.Rev.1. More recent data discussed infra suggests, however, that the percentage of follow on case has declined significantly in American antitrust law.

> left by public enforcers and seldom stalks his own prey.[52]

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

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

> With both public and private enforcers active in a regulatory field, there is a very real possibility that they will be working at cross purposes. If regulated parties who are similarly situated receive different treatment depending on whether public and private enforcers win the race to the courthouse, then the fairness of the regulatory program is open to question.[53]

This concern, like Coffee's concern about the misallocation of enforcement resources, can be addressed by giving public authorities authority to veto or take over cases commenced by private Attorneys General.

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

---

52 John Coffee Jr. "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working" (1983) 42 Maryland L.R. 215 at 238. One study of class actions classified lawyers as social advocates or legal mercenaries and suggested that the latter "typically do little research prior to initiating a lawsuit, spend little time mobilizing the class to pursue its interests and seek relatively narrow remedies through litigation." Bryant Garth et al "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Actions" (1988) 61 S.Cal.L.Rev. 353 at 389. Social advocates in contrast spend more time developing a case but their efforts are frequently unwritten by governmental subsidization.

53 at 839

private Attorneys General will impose unwarranted costs on defendants and the public at large.

F. Summary

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

Public enforcers may enjoy comparative advantages over private enforcers in terms of economies of scale and investigative tools. Nevertheless, these advantages suggest the need for an appropriate mix of public and private enforcement. There are, however, some arguments about why allowing any private enforcement might be harmful. One argument is that private enforcement could result in over-deterrence if numerous private enforcers are attracted by high rewards. All private enforcement presents a risk that it will be employed for strategic and private reasons that are not in harmony and may be in conflict with the public goals of the legislation sought to be enforced. Finally, private enforcement can disrupt decisions not to prosecute that may be based on a coherent and defensible enforcement policy of public officials. Most of the weaknesses of private enforcement can be addressed by procedural features such as sanctions for strategic behaviour and allowing public officials to intervene or even terminate private enforcement which disrupts prosecutorial policies. Various procedural remedies for the weaknesses of private enforcement will be discussed in the third section of this paper. The next section will examine the strengths and weaknesses of private enforcement in various competition law contexts.

II. THE DEBATE OVER PRIVATE ANTI-TRUST ENFORCEMENT

A. The Comparative Legal Experience

Private enforcement of anti-trust laws has a long history. The U.K. Statute of Monopolies, enacted in 1623, provided that an individual, financially injured in his business or property by a restraint of trade, could bring suit and, if successful, collect treble the amount of his damages from the perpetrator of the anti-competitive

activity.[54] More generally, the common law of restraint of trade, whose genesis predates even the Statute of Monopolies, has long recognized the right of private parties to challenge unreasonable restraints of trade in contracts to which they are parties (e.g. employment contracts, contracts for the sale of a business) and restrictions on trade contained in by-laws or rules of guilds and other trade associations with regulatory powers.[55] This body of doctrine also recognized, albeit in limited circumstances, the right of private parties to maintain tort actions for conspiracy where they were able to demonstrate injury from the collusive activities of other parties, although the courts proved more willing historically to apply this doctrine to the activities of unions than to business firms conspiring to eliminate competitors through boycotts or other forms of predatory behaviour.[56]

i) United States

In the U.S., Section 7 of the Sherman Act, 1890, provided that "any person who shall be injured in his business or property...by reason of anything forbidden...by this Act may sue therefore...and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonably attorney's fee." Section 7 of the Sherman Act has now been superseded by Section 4 of the Clayton Act of 1914, which enables private persons to bring anti-trust suits for treble damages for damage suffered as a result of any anti-trust violation. The Clayton Act also provides a one-way cost rule, favouring plaintiffs, and that final determinations resulting from prior government enforcement proceedings are prima facie evidence of similar facts alleged in subsequent anti-trust proceedings. In addition, Section 16 of the Clayton Act permits private parties who have suffered injury as a result of any anti-trust violation or are threatened with injury to seek equitable relief from the courts, including most prominently injunctive relief. In the U.S., the treble damage remedy available to private parties runs parallel to three classes of sanctions that may result from public enforcement of the anti-trust laws i.e., 1) fines; 2) incarceration; and 3) structural remedies (such as divestiture).

Whether Congress, in enacting these provisions of the Sherman and Clayton Acts, intended private actions to the primary tool for deterring anti-competitive activity or instead meant them merely to be a device enabling the compensation of injured parties has been the subject of some debate. Lack of any initial budgetary appropriation by Congress for Sherman Act enforcement provides some support for the former view, although during the first fifty years of Sherman Act enforcement only 175 private suits were filed and of these the plaintiffs were successful in only

---

54 See Kenneth Elzinga and William Breit, The Anti-Trust Penalties: A Study in Law and Economics (New Haven: Yale University Press, 1976) at 63.

55 See Michael Trebilcock, The Common Law of Restraint of Trade: A Legal and Economic Analysis (Toronto: Carswell, 1987), chap. 1.

56 Ibid.

13.[57] More recent U.S. experience reflects a sharply different and larger role for private anti-trust suits. A 1970 study by Posner estimated that between 1890 and 1969, 9,700 private anti-trust suits were filed in the U.S. and up to 1965, the ratio of private to government cases tended to be 6:1 or less.[58] More recent empirical studies, including most prominently the Georgetown Private Anti-trust Litigation Project (the Georgetown Project) which collected and analyzed data on all private anti-trust cases filed from 1973 to 1983 in five federal districts, found that from the mid-1960s until the late 1970s, the absolute and relative number of private anti-trust cases grew, peaking at 1,611 cases in 1977, while the ratio of private to public cases exceeded 20:1. In the 1980s, however, both the absolute and relative numbers of private anti-trust cases have declined, and the ratio of private to public cases has fallen to the 10:1 range.[59] In the sample of cases analyzed in the Georgetown Project horizontal price fixing was the most frequent primary allegation, followed by refusal to deal. When primary and secondary allegations were combined, refusal to deal was the most frequent allegation, followed by horizontal price fixing, tying or exclusive dealing, and price discrimination. Vertical allegations outnumbered horizontal allegations. The largest group of plaintiffs were downstream business entities - dealers, business customers, franchisees and licensees - suing their suppliers. The next largest group of plaintiffs was competitors suing each other. Challenges by competitors to mergers outnumbered those by suppliers, dealers and customers by a ratio of 2:1. Of the cases for which the final disposition was known, over 80% of the cases settled. Only 5.4% of all cases went to trial. While some estimates of private treble damage actions filed in the U.S. before 1960 suggested that about 75% of all such actions were initiated after and in reliance on similar government enforcement actions, data from the Georgetown Project suggest that the average percentage of independently initiated cases for the period 1973 to 1977 was 88.8% and follow-on cases 11.2% and that for the period 1978 to 1983, the percentage of independently initiated cases was 94.1% and the percentage of follow-on cases averaged 5.9%.[60]

---

57 See Elzinga and Breit, op.cit. (1976) at 66-68.

58 Richard A. Posner, "A Statistical Study of Anti-trust Enforcement", (1970) 13 J. of Law and Econ. 365.

59 See Steven Salop and Lawrence White, "Economic Analysis of Private Anti-trust litigation" (1986) 74 Georgetown L.J. 1001; Hugh Latimer, "Private Enforcement of the Anti-trust Clause in the United States - Is Reform Called For?", Chapter 32 in S. Khemani and W. Stanbury (eds.) Canadian Competition Law and Policy at the Centenary, (Halifax: Institute for Research on Public Policy, 1991) chapter 32, Table 1 at 667.

60 Thomas Kauper and Edward Snyder, "An Inquiry into the Efficiency of Private Anti-trust Enforcement: Follow-on and Independently Initiated Cases Compared" (1986) 74 Georgetown L.J. 1163.

ii) Canada

In Canada, the historical experience has been sharply different. The Combines Investigation Act enacted in 1889, provided for no private rights of action and recognized no such rights until amendments to the Act in 1976. However, the courts from an early date recognized that an agreement in violation of the Act was invalid and unenforceable as between the parties[61] and much more recently have recognized that violations of the criminal provisions of the Canadian Competition Act may provide the basis for common law tort actions for conspiracy or unlawful interference with economic or contractual interests or relations[62]. Similarly, some courts have suggested that in interpreting and applying the common law of restraint of trade in a contemporary context, the courts should be influenced by the objectives of the Competition Act particularly in applying the public interest (as opposed to parties' interest) strand of the Nordenfelt common law restraint of trade test[63]. However, the preponderance of opinion in recent case law is that the reviewable practice provisions contained in Part VIII of the Competition Act do not provide private parties with a basis for civil relief, because they do not entail per se illegality,[64] although this issue cannot yet be regarded as conclusively resolved.

While the common law thus recognizes limited private rights of actions in various contexts for anti-competitive practices, the process of reforming Canada's competition laws that began in 1969 with the publication by the Economic Council of its Interim Report on Competition Policy[65] focused significant attention on the question of whether a more prominent role should be assigned to the private enforcement of anti-trust laws. The Economic Council of Canada, in its Report, supported a larger role and in 1971 its views were adopted in Bill C-256 in the form of a double damage provision modelled after the Clayton Act. However, Bill C-256 was withdrawn in the face of considerable business and political opposition, and in

---

61 See Weidman v. Shragge (1912) 46 S.C.R. 1.

62 See Canada Cement Lafarge v. B.C. Lightweight Aggregate [1983] 1 S.C.R. 452; Westfair Foods Ltd. v. Lippens Inc. (1989) 64 D.L.R. (4th) 335; Direct Lumber Co. v. Western Plywood Co. [1962] 2 S.C.R. 646, Valley Salvage Ltd. v. Molson Brewery (1975) 64 D.L.R. (3d) 734; Philco Products Ltd. v. Thermionics [1940] S.C.R. 501.

63 See Tank Lining Corp. v. Dunlop Industrial Ltd. (1982) 140 D.L.R. (3rd) 659; Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. [1894] A.C. 535.

64 See Proctor and Gamble Co. v. Kimberley-Clark of Canada Ltd. (1991) 40 C.P.R. (3d) 1; R.D. Belanger and Associates Ltd. v. Stadium Corp. of Ontario (1991) 26 A.C.W.S. (3d) 509; rev'd on other grounds 5 O.R. (3d) 778; Harbord Insurance Services Ltd. v. Insurance Corp. of B.C. (1993) 9 D.L.R.(2d) 81; Polaroid Canada v. Continent-Wide Enterprises (1995) Ont. G.D. unreported; Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc. (1994) 48 A.C.W.S. (3d) 409, rev'd May 1995 Ont. Div. Ct. unreported.

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

the Stage I amendments to the Combines Investigation Act, enacted in 1976, a single damage remedy for breach of the criminal provisions of the Act was adopted instead. This provision is now found in Section 36 of the Competition Act, which provides as follows:

> 36.(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> (2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.
>
> (3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.
>
> (4) No action may be brought under subsection (1),
>
> (a) that in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> (i) a day on which the conduct was engaged in, or
>
> (ii) the day on which any criminal proceedings relating

> thereto were finally disposed of,
> whichever is the later; and
>
> (b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from
> (i) the day on which the order of the Tribunal or court was contravened, or
> (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
> whichever is the later.

The level of private enforcement activity under Section 36 since its enactment has been extremely sparse.[66] This may partly be explained by constitutional doubts as to the validity of the section which persisted until 1989, when the Supreme Court of Canada upheld the validity of the section in General Motors of Canada Ltd. v. City National Leasing[67]. However, even since the constitutional validity of the Section was resolved, there appears to be only one reported case on Section 36, and since 1976 only three reported cases where plaintiffs sought (unsuccessfully) to prove a violation of the criminal provisions of the Act, and only two reported actions (both unsuccessful), where plaintiffs sought to rely on a previous criminal conviction.[68] Thus, in sharp contrast to the U.S. experience, public enforcement actions with respect to the criminal provisions of the Competition Act (including the misleading advertising provisions) vastly outnumber private actions with respect to alleged violations of the same provisions.

With respect to the reviewable practice provisions in the Competition Act (now Part VIII), first enacted in the 1976 Amendments and extended in the 1986 Amendments through the transfer of the merger and monopoly provisions from the criminal law to administrative review by the Competition Tribunal, Section 36 has no application since, by its terms, it is confined to the criminal provisions in Part VI of the Act. Moreover, the record of public enforcement of these provisions, at least as reflected in concluded proceedings before the Competition Tribunal, is itself quite sparse. Between 1976 and 1986, there were only two reported decisions of the former Restrictive Trade Practices Commission (now superseded by the

---

66 For a review of this experience, see Glenn Leslie ar Stephen Bodle "The Record of Private Actions Under Section 36 of the Competition Act" (199 Competition P Record 50.

67 General Motors of Canada Ltd. v. City National Leasing [1989] 1 S.C.R.

68 See Leslie and Bodley, op.cit.

Competition Tribunal) - one an exclusive dealing case[69] and the other a tying case[70]. Since the 1986 Amendments, the Tribunal has decided two refusal to deal cases (section 75)[71], two abuse of dominant position cases[72], one exclusive dealing case[73] and two contested merger cases[74]. In public enforcement proceedings under Part VIII of the Act, the primary remedy is injunctive relief (cease and desist orders), and only in extreme cases where such orders are likely to prove ineffective, structural relief. The Tribunal cannot impose fines for conduct or practices found to violate any of the provisions of Part VIII except for ensuing breaches of orders that it has made with respect to such conduct or practices.

iii) Australia

With respect to the Australian experience, prior to 1974 private statutory rights of action for breach of prohibited restrictive practices were not recognized. However, the Trade Practices Act of 1974 provides that private parties may bring proceedings before the Federal Court relating to restrictive trade practices under Part IV of the Act. Remedies available to private litigants include single damages; injunctions (except for mergers); divestiture orders for mergers only; and other orders. The Federal Court of Australia Act also permits a person to bring a representative or class action on behalf of others. According to a recent comment on the Australian experience by David Smith[75], the Trade Practices Commission actively encourages private actions as an alternative to instituting proceedings itself. Over the period 1975 to 1994, 79 private actions have been decided under the competition provisions of Part IV of the Trade Practices Act, compared to 61 Commission cases. About a third of the private actions have related to secondary boycotts by labour unions, which do not fall within the Canadian Competition Act. Setting aside these cases, misuse of market power, anti-competitive agreements and exclusionary provisions, and exclusive dealing are the most common areas of private enforcement activity. In the Australian experience, apparently the type of

---

69 Director of Investigation and Research v. Bombardier Ltd. (1980) 53 C.P.R. (2d) 48.

70 The Director of Investigation and Research v. BBM Bureau of Measurement (1981) 60 C.P.R. (2d) 26.

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

72 Director of Investigation and Research v. Nutrasweet Co. (1990) 62 C.P.R. (3d) 1; Director of Investigation and Research v. Laidlaw Waste Systems Ltd. (1992) 40 C.P.R.(3d) 289.

73 Director of Investigation and Research v. Neilson (1995) (as yet unreported).

74 Director of Investigation and Research v. Hillsdown Holdings Ltd. (1992) 41 C.P.R. (3d) 289; Director of Investigation and Research v. Southam Inc. (1992) 43 C.P.R. (3d) 161.

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

practices or conduct where private action has occurred or is most likely to occur involve some of the per se breaches or the less complex rule of reason or abuse cases - that is conduct with immediate impact or detriment, for example, refusal to supply, boycott, supply on discriminatory terms, blatant misrepresentations in advertising or promotional material. Over the entire period 1975 to 1994, private parties have challenged only two mergers by way of an application for a declaration, which may be followed by a divestiture order. Injunctive relief is not available to private parties seeking to oppose a merger. Smith claims that there is acceptance by all stakeholders of the positive role that private enforcement has played in the application of competition law in Australia and that the right of private action has complemented public enforcement and played a significant role in enhancing the level of understanding of the Trade Practices Act and the overall level of compliance within the business community.

B. Theoretical Debates Over Private Anti-trust Enforcement

i) Penalties for Anti-trust Violations

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

In the first systematic treatment of the policy implications of alternative antitrust penalties, Elzinga and Breit in their 1976 book[76] posed the question of the optimal enforcement of anti-trust laws. In theory, they argued that the marginal social benefits of enforcement decline as more cases are brought with respect to less serious or more debatable practices, while the marginal social costs of enforcement rise with increasing levels of enforcement. Thus, in an ideal world public and private resources would be invested in enforcement activity up to the point where the marginal cost of enforcement is equated with the marginal benefits of enforcement - not less and not more. Stated differently, the policy objective should be to minimize the costs resulting from harmful conduct and the costs incurred in reducing it.[77] This implies less than perfect or complete enforcement of anti-trust

---

76 Op.cit.

77 Warren Schwartz, Private Enforcement of the Antitrust Laws (Washington, D.C.: American Enterprise Institute, 1981).

laws. The authors acknowledge (as do Finkelstein and Quinn in a Canadian context[78]) that it is impossible to determine whether existing levels of enforcement are at, below, or above this level. In the nature of things, this would require detailed information on the underlying incidence of anti-trust violations, and not merely those that have attracted formal enforcement activity. This information is unknown, and almost by definition unknowable.

Elzinga and Breit argue in their book that the four principal sanctions available for antitrust violations i.e. 1) fines 2) incarceration 3) treble damages and 4) structural remedies, all present their own problems, but appropriately structured fines are a more effective deterrent than any other type of sanction. With respect to incarceration, they point to the traditional reluctance of U.S. courts to jail anti-trust violators, in part because in large corporations it is often difficult to identify with confidence individuals in senior management who were ultimately responsible for initiating the offending practice. In the case of structural remedies, such as divestiture, which have also been infrequently used, there are problems in fashioning remedies that do not forfeit economies of scale and scope; administrative problems in unscrambling assets once combined; and problems of determining to whom divestiture should occur in order to promote a more pro-competitive outcome. With respect to treble damages, they argue that treble damages promote three sets of social costs: first, perverse incentive effects, where plaintiffs have an incentive not to adopt precautions to avoid or minimize the impact of anti-trust violations on them, given the windfall that treble damages often represents; second, misinformation effect where plaintiffs have a strong incentive to misrepresent pro-competitive or competitively neutral behaviour as anti-competitive in order to realize the gains from a treble damage award; and third, reparation (transaction) costs that are entailed in determining both liability and fixing quantum.

The authors argue that while historically fines for anti-trust violations in the U.S. have been trivial, and thus have entailed suboptimal deterrence, a properly structured fine regime is the most efficient form of deterrence. They argue that anti-trust violations should be penalized by a mandatory fine of 25% of a firm's pre-tax profits for every year of anti-competitive activity. Given this mandatory fine, public enforcement authorities can then increase or decrease the amount of monopolistic activity by altering the amount of resources invested in detecting and convicting violators. Indeed, since publication of the authors' study, fines for many antitrust violations in both the U.S. (reflected in the U.S. Sentencing Guidelines) and Canada have increased dramatically. They argue that public agencies have an advantage in investigating anti-trust violations in that they have at their disposal investigatory powers that would entail significant potential for abuse if extended to the private sector and that casual evidence suggests that almost every important

---

78 Neil Finkelstein and Jack Quinn, "Reevaluating the Role of Private Enforcement and Private Party Access to the Competition Tribunal", paper presented at the University of Toronto Faculty of Law December 8, 1995.

development in anti-trust law has occurred in government suits. Private parties under their regime would still have an incentive to inform public agencies of alleged violations, given that the cost of providing such information is so low. With respect to the argument that equity demands that victims of anti-trust violations be compensated, they point out that determining the identity of those damaged by anti-competitive behaviour and the extent of the damages is analogous to the problem in Public Finance theory of determining the incidence and burden of a tax in that monopoly overcharges, depending on elasticities of demand and supply in input and output markets, will be shifted in varying degrees backwards to suppliers, employees, shareholders or creditors, or forward to direct and indirect purchases, as well as inducing inefficient substitution effects (deadweight losses), that will be next to impossible to measure with any degree of accuracy and at reasonable cost in any compensation-based regime. In a later paper[79], they refer to a comment by Posner to similar effect: "Everybody's economic welfare is bound up with everybody else's. Why stop with the ultimate consumer? If he is forced to pay a high price for a product, demand for other products will fall, and this may hurt the suppliers of those products, and the suppliers' suppliers and so on ad infinitum."[80] They emphasize in this later paper that deterrence and compensatory rationales for private rights of action imply quite different research and policy agendas. This is a crucially important issue throughout the debates over private anti-trust enforcement and warrants further comment.

ii) Deterrence and Private Enforcement

With respect to the deterrence rationale for private enforcement, as with public enforcement, the optimal sanction is a product of the probability of successful action and the sanction in that event, yielding an appropriate expected cost of violation. However, with private enforcement (unlike public enforcement) these two variables cannot easily be set independently. If a high sanction is predicated on a low probability of enforcement, this sanction will encourage excessive enforcement activity by private parties motivated by the incentive to capture the high sanction.[81] With public enforcement, enforcement resources can be fixed at a constant level. However, with a mixed and uncoordinated system of public and private enforcement, it is impossible to set the sanction and probability of enforcement in a systematic way.[82] These problems have led some commentators to propose decoupling the amount that the defendant pays and the amount that the

---

79 William Breit and Kenneth Elzinga, "Private Anti-trust Enforcement: The New Learning", (1985) 28 J. of Law and Econ. 405.

80 At p.415.

81 See Landes and Posner, op.cit.; Schwartz, op.cit. (1981).

82 See Schwartz, op.cit. (1981); Schwartz, "An Overview of the Economics of Anti-trust Enforcement", (1980) 68 Georgetown L.J. 1075; Breit and Elzinga op.cit. (1985).

plaintiff receives, in order to avoid incentives to invest in socially excessive levels of enforcement.[83] However, disagreement persists as to whether under a decoupling approach plaintiffs should always receive less than defendants pay, or whether there may be some forms of anti-trust violations entailing large-scale harm that require substantial investments in investigative and enforcement resources where private enforcement is unlikely to occur unless the plaintiff receives more than the defendant pays[84]. Where decoupling involves defendants paying more than plaintiffs receive, there are legitimate concerns over collusive and socially suboptimal settlements that may compromise deterrence objectives. Other proposals entail detrebling of damages for readily observable violations e.g. mergers, tying, exclusive dealing, refusals to deal, or for most suits by rivals, where the probability of detection is high, and retaining treble damages only for non-readily observable violations, e.g. price fixing.[85]

On a deterrence rationale for private anti-trust enforcement, even if the problem of the multipler could be resolved so as to induce a socially optimal level of investment in anti-trust enforcement activity, there is still the question of how to determine the damages to which the multiplier is to be applied. Two basic choices are available: first, to set the basic damage equal to the gains by the party who has engaged in anti-competitive violations, or second, to set the basic penalty equal to the harm caused by that activity. With respect to the first option, it is important to distinguish two classes of cases - those where downstream parties have suffered a monopolistic overcharge and those where competitors are complaining of exclusionary practices.

In the first class of case, to remove all gains from the violator from engaging in monopolistic practices may discourage the pursuit of practices that result in greater gains to it and others than harm to society (e.g. a merger which yields some price increases but also enables the realization of even greater cost efficiencies). To allow recovery of the full monopoly overcharge may also ignore the costs incurred by the monopolist in obtaining monopoly power. These difficulties suggest that it may be preferable to define the basic damages so as to reflect harm to society rather than gains to the monopolist.[86] In this case, the optimal damage measure is arguably the sum of the deadweight loss triangle (reflecting inefficient substitution effects) and the profit rectangle (relative to the competitive price), which will force a

---

83 See Schwartz, op.cit.

84 See Mitchell Polinsky, "Detrebling v. Decoupling Anti-trust Damages: Lessons from the Theory of Enforcement", (1986) 74 Georgetown L.J. 1231.

85 See Breit and Elzinga, op.cit. (1985); Frank Easterbrook, "Detrebling Anti-trust Damages" (1985) 28 J. of Law and Econ. 445; Herbert Hovenkamp, "Treble Damages Reform" The Antitrust Bulletin, Summer 1988 233.

86 See Schwartz, op.cit. (1980).

potential monopolist to compare any private cost savings from the activity with the deadweight loss triangle.[87] In this respect, compensating parties only for the monopoly overcharge will underdeter because it will ignore welfare losses sustained by parties who have inefficiently substituted away from the monopolized good.

Where the anti-competitive practice complained of involves competitors complaining of exclusionary practices by rivals, damages sustained by plaintiffs (e.g. diminished going concern value of firm, discounted foregone profits) may poorly reflect harm to society, although one could in principle set the optimal damage measure in the same fashion as in suits by down-stream parties. However, to the extent that private anti-trust proceedings are designed to pre-empt successful exclusionary behaviour (e.g. predation) these effects will be difficult to estimate, and in any event may not fully capture all the social costs (including costs to competitors) that exclusionary conduct engenders.[88] In short, damages suffered by plaintiffs in both classes of cases will be a poor means of reflecting either benefits realized or harm caused to society from violations.

In these debates over the optimal structure of a deterrence-oriented private enforcement regime, it is important to stress that if substantive rules could discriminate perfectly between efficient and inefficient behaviour, and courts and tribunals could apply these rules perfectly (i.e. error costs are zero), there would be little need to worry about the structure of penalties. As Easterbrook remarks: "Those whose conduct is beneficial would be left alone. Others could be hanged".[89] Error costs engendered either in the framing of over-inclusive or ill-defined substantive rules or in their adjudication tend to strengthen the case for public enforcement over private enforcement, in that prosecutorial discretion, if properly exercised, can temper these costs, while private parties have no incentive to take account of the social consequences of error costs. However, this in turn implicates another dimension of the debate over public or private enforcement which is inherently intractable. That is, while it is possible to deduce some of the incentive properties of various private enforcement regimes for private parties and at least the nature if not the magnitude of the social costs and benefits that are likely to be associated with these incentive properties, public enforcement implicates the incentive properties operating on bureaucrats, politicians, and judges or adjudicators. However indeterminate the analysis of the efficiency properties of private enforcement regimes, we have an even less firm grasp of the incentive properties of key public sector decisionmakers in this area. For example, will politicians be properly motivated to enact only welfare-enhancing competition laws and allocate appropriate budgets for their enforcement to the relevant public

---

87 See Breit and Elzinga (1985) op.cit.

88 See Hovenkamp, op.cit.

89 See Easterbrook, op.cit; M. Block and J.G. Sidak, "The Cost of Anti-trust Deterrence: Why Not Hang a Price-Fixer Now and Then?" (1980) 68 Georgetown L.J. 1131.

agencies? Will officials and employees in these agencies have appropriate incentives to investigate and enforce these laws, subject to budget constraints, in ways that are designed to maximize social welfare? Will judges and adjudicators charged with interpreting these laws possess the necessary incentives, information and expertise to interpret and enforce them in ways that maximize social welfare?

James Musgrove argues that those who wish to make changes to the present enforcement regime bear the burden of proof as to why changes are necessary or desirable.[90] In our view, this misconceives the nature of the policymaking process. On almost any important public policy issue, we never know enough to be absolutely certain whether a change in policy is likely to enhance social welfare until we try it and observe the consequences. That is to say, policymaking in the real world has a substantial trial and error component to it. If the burden of proof were as demanding as Musgrove argues, which would entail knowing at any given time whether the legal system is precisely at the intersection between the marginal social benefit and marginal social cost functions in anti-trust enforcement (an unknowable datum), we would never have been able to justify enacting competition laws in the first place or in amending them extensively over the past two decades with a view to rendering them more effective, or in adopting the private damage remedy in Section 36. In all of these cases, none of the critical information that in an ideal world one would want to have was available at the time that these changes were made.

iii) Compensation and Private Enforcement

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

> I will say that I know of no widely espoused ground for redistributing wealth that is effectively served by

---

90 James Musgrove, "Remedies for Reviewable Conduct: Adjusting the Balance" Canadian Competition Record, Summer 1995.

providing compensation to persons injured by anti-trust violations.

> One must begin with the realization that disparities in outcome among individuals will inevitably occur. People are born more or less wealthy, with more or less intelligence, and prove to be more or less lucky. Which of the many causes of the disparity in outcome justify compensation? When is the outcome so unfortunate, whatever its cause, that compensation should be paid?
>
> From neither of these perspectives do anti-trust violations seem to provide a good case for compensation. The losses from antitrust violations are widely dispersed, do not represent the disappointment of strongly held expectations, and can in many cases be adapted to without severe dislocation in the lives of the persons affected. Moreover, existing welfare laws, unemployment compensation, bankruptcy laws, and a number of provisions in the tax laws provide relief from any catastrophic losses, including those that might result from an antitrust violation.
>
> Of course, the issue is not whether compensation would be justified if it could be provided without cost. If compensation is incorporated as a goal of a private system of antitrust enforcement, the efficacy of the system is greatly impaired. There are, moreover, substantial costs, which will impede the process of providing compensation even if the goal is accepted in principle. The payment of compensation in antitrust proceedings seems both an ineffective way to achieve justice and an unjustifiable impairment of the effort to enforce the law.[91]

Again, we do not find these arguments compelling. The case for compensation in other private law contexts does not rest on any notion of distributive justice of the kind that Professor Schwartz outlines, but a notion of corrective justice[92], whereby irrespective of the wealth of the respective parties, where one party engages in a form of wrongdoing which violates the equal autonomy of another party, a legal obligation is recognized to correct for the consequences of that wrongdoing. This theory of corrective justice best explains

---

91 Warren Schwartz, Private Enforcement of the Antitrust Laws, op.cit. (1981) at pp.31-32.

92 See Ernest Weinrib, The Idea of Private Law, (Cambridge, Mass.: Harvard University Press, 1995).

why in various areas of private law (such as tort and contract law) we recognize the right of innocent parties to secure compensation from those who have wronged them, not primarily for instrumental reasons, such as deterrence, even though this may often be a socially beneficial by-product of such claims by increasing the probability of liability and hence the expected cost of violations. This case is clearest under the Bureau's proposed civil misleading advertising provisions, where a violation may often also be a tort or breach of contract but where the Competition Act may offer more effective and generic forms of relief (such as restitution) in cases involving large numbers of small grievances. The question that arises in the reviewable practices context is whether this case is any weaker here than in other areas of law.

The enactment of s.36 of the Competition Act in 1976 (following abandonment of the earlier double damages proposal) can be interpreted as a recognition of the compensation rather than deterrence rationale for private enforcement of our competition laws - most plausibly on a corrective justice basis. The follow-on or piggy-back features of both s.36 of the Competition Act and s.4 of the Clayton Act are also more consistent with a compensation rather than deterrence rationale for private enforcement. Is there any less persuasive case for applying this rationale to the reviewable practices contained in Part VIII of the Act? First, it needs to be noted that mergers and monopolies at the time of the enactment of s.36 fell within the criminal provisions of the Act and were only transferred to the category of reviewable practices in 1986 so that for the first decade of the private damage remedy it was designed to apply to two of the major classes of reviewable practices today. Second, and conversely, it might be argued that because the reviewable practices entail adjudication on a rule-of-reason basis, in contrast to the criminal violations that arguably entail more sharply defined forms of wrongdoing, it is inappropriate that practices that are determined after the fact in most cases to be breaches of the reviewable practice provisions should sustain claims for compensation in respect of past behaviour. The argument, in short, is that this entails a form of retroactive liability. While this argument is not without force, in the end we do not find it dispositive. In fact many of the practices that fall within the criminal prohibitions, at least in Canada, are not per se illegal. The conspiracy provision (section 45) requires an "undue lessening of competition", which the Supreme Court in the PANS[93] case held involved "a partial rule-of-reason". Other criminal offences such as predatory pricing require proof that the prices in question were "unreasonably low" (s.50(1)(c)). Other offences, such as bid-rigging and fixing interest rates on deposits or loans, are more clearly per se illegal. Thus, the distinction between per se illegality and rule-of-reason review does not closely track the distinction between criminal prohibitions and administratively reviewable practices. Furthermore, in many other areas of the private law, where compensation is routinely awarded for wrongdoing, rule-of-reason review, in effect, is required to determine liability. For example, in negligence actions in tort law, a

93 R. v. Nova Scotia Pharmaceutical Society (1992) 2 S.C.R. 606.

failure to take reasonable care is typically a pre-condition to liability and also typically requires fact-intensive review of the impugned conduct in question ex post facto. However, neither in the tort of negligence nor with respect to reviewable practices under the Competition Act are the courts or Tribunal making decisions in particular cases unconstrained by general legal principles - that is to say, they are not simply making up the law retrospectively.

Thus, we conclude that at the level of principle, the case for compensation of parties injured by reviewable practices found to violate Part VIII of the Competition Act is compelling, while the case for structuring private enforcement remedies in this context to serve deterrence ends is much less persuasive. We take this latter view because if policymakers were concerned to assign a priority to deterrence with respect to reviewable practices, we accept one of the implications that emerges from the recent scholarship on private anti-trust enforcement in the U.S. that an appropriately structured fines regime is likely to be a much more efficient form of deterrence than any other form of sanction, public or private. Moreover, the U.S. experience suggests serious conceptual difficulties in designing a private enforcement regime that simultaneously serves both deterrence and compensation rationales. Asking a single policy instrument to serve multiple objectives is often a prescription for policy incoherence. The fact that legislators in Canada have not seen fit to attach any public sanctions to reviewable practices, other than the possibility of preventing their continuance, suggests that it would be a deep second-best response to the case for deterrence to attempt to offset this decision through deterrence-oriented private remedies. However, given this decision to eschew deterrence objectives with respect to reviewable practices - in sharp contrast to U.S. anti-trust law where such practices may attract both publicly enforced fines and privately enforced treble damage awards - it seems to us that at a minimum legitimately aggrieved victims of practices found to be anti-competitive under Part VIII of the Competition Act ought to receive compensation for their injuries. In our view, this argues for extending S.36 of the Competition Act to reviewable practices, but vesting in the Tribunal, rather than the courts, the right to award compensation to private parties in the event that it finds a practice to violate the Act in addition to adopting orders designed to ensure the discontinuance of the practice in future.

We are aware, of course, that the Competition Policy Bureau in its Discussion Paper on Competition Act Amendments of June 1995 proposes only that private parties be entitled to apply directly to the Tribunal for injunctive (not compensatory) relief with respect to reviewable practices that fall within Part VIII and that even in this case mergers be excluded from this proposed regime. We note in this respect that s.16 of the Clayton Act has provided private parties with access to this form of relief from the courts since 1914 (with no exception for mergers) and that this issue is regarded as so peripheral to debates over private enforcement of anti-trust laws in the U.S. that it warrants a mere footnote in Elzinga and Breit's widely-cited book on

the topic,[94] and less than a page in Hovenkamp's extensive treatment of the subject.[95] The case for at least this degree of private access to the Competition Tribunal seems to us to be unanswerable. First, even injunctive relief that corrects the situation for the future engages directly the corrective justice rationale for private rights of action in respect of validated claims of wrongdoing. Second, the Competition Policy Bureau has recently sustained significant cuts to its enforcement budget. Over the past three years, its operating budget has been reduced by about two million dollars and further cuts seem likely and the number of FTE personnel reduced from 274 to 245.

This has occurred at precisely the time when its responsibilities appear to be significantly expanding, particularly with respect to industries that were formerly publicly owned and/or closely regulated but where a combination of privatization and/or deregulation has opened up the fact or possibility of competitive segments emerging in these industries requiring the application of general framework competition laws rather than detailed, industry-specific regulation.[96] Indeed, some of the critics of the Bureau's proposal to provide private parties access to the Tribunal for injunctive relief in respect of reviewable practices have been prominent amongst those advocating a substantially enlarged role for the Director in these sectors.[97] At a time of severe fiscal restraint, it is disingenuous to suggest, as the Competition law Section of the Canadian Bar Association does in its submission to the Bureau on its reform proposals, that if public enforcement is inadequate additional public funding should be sought for the Bureau, when over the entire range of government functions, from welfare to employment to education, individuals are being asked to assume a larger responsibility for their own well-being. It is not unreasonable to ask private parties aggrieved by alleged competition law violations to do the same.

Third, because we have so limited an understanding of the incentives operating on politicians and bureaucrats in contexts such as the present, to vest an enforcement monopoly in the Bureau and its political overseers is inconsistent with general norms of public accountability. It is particularly incongruous to maintain the virtues of a public monopoly in the context of the enforcement of competition laws whose primary aim is to redress the adverse social consequences of private monopoly. In our view, the floodgates objection either to our proposal that both compensatory and specific relief be available to private parties with respect to

---

94 Elzinga and Breit, op.cit. (1976) p.16, fn27.

95 Herbert Hovenkamp, Federal Antitrust Policy (West, 1994) at 551.

96 See Finkelstein and Quinn, op.cit.; Smith, op.cit.

97 See Lawson Hunter et al., "All We Are Saying, Is Give Competition A Chance - The Role of Competition Policy in Industries in Transition from Regulation to Competition", paper presented at the University of Toronto, Faculty of Law, December 8, 1995.

reviewable practices or the Bureau's more limited proposal for specific relief only, and attendant concerns over frivolous, vexatious, and harassing litigation and a consequent "chill" on pro-competitive or competitively neutral conduct, carries limited force. We appreciate that private enforcement mechanisms in the present context, as in other civil contexts, may be employed for privately advantageous strategic purposes that are antithetical to the social welfare objective of the legislation, but we view these concerns as warranting close attention to design variables that can constrain such possibilities, rather than denying private rights of enforcement altogether in all cases. These concerns are most legitimate in the case of time-sensitive mergers where delays may undermine the terms of the acquisition (in the case of stock acquisitions or capitalizations) or generate damaging forms of uncertainty for management, employees, suppliers and customers of the merging parties. As we argue in the next section, this suggests a case for considerable caution in making interim remedies available to private parties or at the limit may warrant the exclusion of mergers altogether from the private enforcement regime (as the Bureau proposes) until more experience develops with the regime, although we note that injunctive relief, including interim relief, is available to private parties with respect to mergers under section 16 of the Clayton Act (although rarely invoked) and the Australian Trade Practices Act permits private parties to seek declarations and divestitures in the case of mergers (again rarely invoked), but not interim relief.

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

Having so concluded, we recognize that there are a number of important design variables that require to be addressed if our proposal is to be operationalized in an efficient and equitable manner. In short, the devil is largely in the detail. We turn to a detailed analysis of these design issues in the next section of our paper.

III. THE DESIGN OF A PRIVATE ACTION BEFORE THE COMPETITION TRIBUNAL

The first two sections have examined the strengths and weaknesses of private enforcement of public laws in general and competition law in particular. This

section will outline design, procedural and remedial options for allowing private litigants to bring actions in the Competition Tribunal concerning the reviewable practices in Part VIII of the Competition Act. An attempt will be made to identify the features which can maximize the potential of private actions as an effective compensatory and regulatory device while minimizing the social costs of private enforcement.

A wide range of procedural issues will be discussed in this section, all of which are important in their own right. Nevertheless, it is important to bear in mind that all of these features are interrelated. For example, it will be suggested that broad standing rules are desirable from an enforcement perspective, but that they may cause problems of duplicate recovery if damages are available as a remedy. Similarly, the procedures required to screen out frivolous claims may depend in part on the costs rules employed by the Competition Tribunal. In turn, more generous cost rules may be required to make litigation possible if plaintiffs cannot recover damages or interim remedies. In civil litigation, case management strategies frequently stress the need for a holistic approach which monitors and control the behaviour of litigants at all stages of the civil process. Private actions before the Competition Tribunal raise similar issues ranging from the appropriate test for standing, pre-trial procedures including discovery and the availability of interim and final remedies.

A. Standing

i) The American Experience

The appropriate test for granting a litigant standing is a controversial topic in American antitrust law. Section 4 of the Clayton Act[98] provides an apparently simple injury-based test for standing when it states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court...and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The jurisprudence interpreting this provision has become increasingly complex and subject to criticism. Much of this complexity and criticism relates to problems created by the treble damage remedy.[99]

---

98 15 U.S.C.@ 15

99 Daniel Berger and Roger Bernstein "An Analytical Framework for Antitrust Standing" (1977) 86 Yale L.J. 809; Stephen Calkins "Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System" (1986) 74 Geo.L.J. 1065 at 1080, 1101-1104.

In Hanover Shoe v. United Shoe Machinery[100], the plaintiff, a manufacturer of shoes, was granted standing even though the defendant argued that it had not been injured in its business or property because it had passed on increased costs caused by a antitrust violation to its customers. The Court reasoned that the plaintiff as a direct purchaser was in the best position to bring the suit and that allowing the defendant to raise a passing on defence would "require massive evidence and complicated theories".[101] The ultimate consumers of shoes could not be expected to act as private Attorneys General vindicating antitrust laws because they "would have only a tiny stake in the lawsuit and hence little incentive to sue."[102] This decision stressed the public interest in vigorous enforcement by those with the most incentive to litigate and preventing unjust enrichment to the benefit of antitrust violators more than achieving corrective justice. The plaintiff would receive a windfall if it had indeed successfully passed on the costs of monopoly to its customers and the customers would be denied a valid claim for compensation if they had absorbed costs associated with the violation. The danger of a broader standing rule was that allowing both the direct purchaser and the consumer to bring separate actions could result in duplicate recovery. If an injunction or a remedy other than damages was requested, however, granting the consumer standing would not pose a particular problem.[103] As the Court noted, it would be unwise to rely on diffuse consumers to bring an action, but nevertheless should such an action be brought, the main problem would be correctly apportioning the damages suffered between direct and indirect purchasers.

In Illinois Brick v. State of Illinois[104], the state of Illinois and local governments sued a brick manufacturer claiming that they were injured by illegal overcharges on concrete blocks that were installed in governmental buildings by masonry contractors. The governments were in the position of the ultimate shoe purchasers in Hanover Shoes, but perhaps because they were governments with regulatory interests, they brought an action. In a very controversial decision, the Supreme Court denied standing noting that it was "unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages

---

100 392 U.S. 481 (196)

101 ibid at 493

102 ibid at 494

103 There might be some double jeopardy problems if the direct and indirect purchasers brought successive suits, but this would be less likely if damages were not available or modest. As Hovenkamp observes: "equity suits create no risk of duplicate recovery: it costs a defendant no more to comply with ten identical injunctions than to comply with one. Lowers courts have held that an indirect purchaser may seek an injunction against a cartel." Herbert Hovenkamp Federal Antitrust Policy The Law of Competition and its Practice (St. Paul: West, 1994) at p.568.

104 431 U.S. 720 (1977)

among all 'those within the defendant's chain of distribution."[105] As in Hanover, the court was concerned that broader standing rules would bring too many parties into the litigation and complicate the task of calculating and apportioning damages.[106] The dissent argued that not only would granting indirect purchasers standing recognize the compensatory claims of such ultimate consumers, but it would also recognize that direct purchasers may be unwilling to bring antitrust actions against their direct suppliers.[107] This is an important consideration because the effect of the restrictive Illinois Brick decision is that, absent public enforcement, a supplier and a direct purchaser can contract out of antitrust laws and perhaps pass the costs on to a more diffuse group of consumers who even if they had the incentive to sue, would be legally prohibited from doing do. In addition, an action between a direct purchaser and its supplier may be more vulnerable to a collusive settlement that does not fulfil the broader public interest in enforcement.[108]

In a less controversial decision the same year, the Supreme Court ruled that a plaintiff only has standing to recover damages caused by an "antitrust injury"[109]. The plaintiffs ran bowling alleys and brought an action against Brunswick Corp. after it purchased a number of bowling alleys that had gone out of business in part because of debts owed to Brunswick for its bowling equipment. The Supreme Court held that even if Brunswick's acquisitions violated antitrust laws, the plaintiff bowling alleys did not have standing to recover damages caused to them by the increased competition created when Brunswick took over the bankrupt bowling alleys. Any damage suffered by the plaintiff was not an antitrust injury because it could have been suffered without any antitrust violation, for example if the bowling alleys had been refinanced or taken over by another company with less market concentration. The Court stressed that recovery of damages in these circumstances would be "inimical to the purposes" of anti-trust laws which were enacted for "the

---

105 ibid at 746

106 See also Associated Gen. Contractors Inc. v. California State of Carpenters 103 S.Ct. 897 at 911 (1983) denying a union standing to bring an anti-trust action on the basis that it was not as directly affected as a competitor or a direct purchaser. In other cases, however, the American courts have granted standing to plaintiffs who may not be directly affected. Blue Shield v. Virginia 457 U.S. 465 (1982); Re Insurance Antitrust Litigation 113 S.Ct. 2891 (1993). See generally Herbert Hovenkamp Federal Antitrust Policy The Law of Competition and its Practice (St. Paul: West, 1994) ch.16.

107 Even the majority conceded that "direct purchasers sometimes may refrain from bringing treble damages suits for fear of disrupting relations with their suppliers" ibid at 746, but concluded that after denying defendants a passing on defence in Hanover, it was only fair to prohibit the ultimate victims of passing off from bringing claims.

108 The regulation of settlements in private antitrust actions will be discussed infra under the heading "Supervising Settlements".

109 Brunswick Corp. v. Pueblo Bowl-O-Mat 429 U.S. 477 (1977).

protection of competition, not competitors."[110] Again, this restriction on standing is intimately connected with the damage remedy. The plaintiffs in this case may have been more likely to engage in strategic behaviour because they were challenging the activities of their competitor. Nevertheless, if their claim that Brunswick violated antitrust laws was well-founded, there is no intrinsic reason why a remedy other than damages, such as an injunction or divesture, would not be appropriate.

The requirement for proof of an antitrust injury is related not only to the remedy sought, but also the liability rule employed. If a substantial lessening of competition must be proven to establish liability, the likelihood that a plaintiff's damages will not be an antitrust injury is drastically reduced. Nevertheless, there may be some utility in requiring plaintiffs to plead an antitrust injury as part of their cause of action. Such a requirement "may expose those complaining of a rival's increased efficiency...[and] also serve to uncover breach of contract claims or other common law claims disguised as antitrust suits."[111]

ii) A Functional Approach to Standing and Damages

There are good reasons why many of the American restrictions on standing will not be necessary or advisable in the context of a private action in the Competition Tribunal with respect to reviewable conduct. The direct injury test required by American courts has been criticized as "inherently unworkable" and "arbitrary even metaphysical"[112]. Denying indirect purchasers or consumers standing would be in tension with the purposes of the Competition Act[113] in providing consumers "with competitive prices and product choices". Nevertheless, the Bureau's June 1995 Discussion Paper proposes that standing be granted either on the basis that a litigant would be "directly affected in their business or property" or "materially affected."[114] The latter phrase is preferable because it could be interpreted to grant indirect purchasers standing on the basis that they have been materially affected by the alleged anti-competitive behaviour. As demonstrated

---

110 ibid at 488. See also Cargill Inc. v. Montfort 479 U.S. 104 (1986); Richard v. USA Petroleum 110 S.Ct. 1884 (1990).

111 Herbert Hovenkamp Federal Antitrust Policy The Law of Competition and its Practice (St. Paul: West, 1994) at p.552.

112 Daniel Berger and Roger Bernstein "An Analytical Framework for Antitrust Standing" (1977) 86 Yale L.J. 809. See also A Ashdjian "Competitor Standing under Cargill Inc. v. Montfort : An Erosion of the Clayton Act" (1987) 37 Amer.U.L.Rev. 259; Clare Defense "A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions' (1984) 72 Calif.L.Rev. 437; Kurt Saunders "Diluting our Antitrust Laws: Federal Standing under Section 4 of the Clayton Act" (1984) 46 U.Pitt.L.R. 241.

113 R.S.C. 1985 c.C-34 s.1.1.

114 Bureau of Competition Policy Discussion Paper June 1995 at p.23.

above, the direct injury test is underinclusive in achieving corrective justice because it prevents ultimate consumers from seeking compensation for antitrust injuries that they have suffered. It is also underinclusive from a deterrence perspective because it relies exclusively on direct purchasers to act as private Attorneys General even though they may be reluctant to bring or continue actions against their suppliers.

The rationale for limiting standing to direct purchasers is related almost entirely to concerns about multiple recovery of damages against the defendant and making the assessment of damages more difficult.[115] Treble damage awards increase the likelihood that plaintiffs including indirect purchasers will compete for damage awards and also increase the danger that multiple recovery will harm defendants. Nevertheless, the problems of duplicate recovery and assessment of damages that have motivated American courts to restrict standing are present even if only single damage remedies are used. So far, the experience with single damages under s.36 of the Competition Act has been so sparse that it is not yet known whether Canadian courts will use the blunt remedy of a denial of standing to deal with the difficulties in calculating and apportioning damages.

A better approach would be to allow indirect purchasers standing to bring an action, but to exercise caution in awarding damages to minimize the risk of duplicate recovery.[116] One method would be in an action brought by either a direct or indirect purchaser to invite or require intervention by the other to ensure that they would be bound by the judgment and estopped from bringing actions in the wake of a successful action. This approach would require the Tribunal to notify potential litigants and bind them by a judgment. It would be preferable to either allowing duplicate recovery or estopping a litigant by the result of a previous case of which it had no notice. The ultimate protection against duplicate recovery will be requiring each party to carefully establish its damages.

Another issue that will be confronted should any damage remedy be available is whether the damage caused to the plaintiff was caused by the antitrust violation or some other factor including increased competition. The American courts in requiring the plaintiff to establish an antitrust injury have rightly been reluctant to award a plaintiff damages that were not caused by the anti-competitive effects of a violation. The requirement of an antitrust injury can be supported on the grounds of corrective justice (restoring the plaintiff only to the position it would have

---

115 One possible justification is that an incentive to bring an action will be created by pooling the damages for direct purchasers and not allowing indirect purchasers to dilute the damages available. This may be so, but under American law, the danger that enforcement will break down should the direct purchaser not bring a suit is equally as great.

116 There is also a danger of duplicate recovery if a litigant recovers damages under both the Competition Act and some common law form of action. This possibility will be discussed infra under the heading "Choice of Forum".

occupied absent the violation) and on regulatory grounds (discouraging plaintiffs from seeking damages for harms caused by competition). Nevertheless, it should be recognized that determining the exact extent of an antitrust injury may be difficult and resource intensive. The plaintiff will not only bear the burden of demonstrating some loss, but also that the loss would not have been incurred but for the anti-competitive behaviour.[117] The requirement of an antitrust injury will make the assessment of damages more resource intensive, but it may also help minimize the use of private actions for strategic reasons that are unrelated to the purposes of the Competition Act.

The standing test for private plaintiffs should be flexible enough to ensure that a plaintiff does not have to wait to sustain harm before being granted standing. Again, standing is related to remedies. A plaintiff who has to wait until a supplier's announced refusal to deal has actually caused material hardship may be placed in the position of having to claim substantial damages. It is better to allow the plaintiff to bring a case in the Tribunal on the basis of an apprehended violation. This may allow the matter to be litigated more quickly, which is an important consideration especially if the plaintiff has restricted access to interim remedies. The Tribunal should retain the power to deny standing if the plaintiff's claim is only hypothetical or speculative.

iii) Public Interest Standing without Damages

If damages are not available as a remedy, a strong case can be made that standing should not, as it is under s.36 of the Competition Act, be restricted to those who have "suffered loss or damage as a result of" a violation. This test could preclude a public interest litigant such as a consumer, employee or industry association from bringing an action even though they might have a broader ideological or financial interest in pursuing an action. The requirement that a plaintiff be directly affected by the impugned practice makes sense if the purpose of the legislation is to achieve corrective justice. If deterrence or the prevention of unjust enrichment is included as legitimate purposes, however, any litigant should be able to act as a private Attorney General. Consumer groups for example might be in a good position to enforce civil misleading advertising provisions even though they might not be directly affected by the impugned practice. Similarly, industry associations may be in better position to bring claims concerning refusals to deal or exclusive dealing, than individual firms that may have fewer resources and be more vulnerable to retaliation from a respondent. Given that the incentives to bring any action will be less if damages are not available, it might be imprudent to deny standing to those who act because of altruistic or ideological motives. This is particularly the case in the civil misleading advertising context, where damages suffered may be quite small and/or difficult to establish. As is the case with public

---

117 As suggested in the second section, fines can be more easily calibrated than damages to achieve optimal deterrence.

law adjudication, such cases may make important qualitative additions to the jurisprudence concerning reviewable practices. Nevertheless, it can be expected that the bulk of actions will be undertaken by competitors and customers who have a material interest in securing compliance in the future.[118]

Should damage awards not be available, an extremely broad standing rule would be possible and even desirable. For example, one submission to the Bureau's Advisory Committee on amendments to the Competition Act proposes that standing be granted to "persons or organizations having a legitimate, substantial interest in a manner."[119] The Ontario Law Reform Commission has proposed that when a person without a "personal, proprietary or pecuniary" interest in a matter applies for standing the following factors should be considered:

> 1) whether the issues raised in the proceeding are trivial
> 2) the number of persons affected in any way, whether personally or otherwise
> 3) if the issues raised against the defendant have been raised in another proceeding and whether the plaintiff can intervene in that proceeding
> 4) whether to proceed would be unfair to persons affected
> 5) whether another reasonable and effective method exists to raise the issues sought to be litigated.[120]

The difficulty is that this test is quite elaborate and covers matters, such as whether the issues are trivial, that are more appropriately considered at summary judgment. It is also impractical to stress whether there are other means to bring the challenge[121], because the Director could always bring an action. Granting broad standing to those with a legitimate and substantial interest in a matter is preferable. There is no reason to believe that such public litigants will be more motivated by strategic considerations unrelated to the purposes of the Act than direct purchasers or competitors. In any event, procedures other than a denial of standing are better suited to address the danger of strategic behaviour by any plaintiff.

---

118 In the Georgetown study, 36.5% of plaintiffs were competitors; 27.3% were dealers; 12.5% were customer companies: Steven Salop and Lawrence White "Economic Analysis of Private Antitrust Litigation" (1986) 74 Geo.L.J. 1001 at 1007.

119 Unitel submission

120 Ontario Law Reform Commission Report on the Law of Standing (Toronto: Ministry of the Attorney General, 1989) at pp.183-4 (s.2(2) of a Draft Act respecting Access to Courts.)

121 This is an increasingly important considerations in other standing contexts. Canada (Minister of Finance) v. Finlay (1986) 33 D.L.R.(4th) 321 (S.C.C.). See generally Kent Roach Constitutional Remedies in Canada (Aurora: Canada Law Book, 1994) ch.5.

iv) Summary

American restrictions on standing are closely related to the emphasis placed on treble damages. There is little reason why indirect purchasers and ultimate consumers should not have standing provided that damages are assessed with care in order to prevent duplicate recovery. A standing test based on material as opposed to direct effects is superior because it allows legitimate yet indirect claims for compensation to be made and allows a broader range of affected parties to act as private Attorneys General. This is particularly important if direct purchasers are reluctant to bring actions against their suppliers. A standing test based on material effects is not optimal from a deterrence perspective because it would preclude public interest standing by consumer, employee and industry associations who may have a genuine and substantial interest in a matter and a superior ability to litigate than individuals who are directly or materially affected. Challenges to standing should not be encouraged because a denial of standing is a blunt remedy to curtail frivolous and vexatious proceedings.

B. Intervention

i) Public Interest Parties

Section 9(3) of the Competition Tribunal Act[122] provides:

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person.

This provision does not on its face encourage public interest intervention as a friend of the court because it seems to require a public interest intervenor only to make representations on matters that affect that group as distinct from the public at-large. For example, an application to intervene must contain "a concise statement of the matters in issue that affect that person."[123] It might be difficult for a consumer or industry association to demonstrate that it was affected by, for example, a specific allegation of misleading advertising even though they might have information about consumer and industrial practices that would be relevant to the case. The need for this information from intervenors could be greater than in cases commenced by the Director because private parties will not have the same research and investigative capabilities as the Director.

---

122 R.S. 1985 c.19 (2nd Supp.).

123 R.27(2)(c). When an Attorney General of a province requests to intervene he or she is only required to make "a concise statement of the nature of the interest of the attorney general in the proceedings. R.34(2)(b). This is an implicit recognition of the claim of such a representative to represent the public interest as distinct from a personal interest.

The quid pro quo for restricting intervention to those who are directly affected appears to be that intervenors may have robust procedural rights to participate in matters which by definition affect them. In American Airlines v. Competition Tribunal [124], the Supreme Court indicated that an intervenor could, in the discretion of the Tribunal, have "the right to discovery, the calling of evidence and the cross-examination of witnesses." This effectively gives the intervenor the same procedural rights as a party, with the possible exception of the right to appeal. The fact that the intervenor was by definition directly affected by the matter being reviewed figured prominently in the court's decision. In the Federal Court of Appeal, Chief Justice Iacobucci stressed that the requirement that affected intervenors be treated fairly "answers the concern...that a wider role for intervenors will prolong and complicate proceedings before and thereby delay decisions of the Tribunal."[125] If the grounds for intervention were expanded to allow public interest intervention by a party not directly affected, then the case for allowing more than oral argument would be less compelling. More limited participation by public interest intervenors would address concerns that public interest intervention would delay the Tribunal hearings and impose excessive costs on the parties.[126] The Tribunal can also control the ability of intervenors to adduce evidence in order to avoid duplication.[127]

ii) Directly Affected Parties

Even if public interest intervention was allowed, it would be prudent to continue the opportunity that directly affected parties presently have at the Tribunal's discretion to enjoy fuller participatory rights. This would allow the Tribunal to take steps to ensure that all those affected in the matter have an opportunity to call evidence and cross-examine witnesses and perhaps even engage in discovery. To take an example discussed in the previous section, the Tribunal could invite or require a direct purchaser to participate in an action brought by an indirect purchaser. The direct purchaser would likely be a valuable source of

---

124 (1989) 89 NR 241 at 248 (Fed.C.A.) aff'd (1989) 92 N.R. 320 (S.C.C.)

125 ibid at 247.

126 The Tribunal itself has been reluctant to allow intervenors to participate in discovery in part "because running a discovery process involving all the parties and intervenors would be cumbersome." It also noted that "the right of discovery is not a necessary requirement for a fair hearing. Many courts do not provide for such." Director of Investigation and Research v. Air Canada et al. Ruling of the Competition Tribunal on the role of intervenors January, 9, 1989 at pp.10,12.

127 For example, intervenors have been required to demonstrate that evidence that they seek to introduce "is non-repetitive (i.e., that it has not been adequately dealt with in the evidence so far) and that the relevant party has been requested to adduce the evidence, but has refused." Director of Investigation and Research v. Air Canada et al. Ruling of the Competition Tribunal on the role of intervenors January, 9, 1989 at pp. 14-15.

the status of a party would help eliminate the risk of duplicate recovery. In addition, directly affected parties could as intervenors supplement the information that private plaintiffs and respondents provide to the Tribunal.

Directly affected parties may also play an important role as intervenors in cases that they may have intended to initiate, but were pre-empted by the Director taking his or her own enforcement action. Such parties might have valuable information to contribute. In any event, they might have valid claims to receive some compensation from the respondent once liability has been established. The Tribunal could be given the power to order restitution to directly affected intervenors in a proceeding initiated by the Director. Such an intervenor would have to produce evidence of any damages it may have suffered because of the reviewable practice. Intervention in a Director's action to achieve restitution might be preferable to forcing the directly affected party to commence a subsequent action for compensation that follows on and duplicates most aspects of the Director's original action.

iii) The Director

In addition to those who are directly affected by the matter, the Director could retain rights to intervene including participation in discovery, the calling of evidence and the cross-examination of witnesses. One of the major weaknesses of private enforcement is that it can disrupt coherent enforcement policies based on the prudent and reasoned exercise of prosecutorial discretion. In the next section, we will discuss more drastic means to respond to this weakness by granting the Director powers to stay or pre-empt private actions. A less drastic method of preserving some of the positive values of public enforcement policy is to allow the Director broad rights of intervention. This means that before the Competition Tribunal makes a determination that the Director believes is unwarranted, the Tribunal will have been exposed to the evidence and argument that was the basis of the Director's opinion.[128] In order to make the Director's right of intervention meaningful, it will be necessary to require private parties to notify the Director before commencing proceedings. This should not be onerous as in many cases, the private litigant will already have attempted to persuade the Director to take enforcement action. The Director should have a limited amount of time, for example thirty days, to decide whether to commence his or her own action; to intervene in a privately commenced action; or to take no action. It should be clear

---

128 The Tribunal may desire such information. For example, it has commented that "the Director chose not to take any position with respect to Mr. Broome's request for leave to intervene. The Tribunal would have preferred to have had an expression of opinion from that office. The Director has a direct and continuing interest in the development of jurisprudentially sound procedures and practices before the Tribunal. Decisions are always more solidly based when the decision-maker has had the advantage of considered arguments presented by parties having an interest in the matter in issue." Director of Investigation and Research v. Southam Inc. et al. Ruling on Request to Intervene August 9, 1991 at p.5.

that the Director does not have to intervene and that the decision not to intervene does not reflect the Director's views about the merits of the case. Routine intervention by the Director could drain limited enforcement resources. Nevertheless, it may be warranted in those cases where the case may have unanticipated effects on broader competition policy.

It is advisable to make clear that the Director can intervene with respect to any reviewable matter brought before the Competition Tribunal by a private party. One problem with the Australian Trade Practices Act 1974 which allows private enforcement is that it has been unclear whether the Trade Practices Commission can intervene. The Australian Law Reform Commission has recommended that the Commission be given a right to intervene, albeit subject to court approval and conditions in each individual case.[129] There is concern in Australia that the Commission's intervention may impose costs and delay on proceedings commenced by private parties.[130] Nevertheless, it seems appropriate that private parties and intervenors absorb these costs because they are engaging in the enforcement of a public law where prosecutorial discretion has played an important role. The Director will, of course, have to exercise restraint in exercising the right of intervention.

Both the right and scope of intervention rights should be specified in any amendments to the Competition Act. There is precedent for this in s.86 of the Act which allows private parties to apply to the Tribunal to register specialization agreements. The Tribunal can do so, but only "after affording the Director a reasonable opportunity to be heard".[131] It would be desirable to clarify this language to make clear whether the opportunity to be heard includes the right to participate in discovery, call evidence and cross-examine witnesses.

iv) The Director and Appeals

In addition to rights of intervention, the Director could also be given the right to appeal.[132] The Director's right to appeal a case that it has intervened in should only be exercised in the rarest of case. It could, depending on the circumstances, allow the Director to stand in the place of either the original plaintiff or respondent for example where that party could not continue because of the costs of an appeal.

---

129 Australian Law Reform Commission Compliance with the Trade Practices Act 1974 (June, 1994) at pp.37-8.

130 Private Right of Action Some Comments on the Australian Experience at pp.12-13.

131 Competition Act R.S.C. 1985 c.C-34 s.86(1). Section 87(1) provides the same right to the Director when an application by a private party is made to modify a specialization agreement.

132 This right would effectively make the Director a party to private proceedings when he or she chose to exercise the right. Edmonton Friends of the North Environmental Society v. Canada [1991] 1 F.C. 416 (C.A.).

An appeal by the Director would impose costs on the successful party that was forced to respond to an appeal and it should be used sparingly. Nevertheless, it could be justified in a circumstance where the Director genuinely believed that the Tribunal's decision was not simply wrong on the merits, but presented a significant derogation from effective and efficient competition policy. The right to appeal might not be necessary if the Director was given a right to stay or pre-empt a privately commenced action. On the other hand, the case for allowing the Director to appeal would be stronger if he or she cannot prohibit private actions.

v) Provincial Attorneys General

Section 88 of the Competition Act provides that provincial Attorneys General may intervene in any proceedings before the Tribunal when a private party applies with respect to a specialization agreement "for the purpose of making representations on behalf of the province." Similarly, under s.101 of the Act provincial Attorneys General may intervene before the Tribunal to make representations on behalf of the province with respect to applications concerning mergers. The rationale for this provision is unclear. It is difficult to understand why provincial Attorney Generals should have a preferred position over other interested individuals given that, unlike the Director, they do not have a mandate to develop a coherent prosecutorial policy with respect to reviewable matters. The costs of such automatic rights of intervention might outweigh the benefits. Provincial Attorneys General should have fewer participatory rights than the Director and they should have to satisfy the general test for public interest intervention.

C. The Powers of the Director in Relation to Private Actions

One of the most difficult issues in the design of a private right of action is determining what powers the Director should have with respect to privately commenced actions. The exact contours of the Director's powers will depend on the balance that is struck between facilitating private enforcement and preserving the Director's present ability to decide when not to take action with respect to a reviewable matter. As discussed in the first section, one of the benefits of private enforcement is that it allows the Tribunal to review matters even though the Director may not have the resources or incentive to engage in such review. On the other hand, one of the weaknesses of private enforcement is that it prevents the Director from developing a coherent enforcement policy based on deciding when a potentially reviewable matter should not be reviewed.

i) The Director's Powers with Respect to Mergers

The present Act implicitly recognizes the value of the Director's decision not to oppose reviewable mergers, which are particularly sensitive to delay and obstruction by enforcement action even if they are ultimately found to be pro-competitive. Section 102 of the Act allows the Director on an application by parties to a merger to issue an Advance Ruling Certificate indicating that he or she is satisfied that no grounds exist for reviewing the merger as anti-competitive. Such a ruling gives the applicant substantial but not absolute protection from subsequent enforcement actions because of the Director's present monopoly over the prosecution of reviewable matters. Section 103 of the Act provides that if the merger is substantially completed within a year, the Director shall not apply to the Tribunal "in respect of the transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued." In other words, the Director can take enforcement measures even after issuing an Advance Ruling Certificate if the merger is not substantially completed in a year or if he or she receives substantially different information.

If mergers were subject to private enforcement before the Tribunal, the effects of the Director's certificate would have to be addressed. One option would be that the certificate would, subject to the conditions in s.103 of the Act, simply prohibit the Director from intervening in the private enforcement action. This seems to be an unsatisfactory approach for a variety of reasons. The Director should be able to intervene at least to present to the Tribunal evidence and justifications for his advance ruling. As discussed above, the Director should retain the ability to intervene in privately initiated proceedings that raise important issues concerning competition policy.

Andrew Roman has proposed that private actions should be allowed to proceed even if the Director has made an advance ruling approving a proposed merger. He argues that the Director is only a "surrogate - a kind of advocate for the victims appointed without their knowledge or consent [who] should not be able to override the wishes of the actual or prospective victims themselves. Those who are directly affected are likely to have a better understanding of their own needs and problems than can any surrogate bureaucracy."[133] With respect, this argument misconceives the role of the Director and the nature of modern competition law. Competition law is primarily concerned with promoting a policy that enhances social welfare rather than the vindication of private rights. For this reason, the Director is more than a surrogate for private individuals and corporations, but rather a policy-maker. Allowing private actions in the face of an advance ruling on a proposed merger would eviscerate much of the value of the advance ruling.

---

133 Andrew Roman Consumer Enforcement of Competition Laws (Ottawa: Public Interest Research Centre, May, 1989) at pp.21-22.

A rejection of Roman's proposal might lead one to conclude that the issue of the certificate should bar any private proceedings. This approach would ensure that the Director maintains full control of merger policy and a monopoly over enforcement. However, just as Roman's proposal eviscerates the Director's role, this approach eviscerates any role for party parties who may be directly or materially affected by the proposed merger. A private action would only be contemplated when one of the affected parties or perhaps a public interest organization firmly believed that the Director was wrong when he or she issued the certificate. An automatic stay of a private action on the basis of the Director's prior actions under s.102 of the Act would do nothing to dispel lingering suspicions that the Director's judgment was misguided. It would prevent private actions from promoting accountability for the Director's decision not to oppose the merger.

A compelling intermediate approach would be to allow a private litigant some access to the Tribunal to commence a challenge to a merger but then allow the Director to issue a stay after presenting reasons to the Tribunal.[134] This approach balances the value of allowing the Director to control prosecutorial policies with respect to mergers with the value of allowing private enforcement to cast sunlight on the Director's decision not to prosecute. An alternative means to promote accountability would be to require a hearing and reasons each time a certificate was issued, but this would impose a significant burden on the Director even in cases where no one is prepared to challenge his or her decision.

Remaining design issues are at what point the Director should be allowed to stay a private merger challenge and whether the Tribunal should be allowed to review the reasons that the Director provides to justify the stay. If the goal is to maximize sunshine and accountability, the private plaintiff should be given some time to develop its case that the merger is illegal. As will be discussed below, the plaintiff could be allowed to proceed until the action had been certified or survived summary judgment. This approach, however, could delay time-sensitive mergers if interim remedies were available. If a private litigant could not seek such remedies, the proceedings might nevertheless chill merger activity. This concern could, however, be addressed if the Director made clear at an early stage his or her ultimate determination to stay the proceedings. The Tribunal should be able to require the Director to present reasons to justify the stay. Nevertheless, the Tribunal is not going to be in a good position to take a hard look at the merits of the reasons. The reasons for declining to oppose a merger are notoriously difficult to subject to judicial review. Most likely, any form of judicial review would be so deferential as not to prevent any injustice that might be caused by the Director's stay. At the same time, however, the availability of judicial review would cast some doubt on the

---

134 Another alternative would be to allow the Director to take over but not stay the privately initiated proceedings. This would restrict the autonomy of the private plaintiff and not likely dispel doubts about the Director's desire to enforce the law vigorously in the case.

validity of the Director's decision to enter a stay and this could deter or chill the impugned merger.

ii) The Director's Powers with Respect to Other Reviewable Matters

The options for the Director's powers with respect to other reviewable matters are similar to those with respect to mergers. They range from giving the Director the option of intervening in the proceeding to giving the Director the power to stay all privately initiated proceedings. As discussed above, the goal should be to maximize both the positive values of the Director's prosecutorial discretion and the ability of private actions to serve as a check on a monopoly of public enforcement action.

iii) Intervention

As discussed above, the utility of the Director's right to intervene in privately commenced actions should not be underestimated. In addition to making representations to the Tribunal, the Director might also be given the right to present evidence, cross-examine witnesses and perhaps even to appeal a decision. This would ensure that the Competition Tribunal had the value of the Director's broader perspective on enforcement policy.

Another argument against granting the Director any power greater than the right to intervene is that he presently enjoys no greater powers with respect to s.36 actions. Nevertheless, it could be argued that the need for prosecutorial discretion with respect to reviewable matters may be greater than with respect to the criminal breaches or breaches of the Tribunal orders that are subject to private actions under s.36 of the Act. As we have discussed in the second section of this study, however, this difference can be overstated.

iv) Carriage of the Proceedings

Another option is to allow the Director to take over a privately commenced action. The problem is that if the Director was genuinely committed to the particular prosecution, he or she would have already commenced such an action. Given the costs of a privately commenced proceeding and the investigative advantages that the Director enjoys, it can be expected that most private actions will only be commenced after the plaintiff has unsuccessfully attempted to persuade the Director to commence the action. Allowing the Director to take over such a privately commenced action would be a recipe for frustration and distrust. The Director would be forced to devote resources to what in his or her view was not an enforcement priority and the plaintiff would have reasonable suspicions that the Director would not litigate the matter in a vigorous or appropriate matter. Requiring the Director to take over privately commenced actions would also undermine any possible resource savings that might be gained from private actions and force the Director to misallocate public resources. It is far better to either give

the Director the power to stay or pre-empt the action or to intervene in the matter.

Not allowing the Director to take over carriage of a privately initiated matter might create a race to the Tribunal door in those cases where both the Director and a private party wish to commence an action. To avoid this prospect, a private applicant should be required to notify the Director a short time before commencing proceedings. The Director would then have a limited time to launch his or her own action. This action would preclude the initiation of private proceedings, but the private applicant should have a right to intervene in the Director's action in order to ensure that its views and evidence are presented to the Tribunal.

v) Preemption by a Consent Agreement

Another option is to allow the Director to stay private proceedings on the condition that the Director enter into a consent agreement to be ratified by the Tribunal under s.105 of the Act. This would in many cases be a satisfactory way to resolve the dispute provided that the consent agreement was a three way agreement between the plaintiff, the respondent and the Director. Most private actions are settled and there is no reason to believe that this will not occur in the competition context.[135] Settlements are quicker, less expensive and can be more creative than judgments. A consent order would enable the Director to have a regulatory influence on the settlement.

A problem would arise, however, if the consent order did not include the agreement of all the plaintiffs. For such plaintiffs, the consent order would be viewed as a stay of the proceeding. In the United States, concerns have been raised that consent decrees may not fairly treat the interests of those who are not parties to the agreement.[136] This concern is aggravated by the fact that a consent decree takes the form not of a contractual settlement enforceable by the parties but a court order enforceable by both contempt powers[137] and a subsequent s.36 action. Courts could, as they do when approving settlements in class actions, take a role in protecting the interests of absentees but their performance has frequently been criticized.[138] At a minimum, a party who has not agreed to the proposed consent decree should be able to intervene and present evidence when the Tribunal decides under s.105 of the Act whether to make orders based on the agreement.

---

135 In one American study 73.3% of privately commenced antitrust case settled. Steven Salop and Lawrence White "Economic Analysis of Private Antitrust Litigation" (1986) 74 Geo.L.J. 1001 at 1010.

136 Larry Kramer "Consent Decrees and the Rights of Third Parties" (1988) 87 Mich.L.Rev. 231. See generally symposium on consent decrees [1987] U.Chi.L. Forum.

137 Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1992) 92 D.L.R.(4th) 609 (S.C.C.).

138 Judith Resnik "Judging Consent" [1987] U.Chi.Legal Forum 43; Owen Fiss "Justice Chicago-Style" [1987] U.Chi.Legal Forum 1.

Any consent order between the Director and all the parties will naturally pre-empt any proceeding commenced by the plaintiff. Even if all the plaintiffs do not agree, a strong case can be made that a consent order should terminate any litigation over the same matter. The Tribunal, however, should be careful to protect the interests of those not a party to the agreement and particularly those who have commenced an action that will be preempted by the agreement. To this end, a plaintiff whose action will be preempted should be able to make representations to the Tribunal when it decides whether to make consent orders.

vi) Stays with Reasons

Another option would be to allow the Director to stay the privately commenced proceedings by giving reasons to the Competition Tribunal. As discussed above with regards to mergers, the Tribunal is unlikely to be able to closely scrutinize the Director's reasons why the action was not in the public interest. Nevertheless, a requirement that the Director publicly state his or her reasons could promote some of the accountability values served by privately commenced actions. Finkelstein and Quinn, for example, recognize that while the right of the Director to stay private proceedings as contrary to public policy "would be open to possible abuse, such abuse would be limited by the fact that the Director could be required to present his or her reasons and these reasons would be open to scrutiny by the press, the public and Parliament."[139] Requiring the Director to give reasons for a stay satisfies concerns that the decision not to prosecute was a product of inertia and neglect, as opposed to a considered exercise of prosecutorial discretion.[140] Giving the Director the power to stay proceedings would undermine some but not all of the values of private enforcement. A private plaintiff could still commence an action knowing that the worst that can occur is that the Director would have to explain its reasons on the record before entering a stay.

---

139 Neil Finkelstein and Jack Quinn "Re-Evaluating the Role of Private Enforcement and Private Party Access to the Competition Tribunal" supra at p.26.

140 Andrew Roman would likely oppose such a power but even he notes that "the principal reason for private activity is lack of activity by the responsible government officials. On the theory that in most cases some enforcement is better than none, the fact that the governmental authorities may, had they chosen to act, wanted to employ a different strategy seems irrelevant. If public authorities want to enforce the law better than private litigants are doing the answer is to commit more resources, not to preclude private enforcement." Consumer Enforcement of Competition Laws May, 1989 Public Interest Research Centre at pp.45-46. One rejoinder would be that the theory that in most cases some enforcement is better than none does not apply to reviewable matters because of the dangers of chilling efficient and pro-competitive behaviour. In others a decision not to take action can be as reasoned as the decision to bring an action.

vii) Stays without Reasons

Another option is to allow the Director to stay any privately commenced proceedings without giving any reasons to the Tribunal. It could be argued that the Tribunal is not well-suited to require reasons or to evaluate their merits and that the requirement for reasons is an illusory check on the Director's powers. The problem with this approach is that it would prevent privately commenced actions from serving any accountability function. It is important to distinguish between accountability and control.[141] Just because the Tribunal may not be able to control the Director's power to enter a stay does not mean that it cannot maximize the conditions for effective accountability by requiring the Director to attempt to justify his or her actions in entering a stay. In the criminal law context, the Supreme Court has recognized that allowing the Attorney General to enter a stay only after a judicial official had decided whether reasonable and probable grounds support a privately laid information was preferable because it produced the conditions for holding the Attorney General responsible in the legislature and elsewhere for the exercise of prosecutorial discretion.[142]

D. Preventing Frivolous Private Actions

The private enforcement of competition law presents a risk that competitors will engage in litigation for strategic reasons that are unrelated to the legitimate purposes of competition law. For this reason and because of the time sensitive nature of much commercial activity, it is important that efficient and effective procedures be available to screen out frivolous claims. Under s.36 of the Act the procedure available would depend on the jurisdiction in which the litigant chose to commence litigation. Most provinces provide for summary judgments where a respondent and sometimes a plaintiff can establish on the basis of affidavits that there is no genuine issue for trial. Other jurisdictions provide for summary trials which encourage judges to decide cases on the basis of affidavits and avoid a full trial whenever possible.[143] In the United States, there is evidence that summary judgments are granted more frequently to defendants in antitrust cases than in other civil cases.[144] The goal is to develop procedures which efficiently and

---

141 See generally Phillip Stenning ed. Accountability for Criminal Justice (Toronto: University of Toronto Press, 1995).

142 R. v. Dowson (1983) 7 C.C.C.(3d) 527 (S.C.C.).

143 See generally Kent Roach "Fundamental Reforms to Civil Litigation" in Ontario Civil Justice Review Research Studies

144 Stephen Calkins "Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Techniques in the Antitrust System" (1986) 74 Geo.L.J. 1130. See also Hugh Latimer "Private Enforcement of the Antitrust Laws in the United States - Is Reform Called For?" in R.S. Kehmani and W.T. Stanbury eds. Canadian Competition Law and Policy at the Centenary (Halifax: Institute for Research on Public Policy, 1991) at p.661; Scott Helsel "Preventing Predatory Abuses

effectively screen out frivolous claims while at the same time not burdening legitimate private actions. Frivolous and strategic actions can also be partially controlled by rules awarding successful parties their costs and rules restricting interim remedies, both of which will be discussed below.

i) Requiring the Director's Leave

One possible means to prevent frivolous proceedings is to require the leave of the Director for all private actions. This would require the Director either to devote considerable resources to investigating every private action or else to make a decision whether to grant leave without such investigation. This would mitigate any resources savings from private enforcement and would diminish the ability of such actions to supplement public resources. A leave requirement is also vulnerable from an accountability perspective because it would allow the Director without reasons to veto private enforcement actions. Rather than devoting resources to ex ante approval of all actions, it will better to allow the Director to focus his or her energies on reviewing cases after commencement to determine whether they should be preempted by a consent decree or in the case of mergers at least stayed. Alternatively, the Director could intervene in the Tribunal to make representations and present evidence concerning the private action.

ii) Requiring the Tribunal's Leave

Another option would to be require the Tribunal to certify each privately commenced action. Depending on the number of applications, this might strain the Tribunal's workload. Nevertheless, certification by the Tribunal is not impossible nor completely foreign to our legal system. A judge must certify a class action under both Quebec and Ontario legislation. The focus of that certification is on whether the representative plaintiff will adequately represent the interests of the absent class members, but it would be possible for the Tribunal to determine whether the allegation was legally sufficient and raised a genuine issue of fact for determination. Certification may also be useful if it is thought desirable to shelter a plaintiff from the risk of costs awards in the event of a loss. It is easier to give a plaintiff complete or provisional immunity from costs awards if a judicial official has already made a preliminary determination that the case has merit. As will be suggested below, however, many of the advantages of certification can be achieved through liberal use of summary judgment procedures after the action has been commenced.

---

in Litigation between Business Competitors" (1995) William & Mary L.Rev. 1135.

iii) Summary Judgments and Proceedings

In the United States, courts have become much more willing to dispose of antitrust matters on a motion for summary judgment. In 1964, the United States Supreme Court warned that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."[145] By the mid 1980's, the same Court stressed not only the legitimacy, but the efficacy of summary judgments in ending challenges to pro-competitive conduct. In a vertical restraint case, the Supreme Court stated that something more than evidence of price-cutting is needed, "there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributers were acting independently."[146] In a case involving allegations of a horizontal conspiracy, the Supreme Court warned that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or directed verdict, a plaintiff seeking damages...must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[147]

The American experience with summary judgments cannot be simply transferred to the Canadian context because of the importance of treble damages and civil juries in the United States. Nevertheless, it does illustrate that some antitrust matters are amenable to review by means of summary procedures that do not require oral testimony and cross-examination before the trier of fact. This is not surprising given that one of the advantages of private enforcement is that the litigants may have ready access to the information needed to litigate. In the absence of wide ranging discovery, it may be quite possible for some cases to be decided quickly on the basis of affidavits. As the Competition Tribunal has recognized in a different context:

> Delay which is created by litigation conducted in a non-expeditious manner is the main cause of the dissatisfaction which exists generally with court proceedings and adjudicative processes... The parties had been in communication during the previous year for the purpose of trying to negotiate a settlement of the dispute between them. In such circumstances, the basic issues, the areas of dispute and most of the relevant documentation

---

145 Poller v. CBS 368 U.S. 464 at 473 (1964) per Clark J. Harlan J. argued in dissent that "having regard for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is good reason for giving the summary judgment rule its full legitimate sweep in this field." ibid at 478

146 Monsanto Co. v. Spray-Rite Serv. Corp. 465 U.S. 752 at 763-64 (1984).

147 Matsushita Electronic v. Zenith Radio 106 S.Ct. 1348 at 1357 (1986).

> would have been known to both parties before the commencement of litigation. One only has to review the respective affidavits of documents of the parties to realize that this is the case. [148]

At the summary judgment stage, the Tribunal should not blindly defer to unfounded assertions by experts in affidavits. As the United States Supreme Court has recognized "when an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable"[149], summary judgment should be granted. In addition, assigning burdens of proof to both plaintiffs and defendants can be a useful mechanism to facilitate decisions on the basis of summary procedures.[150]

Summary proceedings are less developed in expert administrative tribunals such as the Competition Tribunal than in the courts. Nevertheless, a summary judgment procedure can be designed that will force plaintiffs not only to plead the legal requirements of a reviewable practice but also to produce at an early stage affidavit evidence to support these allegations. In turn, respondents can be given an early opportunity to file affidavits to support its case that its activities are pro-competitive. The Tribunal, either sitting as a single judge or as a mini-panel, can be encouraged to decide the case on the basis of this affidavit evidence. A trial would only be necessary if there was a genuine conflict about the material facts. The Tribunal might be able to decide conflicts in affidavits submitted by experts concerning the effects of the reviewable practice without extensive cross-examination. The Tribunal could decide any legal question that is necessary to apply the relevant law to the facts. This ability to decide legal questions on a motion for summary judgment has meant that American courts can contribute to the jurisprudence without having a full trial. The summary judgment procedure in the Tribunal should be an omnibus procedure that will include any challenges to the plaintiff's standing[151] or the substantive adequacy of its claims.[152] Even if summary

---

148 Director of Investigation and Research v. Air Canada et al. (Ruling of Competition Tribunal on Role of Intervenors, Jan.9, 1989) at pp.8-9.

149 Brooke Group Ltd. v. Brown and Williamson Tobacco Corp. 113 S.Ct. 2578 at 2598 (1993).

150 "Under the summary judgment procedure, a plaintiff is able to set forth evidence of the defendant's market power or exclusive access to an element essential to competition, as well as evidence of any other anti-competitive consequences of the alleged restraint...The defendants, in turn, are expected to introduce documentary and affidavit proof of efficiency justifications underlying the restraints...A court may be able to assess fully the reasonableness of a restrain after only an initial analysis and without requiring a full trial." Edward Brunet and David Sweeney "Integrating Antitrust Procedure and Substance after Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof and Boycotts" (1986) 72 Virginia L.Rev. 1015 at 1056-1057.

151 American restrictions on standing has led to a proliferation of pre-trial motions challenging standing. Maxwell Blecher and Candace Carlo "Toward More Effective Handling of Complex

judgment is not granted in whole, it could be granted in part and the Tribunal could narrow the issues for trial. This in turn can make the discovery and trial process quicker and more efficient.

One design issue is whether summary judgment procedures should be mandatory. Given the ability of summary judgment proceedings to serve double duty as case management devices and a screen on frivolous and strategic cases, a strong case can be made that they should be mandatory. As discussed below, a mandatory summary judgment procedure could also serve as a convenient cut-off for the application of loser-pay costs rules. Mandatory summary judgment procedures, like mandatory case conferences, could add additional pre-trial procedures to complex litigation. In addition, the costs of preparing affidavits for summary judgments should not be underestimated given the British experience with the costs of preparing witness statements.[153] Nevertheless, the affidavits prepared for summary judgment, perhaps supplemented after discovery, could form the basis of any expert evidence to be used at trial.[154] Given the dangers of strategic behaviour and the case management benefits of summary judgments, the general rule should be that a motion for summary judgment should be held. In rare cases where it is clear that a full trial will be necessary and that the summary judgment procedure will not usefully narrow the issues, the parties could be allowed to waive the summary judgment procedure.

iv) Case Management and Settlement Conferences

The new Competition Tribunal Rules enacted in 1994 require the chair of the Tribunal after consultation with the parties, to establish a case management schedule for the disposition of an application.[155] The Chair, at a party's request or on its own motion, may conduct one or more pre-hearing conferences. A variety of matters can be considered at these conferences including motions for intervention,

---

Antitrust Cases" [1980] Utah L.R. 727 at 729-734.

152 In the United States, "the prevailing wisdom is that antitrust actions are too complex, too circumstantial in their nature, and too full of possibly telling factual innuendo to allow them to fail merely because of deficient pleadings. Rather than grant a motion to dismiss, courts routinely give plaintiffs time to develop factual proofs showing the nonexistence of material factual disputes. In effect, resolution of dubious claims is deferred until presentation of full-blown summary judgment arguments." James Withrow and Richard Larm "The 'Big' Antitrust Case: 25 Years of Sisyphean Labor" (1976) 62 Cornell L.R. 1 at 22-23.

153 Lord Woolf Access to Justice Interim Report (1995).

154 At present affidavits of expert witnesses must be served at least 30 days before the commencement of hearings and form part of the record of the proceedings. At the hearing, the expert witness is only examined in chief for the purpose of summarizing or highlighting the evidence contained in the affidavit. Competition Tribunal Rules SOR 94-290 Rules 47 and 48.

155 R.17 SOR/94-290.

clarification or simplification of issues including obtaining admissions, discovery schedules, a timetable for the exchange of summaries of witnesses's testimony and other matters to aid in the disposition of the application.[156]

These rules are consistent with a broad trend towards case management in civil litigation in the United States, the United Kingdom and Canada. Case management is based on the assumption that the parties can no longer be relied upon to process cases diligently through increasingly complex pre-trial procedures. In response, courts and tribunals have devised timetables and schedules for the completion of the pre-trial phase of the lawsuit. Devoting resources to management of pre-trial matters also reflects the fact that most cases settle or are disposed of before trial.[157] There is little reason to believe that case management is any less needed in antitrust matters. For example, some commentators have argued that:

> large antitrust litigations would be better controlled and certainly more fairly adjudicated if it were frankly recognized that pretrial, not trial, is where the merits of such cases are revealed. Trial, if it occurs at all, is but the final denouement of pretrial adjudication, save in the case where pretrial responsibilities have been neglected by the presiding judge.[158]

If anything, the case for case management is stronger in antitrust litigation than other forms of litigation because of the dangers that a plaintiff could delay antitrust litigation for strategic reasons or that a defendant could prolong litigation in order to wear down a smaller plaintiff.

One valid concern with case management is that it may increase rather than decrease the resources that parties and the Tribunal must devote to the pre-trial phase. It has not yet been clearly established that pre-trial conferences increase settlement rates or save resources especially when the resources devoted by the parties and the Tribunal to pre-trial conferences are considered.[159] As suggested

---

156 ibid R.21.

157 Trubek and Cahill "'Most Cases Settle': Judicial Promotion and Regulation of Settlement" (1994) 46 Stan.L.Rev. 1339. The "Georgetown Project" found that 73.3% of cases studied were settled or dismissed before trial. Steven Salop and Lawrence White "Economic Analysis of Private Antitrust Litigation" (1986) 74 Geo.L.J. 1001.

158 James Withrow and Richard Larm "The 'Big' Antitrust Case: 25 Years of Sisyphean Labor" (1976) 62 Cornell L.R. 1 at 5.

159 American studies have concluded that pre-trial conferences do not increase settlement rates while studies in Ontario have shown that they can increase settlement rates. Maurice Rosenberg The Pretrial Conference and Effective Justice (New York: Columbia University Press, 1964); Steven Flanders "Case Management in Federal Courts: Some Controversies and Some Results" (1978) 4 Just.Sys.J. 161; Michael Stevenson et al "The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment" (1977) 15 Osgoode Hall L.J. 591.

above, it may be more efficient to fuse case management with a motion for summary judgment. An omnibus pre-trial hearing that determines whether summary judgment should be granted and where the case is not dismissed also serves as a case management device may eliminate the need for multiple pre-trial hearings. At the same time, however, it must be recognized that individual litigants can frustrate the implementation of challenging procedural rules with requests for adjournment and other adaptive behaviour.

Having a pre-trial conference in the wake of a summary judgment procedure may also help ensure that the Tribunal contributes to settlement discussions in a manner that reflects an intelligent consideration of the merits. One potential problem with pre-trial conferences is that judges may pressure the parties into a premature settlement that does not reflect the merits of the case.[160] As will be discussed below, the danger of premature settlements is particularly high in reviewable matters where the plaintiff and the defendant may have some common strategic incentives to settle their dispute in a manner that may not be consistent with the broader purposes of the Act. A mandatory summary judgment procedure will allow the Tribunal to have a better sense of the merits of the case when encouraging or supervising settlements.

v) Supervising Settlements

In civil litigation, parties are frequently encouraged to settle their cases before trial. Pre-trial conferences are conducted not only to narrow the issues for trial, but to discuss prospects for settlement. Discovery allows each party to investigate the other side's case in part to be able to make more informed decisions whether to settle. Settlement offers and discussions are privileged. Some jurisdictions have offer to settle rules which penalize a party through costs consequences for rejecting an offer that is as good or better than the final award they receive. Voluntary settlements are less controversial when the matters to be settled are conceived of as private matters which affect only the parties to the settlement. Settlements can be more controversial, however, if they affect broader public policy and have effects on third parties not privy to the settlement.[161]

Settlements in privately commenced antitrust actions will conserve the resources that the parties and the Tribunal devote to litigation. They may also be superior to the Tribunal's remedial orders because each party has agreed to the terms of the settlement and the settlement may be more creative and flexible than a compliance order devised by the Tribunal.[162] Nevertheless, there is a danger that

---

160 Carrie Menkel-Meadow "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 U.C.L.A.L.Rev. 485.

161 Owen Fiss, for example, argues that these public conditions are present in much private litigation. "Against Settlement" (1984) 93 Yale L.J. 1073.

162 Note, however, that s.105 of the Act allows the Tribunal to make consent orders based on the

settlements between private parties in antitrust litigation may not always advance the broader purposes of the Act and competition policy. For example, a supplier may settle a case with a distributor with an agreement not to continue a reviewable practice such as a refusal to deal or consignment selling as between the two parties to the action. Such a settlement would achieve compliance with the Act, but only in the particular case because the supplier may continue to engage in the objectionable practice with other distributors. The plaintiff distributor, unlike the Director, would not have an incentive to achieve a settlement that benefits other suppliers. In fact, such a broader settlement may even be contrary to the plaintiff's interest. Settlements could even be inconsistent with the objectives of the Act. The plaintiff distributor could be bought off with a generous monetary settlement instead of negotiating future compliance. There may also be cases where the two parties to the litigation can agree on a settlement which imposes costs on a third party absent from the agreement. All of these scenarios suggest that less reliance can be placed on settlements negotiated between private parties to advance the public ends of the litigation than settlements negotiated with the Director.

What can be done to minimize the danger that private parties will settle private actions in a manner that does not advance or is inconsistent with the objectives of the Act? One option would be to require the Tribunal to approve all settlements, as is done with class actions which have been certified. The approval of all settlements could strain the resources of the Tribunal. Section 105 of the Act, however, contemplates that the Tribunal can approve settlements without a full hearing. If the action has survived summary judgment, the Tribunal may have enough knowledge of the case to decide whether the settlement is consistent with the objectives of the Act. With respect to consent orders that have the Director's agreement, the Tribunal has already demonstrated a willingness to review agreements to ensure that they accord with the purposes of the Act.[163] The need for such a review is even more compelling in cases where only private parties have reached an agreement.

---

terms of a settlement between the Director and a respondent. In addition, the complex relief ordered by courts or tribunals in many public law cases frequently draws on settlement offers and has a negotiated character. Abram Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harv.L.Rev. 1281.

163 In Director of Investigation and Research v. Palm Dairies et al., Nov. 13, 1986 Reed J. stated at p.8 for the Competition Tribunal: "once the Director has invoked the adjudicative powers of the Tribunal, the Tribunal has a duty to determine the nature of the anti-competitive conduct and to fashion an order which in its judgment serves the purposes of the Act. Or, at the very least when the Tribunal is asked to issue a consent order it is incumbent on it to satisfy itself that that order will be effective to accomplish, with due regard to the circumstances of the case, the objectives of the Act." (emphasis in the original) Reed J. stressed that the Tribunal must satisfy itself that "the order sought meets a critical threshold of effectiveness, namely that of eliminating the likely prevention or lessening substantially of competition that gave rise to the application for the order."

E. Discovery

As discussed in the first section, private litigants may be at a disadvantage in prosecuting claims because they do not possess the same investigative powers as public officials. Although they have been somewhat circumscribed by the Charter, the Director still possesses robust investigative powers. Section 11 of the Competition Act allows the Director when conducting an inquiry to obtain a judicial order requiring individuals to testify about relevant matters and produce relevant documents. Warrants to enter premises and seize material can also be obtained if a judge is satisfied that grounds exist for making an order under Part VIII.[164]

The Director's comparative advantage over private litigants should not be overestimated given the broad rights of discovery that private parties possess both in s.36 actions conducted in court, as well as actions conducted before the Competition Tribunal. The general trend in discovery is to allow full discovery of relevant documents and examination of witnesses under oath subject to specific rules of privilege. In fact, most concerns about discovery are about its breadth and its ability to add to the cost and time required for litigation. In the United States, it has been argued that:

> Discovery presents the greatest problem in managing the complex antitrust case. It can be amoebic in proportion - ever expanding in all directions....Discovery is most prone to abuse by counsel seeking to explore every possible avenue, a practice that results in lost time and unwarranted expense.[165]

Discovery abuse is a particular concern because an antitrust litigant may have a strategic incentive to delay litigation and impose the costs of discovery and perhaps interim relief on its opponent. In addition, there is a danger that information revealed in discovery can be misused for purposes other than the enforcement of competition law.

The Rules of the Competition Tribunal provide parties with broad rights and obligations concerning the discovery of relevant documents. At present, respondents to a Director's action have to serve an affidavit of documents on all parties which lists "the documents that are relevant to any matter in issue and that are or were in the possession, power of control of the party"[166] and allow other

---

164 Competition Act R.S.C. 1985 c.C-34 s.15. A warrant is not required if exigent circumstances make the obtaining of a warrant impracticable.

165 Maxwell Blecher and Candace Carlo "Toward More Effective Handling of Complex Antitrust Cases" [1980] Utah L.R. 727 at 748.

166 R.13(2) SOR/ 94-290.

parties to inspect and make copies of the documents listed in the affidavit.[167] Parties can claim that such documents are privileged communications between solicitors and clients[168]; that they were prepared for the dominant purpose of litigation[169]; that they were prepared in an effort to negotiate a settlement or consent order[170] or any other recognized ground of privilege. Upon the motion of a party outlining "the details of the specific, direct harm that would allegedly result from the unrestricted disclosure of the document", the Tribunal may also restrict the disclosure of a document "if it is of the opinion that there are valid reasons" for doing so.[171] The Tribunal can declare documents to be confidential and can "make such other order as it deems appropriate" including closing a hearing or a pre-hearing conference to the public.[172]

The rules contemplate pre-hearing conferences to consider among other matters "the desirability of examination for discovery of particular persons or documents and the desirability of preparing a plan for the completion of such discovery" as well as the exchange of "summaries of the testimony that will be presented at the hearing."[173] Affidavits containing the full statement of proposed expert evidence and the qualifications of the expert must be exchanged before the hearing. At the hearing, the expert may be examined in chief in order to summarize or highlight the evidence contained in the affidavit.[174]

---

167 ibid s.16(1). Note that the Tribunal has the same powers as a superior court of record with respect to the production and inspection of documents". Competition Tribunal Act S.C. 1985 c.19 (2nd Supp.) s.8(2). It can issue subpoenas for the attendance of witnesses and the production of documents. R.71 SOR/ 94-290.

168 This privilege is also protected in investigations made by the Director. Section 19 of the Competition Act requires that any document where a claim to solicitor client privilege has been made be immediately sealed and a judge determine within thirty days in an in camera proceeding whether the claim of privilege is valid.

169 See for example Ed Miller Sales and Rental Ltd. v. Caterpillar Tractor Co. (1988) 61 Atla.L.R.(2d) 319 (C.A.). This case has been called "an important practical victory for defendants" by holding that documents prepared in connection with a Director's inquiry remain privileged in a subsequent s.36 action over the same matter. Musgrave "Civil Actions and the Competition Act" (1994) 16 Adv.Q.94 at p.104.

170 Middelkamp v. Fraser Valley Real Estate Board (1992) 96 D.L.R.(4th) 227 (B.C.C.A.).

171 ibid s.16(2). Similarly, inquiries initiated by the Director are in private and s.12(4)(b) of the Competition Act R.S.C. 1985 c.C-34 allows the presiding officer to prohibit a person whose conduct is being inquired into from attending if the Director or the person being examined establishes that the attendance would "result in the disclosure of confidential commercial information that relates to the business of the person being examined or his employer."

172 ibid. R.62.

173 ibid R.21(2)(d)(f).

174 R.47.

Finkelstein and Quinn have argued against automatic rights of discovery in private actions and would require the Competition Tribunal in each case to determine whether discovery is necessary, cost effective and not intended to be abusive. They argue:

> Our concern is that oral and documentary discovery obligations on responding parties can be extremely onerous in terms of both expense and commitment of management time, particularly in competition cases which are generally complex and document-intensive. That can impose considerable economic hardship on a competitor, and be harmful to the operation of a competitive market. The Tribunal should have discretion to tailor the process to the individual case.[175]

The type of discovery they propose is different from that commonly used in civil litigation because it contemplates the Tribunal playing a primary not a residual role in supervising discovery. Although the trend is towards greater judicial involvement and supervision, discovery in civil cases is designed to primarily be resolved by the parties with motions being made to the court concerning specific matters only when the parties cannot resolve their differences.

There may be fewer dangers in requiring the Competition Tribunal to supervise discovery than requiring the ordinary courts to do so. The Tribunal as an expert administrative agency may already rely more on inquisitorial methods than the ordinary courts. The present rules governing discovery in the Competition Tribunal are very broad in allowing discovery of all relevant documents. In complex cases, especially, it may be necessary to give the Tribunal the discretion to restrict discovery to matters that are material to the issues.[176] A member of the Tribunal assigned to supervise discovery may also be able to determine if the Director has information that is important to the case and not privileged and whether there is a good reason to delay a decision on summary judgment until some specific item has been disclosed in discovery.

To ensure a fair hearing when the case reaches the Tribunal, however, a single member of the Tribunal should supervise discovery and make decisions on summary judgment but generally not sit on the panel which hears the case unless both parties consent. This will ensure a fresh hearing untainted by previous involvement except when the parties can agree that the danger of prejudgment is outweighed by the advantages of having a person on the Tribunal panel who is

---

175 Neil Finkelstein and Jack Quinn "Re-Evaluating the Role of Private Enforcement and Private Party Access to the Competition Tribunal" given at The Competition Act Ten Years On: A Stock-Taking" University of Toronto, Faculty of Law, Dec.8, 1995 at p.29.

176 James Withrow and Richard Larm "The 'Big' Antitrust Case: 25 Years of Sisyphean Labor" (1976) 62 Cornell L.R. 1 at 28.

familiar with the complex facts of the case. Assigning a single member of the Tribunal to supervise discovery and make summary judgment decisions will also help address concerns that the Tribunal could be overburdened with the pre-trial processing of a new private cause of action. In short, intensive Tribunal supervision of the discovery process may be necessary to ensure that private plaintiffs can receive necessary information from defendants but are not allowed to abuse their powers by usurping the extensive investigative powers reserved for public officials or even the broad rights of discovery normally available to civil litigants.

In civil litigation, the use of information obtained in discovery has been a controversial issue. Litigation on this matter could be prevented if the rules clearly limited the use of information obtained in discovery for purposes related to the litigation process. It should be clear that as a condition of receiving information through discovery, a party undertakes to respect the confidentiality of the information and not use it for trade purposes. Concerns about the confidentiality of specific matters could be resolved by the member of the Tribunal who supervises discovery.

The task of supervising discovery could be eased by requiring a plaintiff as a condition of filing a complaint to list the documents it intends to rely upon in making its case. The respondent could then be allowed or required in a short period of time to list and provide the documents it intends to rely upon in making its case. This initial exchange of documents could then place the parties in a position to enter settlement discussions and it could form the bulk of a record for the summary judgment procedure discussed above. It is possible that the parties could invest excessive time and money in compiling the documents for the initial exchange,[177] but that remains their decision. The virtue of initial document exchange is that it provides a basis for both settlement discussions and summary procedures while reserving more extensive discovery procedures designed to reveal smoking guns for cases that are more likely to proceed to a full hearing.

F. Limitation Periods and Follow-on Actions

Limitation periods serve the purpose of promoting repose so that defendants do not face the indefinite threat of liability, ensuring due diligence in the prosecution of claims and ensuring that the claim is litigated on the basis of reasonably fresh evidence.[178] There are a great variety of limitation periods

---

177 In the United Kingdom witness statements are exchanged before civil litigation and there are concerns that parties devote excessive time and money in massaging these statements. Lord Woolf Access to Justice Interim Report (July, 1995)

178 K.M. v. H.M. (1992) 96 D.L.R.(4th) 289 (S.C.C.).

applying to civil claims frequently ranging from 1 to 6 years.[179] The values promoted by limitation periods have been somewhat eroded in recent years by the tendency of courts to read limitation periods subject to discoverability principles unless there are clear statutory words to the contrary.[180] This means that the limitation period does not normally begin to run until the plaintiff actually discovered the harm complained of or it was reasonable to have expected such discovery. In some cases, this can extend the limitation period for a generous period of time resulting in less repose for defendants and litigation on the basis of old evidence.

Private actions under s.36 of the Competition Act are governed by their own special limitation period. Section 36(4) provides that no action shall be brought:

> a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> i) a day on which the conduct was engaged in, or
>
> ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later; and
>
> b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from
>
> i) a day on which the order of the Tribunal or court was contravened, or
>
> ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later.

Sections 36(4)(a)(i) and 36(4)(b)(i) may potentially displace discoverability principles by establishing a two year time period from the day on which conduct or contravention was engaged in. It is possible that such a limitation period might prevent some actions that might only have been reasonably discovered some time after that time. On the other hand, the limitation period could be extended by interpreting the violation as a continuing one in which case the two-year period

---

179 Section 4(b) of the Clayton Act provides a four year limitation period for American anti-trust civil actions. The running of this limitation is suspended by a public prosecution being brought. This allows civil actions to follow in the wake of a successful public prosecution even though the limitation period would have expired in the absence of the public prosecution. On the importance of such "follow-on" actions see Thomas Kauper and Edward Snyder "An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared" (1986) 74 Geo.L.J. 1163.

180 Kamloops v. Neilson [1984] 2 S.C.R. 2; Central Trust v. Rafuse (1986) 31 D.L.R.(4th) 481 (S.C.C.); K.M. v. H.M. supra.

would not start to run until the last day of the continuing violation.

Sections 36(4)(a)(ii) and 36(4)(b)(ii) mean that a criminal prosecution, potentially even one which does not end in a conviction, might give possible plaintiffs 2 more years to bring an action.[181] This extension of the limitation period may be necessary to allow private actions which follow on from official enforcement measures. When a prosecution has been commenced, it can be assumed that the evidence remains fresh and that the defendant has no legitimate sense of repose. Potential plaintiffs are encouraged to wait and see if the government is successful in the hope that their cases will be easier after a conviction. The extension by prosecution has been interpreted quite narrowly by the courts to only apply to conduct penalized in the criminal case.[182] There are also some specific limitation periods with respect to reviewable matters. Section 79(6) provides that no application with respect to abuse of dominant position can be made "more than three years after the practice has ceased." Similarly s.97 provides that no application with respect to a merger may be made "more than three years after the merger has been substantially completed." These limitation periods seem to be worded to preclude the judicial imposition of discoverability principles. This recognizes a respondent's interest in repose, but it might prevent litigation that only becomes viable because of the discovery of fresh evidence more than three years after the impugned practice.

If private actions were allowed with respect to reviewable matters, it would be best to introduce a general limitation period that is simpler than the one used under s.36 of the Act. The Australian Law Reform Commission has recommended a three year limitation period from when damages are suffered but subject to a judicial discretion to extend the period in deserving cases.[183] This seems to be appropriate given the need to promote repose and ensure litigation on the basis of fresh evidence. In order to eliminate the need for litigation, any limitation period should specify whether discoverability principles apply and whether damages are only recoverable for the limitation period.

Extending the limitation period on the basis of the Director's enforcement action as is done under s.36 of the Act would only be necessary if there was a desire to promote follow-on litigation. Follow-on litigation by private parties subsequent to the Director's action can be defended on the basis that the sanctions in the first litigation did not achieve compensation or optimal deterrence. One option would be to have the Director's action preclude any subsequent follow-on litigation by

---

181 James Musgrove "Civil Actions and the Competition Act" (1994) 16 Adv.Q. 94 at 102-103.

182 Berube v. Makita Power Tools Canada Ltd. (1991) 40 C.P.T.(3d) 108 (F.C.T.D.)

183 Australian Law Reform Commission Compliance with the Trade Practices Act, 1974 (1994) at p.61.

private parties. This is a harsh response because it precludes directly affected private parties from making legitimate compensatory claims simply because the Director took the action. Another option is to allow private parties to bring actions after the Director's action. This would require a limitation period that is suspended until the Director's action is completed. This, however, forces respondents to face multiple proceedings and may, as has occured under s.36, require litigation over the terms of the extension. A more compelling third option is to allow directly affected parties to intervene in the Director's action and to make compensatory claims once liability has been established. Not allowing or encouraging follow-on litigation would address concerns discussed in the first section of the study that private enforcement may exploit rather than supplement public enforcement efforts.[184]

G. Costs Awards

Along with the summary judgment procedure described above, costs awards can be used to deter frivolous and strategic litigation. At the same time, however, they present a risk of deterring meritorious litigation especially if a plaintiff is not able or likely to obtain damage awards or even the costs of the litigation.

i) Loser-Pay

The general rule for civil litigation in Canada is the loser-pays for a significant portion of the successful party's cost of litigation. This rule can deter frivolous actions and also partially compensate the successful party for the costs of the litigation.

Section 36(1) of the Act goes beyond the traditional party and party cost awards used in civil litigation which cover roughly one half of the actual cost of litigation and allows the court in addition to single damages to award "any additional amount that the court may allow not exceeding the full cost to him [the plaintiff] of any investigation in connection with the matter and of proceedings under this section." There is little experience under this section but it could encourage the activities of plaintiffs as private Attorneys General by providing them, if successful, with the full cost of their investigation and litigation.[185] The converse of this rule, however, is that under cost rules used in the ordinary civil courts, an unsuccessful s.36 plaintiff would generally be responsible for about half of the respondent's costs. This down-

---

184 John Coffee "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working" (1983) 42 Maryland L.Rev. 215. Nevertheless recent data suggests that follow on litigation constitutes less than 6% of antitrust actions in the United States. Thomas Kauper and Edward Snyder "An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared" (1986) 74 Georgetown L.J. 1163.

185 George Addy "Private Rights and the Public Interest under Canada's Competition Act Oct. 1993 at p.18.

side prospect may actually have deterred more litigation than the prospect of full recovery of investigative and litigation costs if successful.

Should the loser-pay rule be used before the Competition Tribunal because of its ability to compensate successful plaintiffs in reviewable matters, the costs of investigation should as in s.36 be included. Reviewable matters may entail considerable investigation costs including the commissioning of expert studies. The private Attorney General theory would suggest that plaintiffs should be rewarded for devoting their private resources to the task of investigating antitrust violations. The need for generous cost rules to award plaintiffs is especially great if they cannot recover damages as a remedy.

The loser-pay rule not only compensates successful plaintiffs for their costs, but it penalizes unsuccessful plaintiffs. This can be a potent instrument for deterring frivolous cases undertaken for strategic reasons. Nevertheless, such a rule will not deter litigants if the strategic value of their actions outweigh the costs that they might have to pay for losing. It may also not deter frivolous litigation if the awards are great. Posner and Landes, for example, suggest that the loser-pay principle would not deter much speculative antitrust litigation in the United States because of the opportunity of recovering treble damages.[186] One submission to the Director argued that the discipline of cost rules "is unlikely to be effective to curtail or discourage applications motivated by competitive agendas...where the strategic benefit outweighs the associated costs."[187] Loser-pay could be an important, but not a full proof guarantee against frivolous litigation.

There is some evidence that by weeding out more speculative claims at an early stage, the loser-pay principle makes those parties who commence litigation less willing to settle and more prepared to invest in the case in the anticipation that upon success they will be partially indemnified.[188] Thus adoption of a loser-pay cost rule would not necessarily prevent the development of jurisprudence, but it would encourage more certain rather than less certain claims. Legislative changes might be necessary to change the law because innovative litigation will be deterred by the costs rule.[189]

---

186 "The Private Enforcement of Law" (1975) 4 J.Legal Stud. 1 at p.41. Other commentators suggest that the use of loser-pay principle would have ambiguous effects on American antitrust law. Steven Salop and Lawrence White "Economic Analysis of Private Anti-trust Litigation" (1986) 74 Geo L.J. 1001 at 1028.

187 CP Rail System submission October 6, 1995 at p.3.

188 The adoption of the loser-pay principle in Florida medical malpractice cases increased plaintiff's success rates, frequency of litigation, investment in litigation and the value of plaintiffs' settlements and judgments. Snyder and Hughes "The English Rule for Allocating Costs" (1990) 6 J.L.Econ. and Org. 345; Hughes and Snyder "Litigation and Settlement under the English and American Rules: Theory and Evidence" (1995) 38 J.of Law & Eco. 225.

189 J.R.S.Prichard "A Systemic Approach to Comparative Law" (1988) 17 J.Legal Stud 451.

The loser-pay principle can deter some unmeritorious litigation, but it can also deter meritorious litigation. This is particularly true with respect to innovative claims with a low chance of success[190] and claims of limited financial value made on behalf of diffuse groups.[191] Given the undeveloped nature of much jurisprudence concerning reviewable practices, many cases may fall into this risky category and could be deterred should the Tribunal adopt a loser-pay principle. The Australian Law Reform Commission has observed that the loser-pay principle can:

> discourage private enforcement of the TPA. Few consumers or businesses can afford to take the risk of an adverse costs order if the proceedings are unsuccessful. Where the action is successful, the costs that can be recovered are usually much lower than the actual solicitor-client costs incurred in conducting the litigation as they are calculated on a party-party basis and take little or no account of any investigation costs. These problems can be particularly severe where an applicant is seeking injunctive or ancillary relief rather than an award of damages that may help to offset the cost of litigation....the costs rules are of particular concern to consumers who cannot afford to enforce their rights.[192]

One commentator has concluded that the loser-pay principle coupled with a prohibition on contingency fees explains the infrequent use of private antitrust actions in Germany.[193] The fact that provincial and Federal courts would generally employ the loser-pay principle when a litigant brings a s.36 action, along with the modesty of damage awards under this section, may help to explain the dearth of jurisprudence that has developed under this section since its introduction in 1976.[194]

---

190 Steven Shavell "Suit, Settlement and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs" (1982) 11 J.Legal Stud. 55; J.R.S. Prichard "A Systemic Approach to Comparative Law: The Effect of Cost, Fee and Financing Rules on the Development of the Substantive Law" (1988) 17 J.Legal Studies 460.

191 Donald Dewees, J.R.S. Prichard and Michael Trebilcock "An Economic Analysis of Cost and Fee Rules for Class Actions" (1981) 10 J.Legal Studies 155.

192 The Law Reform Commission Compliance with the Trade Practices Act, 1974 Report no.68 (Sydney, 1994) at p.40. Nevertheless the Commission rejected granting plaintiffs an immunity against costs awards on the basis "that it is unreasonable to deprive an innocent party of its rights to costs merely because the litigation was in the public interest." ibid at p.50.

193 Professor Hasley argues "there is little incentive for the prospective plaintiff to pursue a case they have any likelihood of losing and they must be able to finance the litigation from the start. The relative lack of success of most plaintiffs makes this a risky venture." John Halsey "Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law" (1984) 59 Wash.L.Rev. 471 at 497.

194 Bruce McDonald "Private Actions and the Combines Investigation Act" in J.R.S. Prichard et al Canadian Competition Policy: Essays in Law and Economics (Toronto: Butterworths, 1979).

The loser-pay principle may deter consumer claims based on proposed civil misleading advertising provisions. In many cases, a consumer or consumer association would have relatively little to gain in a financial sense from this type of litigation and much to lose if they were forced to pay the respondent's costs, as well as their own lawyers. The ability of the loser-pay principle to deter small monetary claims or claims without a monetary focus has led many to recommend that the loser-pay principle be abandoned with respect to consumer class actions and other public interest litigation.[195] In short, the loser-pay principle can deter frivolous litigation, but it may perform its job too well and deter meritorious and innovative litigation, especially if damage awards do not figure prominently in a new private cause of action.

ii) One-Way Cost Rules

Public interest litigation can be encouraged by a one-way cost rule which provides the plaintiff immunity from costs if unsuccessful but allows a successful plaintiff to recover costs from the defendant. As discussed in the first section, one-way cost rules are used extensively in the United States in order to encourage plaintiffs to act as private Attorneys General. Section 4 of the Clayton Act[196] provides a one-way cost rule by allowing a successful plaintiff to recover "the cost of the suit including reasonable attorneys fee." One-way cost rules are used much less frequently in Canada in part because they are met with resistance from prospective defendants who have much to lose from their adoption. Unlike in the United States, successful defendants under Canadian loser-pay rules generally recover a portion of their costs. In the United States, unsuccessful plaintiffs routinely enjoy the immunity that one-way costs rule provide from costs.

A strong argument can be made that one-way pro-plaintiff cost rules should be used to encourage consumers to bring claims for civil misleading advertising. As explained above, diffuse consumer claims will be deterred by the loser-pay principle. A no-way cost rule would be preferable from this perspective, but it does not address the fact that plaintiffs and their lawyers may not be compensated by the modest damage awards or other remedies available for misleading advertising. Such plaintiffs, if successful, should be able to collect money to pay their legal fees from respondents, both to compensate them for having to vindicate their rights and to

---

195 J.R.S. Prichard "Class Actions and Private Enforcement" in Prichard et al. Canadian Competition Policy: Essays in Law and Economics (Toronto: Butterworths, 1979); Ontario Law Reform Commission Report on Class Actions (Toronto: Queens Printer, 1982) ch.17; Ontario Law Reform Commission Report on the Law of Standing (Toronto: Queens Printer, 1989) ch.6

196 15 U.S.C.@15(a) (1982) "Attorney's fees are rarely awarded under American law and the fact that they are awarded under the Clayton Act is indicative of a special interest in preventing the behaviour proscribed therein." "Note: Redefining the 'Cost of Suit' Under Section 4 of the Clayton Act" (1984) 82 Mich.L.Rev. 1905 at 1920.

provide incentives for other to bring misleading advertising claims. The problem, however, is that consumers will not be the only or perhaps the major plaintiff should civil misleading advertising provisions be adopted. Competitors may invoke these provisions for strategic reasons. Loser-pay could play some role in deterring such actions, but as noted above, only when the strategic benefits of the action do not outweigh the risk of having to pay the respondent's costs if unsuccessful.

Thus even with respect to misleading advertising, the case for one-way cost rules is not clear. Plaintiffs opposing mergers or refusals to deal may well have enough stakes in the outcome of the litigation that they do no not require the prospect of indemnification to encourage their litigation. These cases also provide a greater risk of strategic behaviour. One-way cost rules would prevent the Tribunal from protecting respondents from strategic behaviour by awarding costs should the plaintiff be unsuccessful. They are frequently seen as inequitable because of their asymmetrical treatment of plaintiffs and respondents.

Another form of one-way cost rule used by some administrative tribunal costs is awards to intervenors, sometimes in advance of the hearing.[197] It is vital that costs not be awarded against public interest intervenors if their participation is not to be deterred. The case for requiring respondents to fund intervenors is less clear where the respondent is engaging in a reviewable practice that may be perfectly lawful as opposed to applying for permission to increase rates or do something that is not permissible without administrative authorization. Respondents would vehemently oppose public interest intervention if they were required to foot the bill and there would be disputes about whether the intervention was truly in the public interest and could not be financed by other means. A better alternative might be to apply a no-way cost rule to intervenors, but allow the Director to administer a fund for public interest intervenors.

iii) No-Way Cost Rule

A no-way cost rule eliminates some of the risk of deterring meritorious litigation under loser-pay rules without the controversy that generally accompanies one-way pro-plaintiff cost rules. The Competition Tribunal like many other administrative tribunals presently applies a no-way cost rule. The Federal Court also applies a no-way cost rule on applications for judicial review in large part to encourage judicial review. Thurlow C.J. has explained that the purpose "in departing from the general rule...that costs should follow the event...is to assure a person who is adversely affected by the decision of a federal administrative tribunal

---

197 This is proposed in Richard Janda et al submission to the Director at p.3. See generally K. Engelhart and M. Trebilcock Participation in the Regulatory Process: The Issue of Funding (Ottawa: Economic Council of Canada, 1981); M. Valiante and W.Bogart "Helping 'Concerned Volunteers Working out of their Kitchens': Funding Citizen Participation in Administrative Decision-Making" (1993) 31 Osgoode Hall L.J. 687.

the right to challenge the decision in this Court without running the risk of being ruined by costs if he loses."[198] A no-way cost rule may be particularly important in the early years of private enforcement because of the danger of deterring plaintiffs with uncertain prospects of success. At the same time, it is vulnerable to the criticism that it does not address the risk that plaintiffs will engage in litigation for frivolous or strategic reasons. Moreover, it does not impose on an unsuccessful defendant the full costs of its behaviour and it does not encourage litigants to act as private Attorneys Generals in the manner that both loser-pay and one-way cost rules do.[199]

iv) Maximizing the Advantages of all the Cost Rules

The choice between competing costs rules is not as stark as the above analysis might suggest. Tribunals and courts frequently retain discretion over awards and do not have to commit themselves to any one of the above models. Moreover, legislation could specifically tailor costs rules for particular phases and types of litigation.

The greatest virtue of the loser-pay rule is its ability to deter frivolous and strategic litigation, at least in cases where the strategic value of the litigation does not outweigh the costs that a plaintiff would have to pay if unsuccessful. This rule may be appropriate to apply to the preliminary stages of litigation with respect to mergers and abuse of dominant position which present particular dangers of strategic behaviour. After the litigation had survived summary judgment or certification, the imposition of the loser-pay principle would be less supportable given the need to encourage litigation and the undeveloped nature of the jurisprudence.

Once a case has passed summary judgment, then a variety of no-way and one-way cost rules should be applied. These rules could be used without unfairness to respondents because the case would already have been certified by the Tribunal as involving a genuine issue for trial. When the Director brings proceedings and is unsuccessful, respondents at present do not recover their costs so our proposal gives respondents a greater opportunity to recover their costs. The choice between a no-way and a one-way rule after summary judgment should depend on the incentives faced by the plaintiff. If the plaintiff raises an economically viable claim, a no-way

---

198 Silk v. Canada [1982] 1 F.C. 795 at 801-802.

199 In the context of class actions, Prichard argues against a no-way cost rule because "to not require the defendant to indemnify the representative plaintiff in the event that the class succeeds is to fail to impose on the defendant the full social cost of his anti-competitive conduct. The full social cost is the damages caused plus the costs of enforcement, that is, the representative plaintiff's costs. Therefore, a more appropriate rule is a 'one-way' costs rule with the defendant indemnifying the plaintiff in a successful suit but the plaintiff not being responsible for the defendant's cost if the suit fails." "Private Enforcement and Class Actions" supra at p.245.

cost rule would be acceptable because the value of the relief sought would justify the plaintiff's litigation expense. Nevertheless, a one-way cost rule could be defended on the basis that it compensates the plaintiff for the cost of vindicating its rights and provides an incentive for others to act as private Attorneys General. A one-way cost should be required in those cases where the remedies that a plaintiff seeks are less valuable than the costs of litigation. Some misleading advertising claims would fall in this category, but others would not. It might be difficult for legislation to make a general prediction about the incentives that plaintiffs face and on that basis impose one-way and no-way cost rules in different matters. An alternative would be to allow the Tribunal at the conclusion of an unsuccessful motion for summary judgment to determine whether a one or no-way cost rule should be used for the duration of the litigation.

v) Lawyers's Fees

Costs rules only address the issue of cost shifting between the parties. The fee arrangements that a party makes with its lawyer are also an important feature of the incentive to litigate. If contingency fees are prohibited then plaintiffs with economically non-viable claims may be deterred from litigation regardless of the cost rule employed. This is because they will remain responsible for their own lawyer's bill. Contingency fees are an important means of encouraging litigation because they allow the plaintiff to transfer the risk of litigation to lawyers who can receive compensation for the risk they assume and spread the risk across their portfolio of cases. The contingency fee typically operates to allow litigation to go forward where the lawyer can collect a significant percentage of a significant damage award if successful.

The effects of contingency fees in encouraging litigation are less clear where damages are not awarded or are modest. A plaintiff who upon success receives specific relief may not be in a better position than before to pay its lawyers. For this reason, it may be appropriate to allow the Tribunal to award costs to the successful plaintiff with a multiplier to reflect the risk that the lawyer has accepted. Ontario's Class Proceedings Act[200] allows lawyers to enter into a contingency fee arrangement with their clients and upon success to apply to the court to have the fees awarded multiplied to reflect the risk. A similar provision could be used in those case where damage awards are not available or not likely to pay for the lawyer's fees. One possible candidate would be any civil misleading advertising provision. A one-way cost rule imposed on the respondent could be augmented by a multiplier to compensate the lawyer for the risk of not being paid should the proceeding be unsuccessful. This type of arrangement may be necessary to make consumer claims viable. Neverthless, it would be resisted as inequitable by potential respondents and would not be appropriate in cases where competitors rather than consumers brought misleading advertising claims. A straight no-way cost rule may be easier to

---

200 Class Proceedings Act S.O. 1992 c.6 s.32(7)(b).

administer. At the same time, it should be recognized that such a regime will not make many consumer claims viable.

The financial arrangement between a plaintiff and its lawyer may also affect the manner in which the litigation is conducted. Payment on the basis of an hourly rate gives lawyers an incentive to take steps that will delay litigation and make it more complex.[201] At the same time, payment on the basis of a percentage of the award or settlement creates an incentive for lawyers to under-invest in a case. John Coffee has argued that under either approach lawyers have an incentive to under-invest in their cases from a socially optimal perspective. He bases his conclusion on the fact that under either system, the plaintiff's attorney will generally receive less for his or her efforts than the equivalent of a single damage remedy which represents the social cost of the violation.[202] Professor Coffee stresses the danger of collusive settlements because "the stakes are asymmetric- that is, defendants expect greater benefits from the action than do plaintiff's attorneys."[203] The prospects for regulating the agency problem that Professor Coffee identifies are not clear. One option is to require the Tribunal when approving settlements to have full information about what the plaintiff's lawyers will be paid and to be sensitive to the danger that plaintiffs and especially their lawyers can be bought off by settlements that do not fully advance the purposes of the Act. This would impose costs on the Tribunal and might not address cases in the early stage of litigation where the risk of premature or collusive settlement may be the highest. Nevertheless, the Director would not be precluded from taking enforcement actions with respect to early settlements that were not approved by the Tribunal.

H. Choice of Forum and Common Law Remedies

Although it is relatively certain that private actions with respect to reviewable matters, unlike s.36 actions, will be heard in the Competition Tribunal[204], choice of forum issues may still have some impact on the design of a

---

201 Hon.T.G. Zuber The Report of the Ontario Courts Inquiry (1987) at pp.217-8; Roach "Fundamental Reforms of Ci Litigation" in Ontario Civil Justice Research Studies.

202 John Coffee "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions" (1986) 86 Colum.L.R. 669 at 694.

203 ibid at 724

204 There may be a strong case for making even s.36 matters enforceable only in the Tribunal. As Finkelstein and Quinn argue: "competition law matters are essentially economic regulation. They are accordingly best dealt with by an expert tribunal which can weigh the various interests in an appropriate manner. This is true regardless of whether proceedings are brought by a public agency or a private person....these matters can be brought in a more expeditious and efficient manner before an expert tribunal, which can control its own process and tailor the process to the case at hand. A court follows the applicable Rules of Practice in the jurisdiction, which tend to be

private right of action. Restrictions placed on private enforcement in the Tribunal, such as the present prosecutorial monopoly of the Director or restrictions placed on the procedures or remedies available to a private litigant before the Tribunal, may produce a demand for common law remedies in the ordinary courts. From the perspective of competition law policy, it may be better to allow and even encourage private enforcement before the expert Tribunal rather than forcing it into the ordinary courts.

At present the authorities are not unanimous on whether reviewable matters under Part VIII of the Act can be made the subject of a common law action.[205] In Pindoff Record Sales v. CBS Music[206], a judge of the Ontario High Court refused to strike out a claim that the defendant had engaged in civil conspiracy based on the reviewable practices of market restriction and abuse of dominant position. This approach, which is followed in Britain,[207] would allow plaintiffs even under the present law to avoid restrictions in the Competition Act by alleging common law claims. The ordinary courts could issue any remedy including interlocutory relief and damages for such breaches. Moreover, there is a legitimate concern that the judges of the superior courts as a group would not have the expertise in competition policy that the Competition Tribunal possesses. Allowing private actions before the Tribunal would have the virtue of making the prospect of civil litigation in the courts over reviewable matters less likely. Courts may be less willing to extend common law causes of actions to cover reviewable matters if they know that the plaintiff could seek relief under the Competition Act. Nevertheless granting litigants direct access to the Competition Tribunal would not guarantee that reviewable matters would not be made the subject of civil action or even that a particular defendant might not face subsequent proceedings in the common law

---

more elaborate and rigid, and therefore has less room in practical terms to relax the procedural and evidentiary rules in the conduct of proceedings." Neil Finkelstein and Jack Quinn "Re-Evaluating the Role of Private Enforcement and Private Party Access to the Competition Tribunal" supra at pp.7-8.

205 See James Musgrove "Civil Actions and the Competition Act" (1994) 16 Adv.Q. 94 at 126-129; Glenn Leslie and Stephen Bodley "The Record of Private Actions under Section 36 of the Competition Act" [1993] Canadian Competition Record 50 at 58-59.

206 (1989) 49 C.P.C.(2d) 308 (Ont.H.C.J.). See also R.D. Belanger v. Stadium Corp. (1991) 5 O.R.(3d) 778 (C.A.) demonstrating a reluctance to strike out claims in contract and tort which also alleged a breach of Part VIII's prohibition of exclusive dealing and abuse of dominant position. Breach of the criminal prohibitions of the Competition Act even though actionable under s.36 can also be made subject to independent common law actions. Westfair Foods Ltd. v. Lippens [1990] 2 W.W.R. 42 (Man.C.A.).

207 Daily Mirror Newspapers Ltd. v. Gardner [1968] 2 Q.B. 762 (C.A.); Brekkes Ltd. v. Cattel [1972] 1 Ch. 105. The British approach can be distinguished on the basis that the Restrictive Trade Practices Act, 1956 (U.K.) unlike the Competition Act deems many reviewable practices "contrary to the public interest."

courts.[208] Any federal legislation to restrict the development of civil causes of actions would likely be held ultra vires as legislation relating to property and civil rights.

I. Remedies

i) Interim Remedies

The Competition Tribunal at present has broad powers to issue interim orders when the Director commences proceedings with respect to a reviewable matter. Section 104 of the Act provides:

> the Tribunal, on application by the Director, may issue such interim order as it considers appropriate, having regard to the principles considered by superior courts when granting interlocutory or injunctive relief.

The Tribunal is also directed to tailor the order "to meet the circumstances of the case"[209] and if interim orders are made, the Director is required to "proceed as expeditiously as possible to complete proceedings under this Part".[210] The principles which apply to these remedies are that the Director as applicant must demonstrate irreparable harm that could not be compensated with damages, a serious legal issue that a violation will occur and that the balance of convenience favours the granting of the interim order.[211] An important issue if private applicants were allowed to commence proceedings under Part VIII of the Act would be whether they, like the Director, could apply for interim orders on the above basis.

It is unclear whether private applicants with a cause of action under s.36 of the Act with respect to a criminal breach of Part VI can apply for an interlocutory injunction.[212] In Canada (Attorney General) v. Law Society (British Columbia)[213],

---

208 Amendments to the Competition Act could allow the Tribunal to stay proceedings before it that were previously litigated in the ordinary courts. The Tribunal, however, might allow re-litigation if the issues were framed differently or the parties were not the same. The ordinary courts might not preclude subsequent litigation on the same basis. See Garry Watson "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1989) 69 Can.Bar Rev. 623.

209 ibid s.104(2). In certain merger cases, an interim order stopping a merger can only last for 10 or 21 days. ibid s.100(5).

210 ibid s.104(3).

211 See generally R.J. Sharpe Injunctions and Specific Performance 2nd ed (Aurora: Canada Law Book, 1983) ch.2.

212 Public enforcers in the form of the Attorney General of Canada or of a province can obtain an

the Supreme Court indicated that a provincial superior court could issue an interlocutory injunction as part of its inherent powers "to ensure effectiveness of its disposition."[214] Although the case involved the Competition Act, it also involved a constitutional challenge and did not seem to determine the issue when the matter was later considered by lower courts. In ACI Joe International v. 147255 Canada Inc.[215], a trial judge expressed the view that a s.36 private action was restricted to damages. This case has been criticized[216] and some other cases have held open the possibility that an interlocutory injunction could be issued to a private applicant under s.36 in an appropriate case.[217] More recent cases denying injunctive relief under s.36 create an incentive for the plaintiff to allege an alternative common law tort as the basis for obtaining an injunction.[218] Again, it should be recalled that restrictions on remedies under the Competition Act may produce countervailing demands for common law remedies that have the potential to fragment and disrupt the development of competition policy.

Interim remedies may in some contexts be an effective incentive for private actions. For example, an applicant faced with a refusal by a supplier to deal may require an interim remedy so that it can continue to operate until the merits are litigated. Similarly, an interim cease and desist order may be necessary to stop misleading advertising before substantial harm is caused.[219] On the other hand,

---

interlocutory injunction from a court if damage suffered cannot otherwise be compensated for and will be "substantially greater" than damage caused by the injunction should no breach latter be determined. Competition Act s.33(1).

213 (1982) 137 D.L.R.(3d) 1 (S.C.C.).

214 ibid at

215 (1986) 10 C.P.R.(3d) 301 (Fed.Ct.T.D.). This case was followed recently in 947101 Ontario Ltd. v. Barrhaven Town Centre [1995] O.J. No.15 (Ont.Ct.Gen.Div.) discussed in P.Collins "Injunctive Relief under Section 36 of the Competition Act" [1995] Canadian Competition Record 18.

216 Finkelstein and Kwinter for example argue that in cases dealing with predatory pricing and misleading advertising "a restraining order is often the only effective remedy, Where an offending practice is likely to lead to the elimination of a competitor or the erosion of its market share by damaging its goodwill, the competitor could be driven from the market before damages are awarded." Neil Finkelstein and Robert Kwinter "Case Comment" (1990) 69 Can.Bar Rev. 298 at 308.

217 Industrial Milk Producers v. B.C. Milk Board (1988) 47 D.L.R.(4th) 710 (F.C.T.D.)

218 Church & Dwight Ltd. v. Sifto Canada Inc. (1994) 20 O.R.(3d) 483 (Gen.Div.); See also James Musgrove "Civil Actions and the Competition Act" (1994) 16 Adv.Q. 94 at p.112

219 Bureau of Competition Policy Discussion Paper June, 1995 at p.16. Some commentators, however, maintain that "the availability of preliminary injunctive relief will rarely be an issue in respect of reviewable matters requiring proof of a substantial lessening of competition." Finkelstein and Quinn "Re-evaluating the Role of Private Enforcement and Private Party Access to the Competition Tribunal" supra at p.16.

interim remedies awarded without a full adjudication of the merits present a significant risk of allowing private plaintiffs to benefit from strategic action that may deter pro-competitive behaviour. For example, an interim injunction prohibiting a merger may prevent the merger for the foreseeable future because of the time and market sensitive nature of the transaction. It may also give the plaintiff unwarranted bargaining power by forcing the defendant to settle the claim before the merger can be completed.[220] The costs for the applicant in applying for such a remedy could be relatively modest while the strategic benefit of obtaining the remedy could be enormous. The Tribunal when it grants interim remedies before a full hearing will not be in a position to determine the merits. It may err and on that basis restrain behaviour that turns out to be pro-competitive. The goal in deciding whether interim remedies should be available to private applicants is to maximize the efficacy of private enforcement while minimizing the risk of strategic behaviour.

ii) Interim Remedies only on the Director's Application

One option is to deny private applicants the opportunity to obtain interim remedies and retain the monopoly that the Director presently enjoys over applications for interim remedies with respect to reviewable matters. Although it is possible that the Director could still apply for an interim remedy with regards to a privately commenced application, this is not a likely scenario. If the Director did not conclude that the matter warranted bringing an action, it is unlikely that he or she will believe that it merits an application for interim relief. If it is accepted that interim remedies may be necessary to make some private actions meaningful, then it seems insufficient to rely upon the Director to take this action.

The availability of interim remedies cannot be discussed in a remedial vacuum. If, for example, damages were not available after a full adjudication then an applicant denied an opportunity to apply for an interim remedy may be doubly disadvantaged if compliance orders after a full adjudication could not protect it from irreparable harm. Undertakings by plaintiffs who obtain interim injunctions to pay damages caused by the injunction should they lose on the merits is a common restraint on interlocutory injunctions which will be discussed below. At this juncture, the possibility of a reverse undertaking by the respondent to pay damages should the plaintiff be successful on the merits requires some consideration. In other words, as a quid pro quo for protection against interim relief, respondents could be required to compensate plaintiffs for damages, at least damages inflicted during the litigation process that could have been prevented by an interim remedy.

---

220 An interim injunction is a property rule which must be purchased from the plaintiff and is more drastic than a liability rule which requires only the payment of damages. See Calabresi and Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harv.L.Rev. 1089; Kaplow and Shavell "Property Rules versus Liability Rules: An Economic Analysis" (1996) 109 Harv.L.Rev. 713.

As discussed in the second section, mergers may require special treatment because of their time-sensitive nature and the fact that pro-competitive mergers are particularly vulnerable to strategic obstruction and delay. Finkelstein and Quinn have concluded that the risk of strategic behaviour by private applicants outweighs the benefits of supplementing the Director's existing powers with private applications for interim relief with respect to mergers. They argue:

> Plausible scenarios of strategic behaviour depend upon the ability of the applicant to inflict significant costs on respondents that are disproportionate to the costs experienced by the applicant. In the case of a proposed merger, the target management or competitors may have a strong incentive to apply to challenge, if they have a realistic prospect of obtaining a preliminary injunction halting the merger. Even though the evidentiary hurdles for preliminary injunctive relief are relatively stringent, we believe that the seriousness of the risk of strategic behaviour in merger cases should preclude private applicants from obtaining any preliminary relief. This enforcement role should be reserved to the Director.[221]

The risks of allowing private applicants to obtain interim remedies in merger cases may well outweigh their benefits. Nevertheless, the residual role of the Director in obtaining such relief should not be overestimated. It is difficult to imagine the Director seeking interim remedies with respect to private actions that are not his or her enforcement priority.

iii) Restrictions on Interim Remedies Sought by a Private Applicant

If private applicants are allowed to seek interim remedies, then restrictions could be placed on the availability of such remedies in an attempt to counter the risk of strategic behaviour. These restrictions could be imposed through changing the test for granting interim relief, the duration of interim relief and/or through costs rules and undertakings for damages. For example, section 100 of the Act restricts the duration of injunctions in merger cases where the Director has not made an application under s.92. One option would be to restrict the duration of any interim remedy granted to a private applicant. An obligation could also be placed on a private applicant, as is done at present with the Director, expeditiously to prepare the case for a full adjudication. The time limit on an interim order and the requirement that the applicant be prepared to proceed could be dove-tailed so that the interim remedy would end as the applicant was prepared to litigate the case. A plaintiff that was not prepared to litigate the case at that time would lose the benefit

---

221 Neil Finkelstein and Jack Quinn "Re-evaluating the Role of Private Enforcement and Private Party Access to the Competition Tribunal" Dec.8, 1995 at pp.15-16.

of any interim relief while a defendant that requested an adjournment might have to pay the price of having the interim relief extended.

Section 104 of the Act provides that interim relief on the Director's application should be granted "having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief". The applicant must establish a serious issue, the risk of irreparable harm and that the balance of convenience favours the granting of interim relief. More restrictive requirements could be placed on a private applicant. For example, a private applicant could be required to demonstrate not only a serious issue but a prima facie case.[222] In addition, the court could decide a question of law in those cases where granting the interim remedy will effectively decide the case.[223] Other restrictions could be placed on granting interim remedies. Borrowing from s.33 of the Act applying to interim injunctions for criminal breaches, the court could be required to conclude before granting interim relief that the plaintiff is likely to suffer damage that cannot be adequately compensated under any other provision of the Act and that will be substantially greater than any damage that the respondent would suffer should the enjoined activity not be found to be a violation. Borrowing from s.100 of the Act, the grant of interim relief could be made conditional on the Tribunal finding that without the relief, its ability to provide a remedy after a final adjudication would be substantially impaired and that the impugned activity is reasonably likely to prevent or lessen competition substantially. Both of these approaches would essentially codify the traditional tests of irreparable harm and balance of convenience but in a manner that is sensitive to the structure of the Act and the harms of prohibiting pro-competitive behaviour. The Act could even provide a presumption that interim relief should not be granted and direct the court to consider the dangers of strategic behaviour and deterring pro-competitive behaviour.

Applicants for interim relief could be deterred from strategic behaviour by having to pay the costs of the respondent for an unsuccessful application, perhaps on a solicitor and client basis. The effect of loser-pay costs rules in deterring some meritorious applications was discussed above, but such a rule may be warranted with respect to applications for interim remedies because the risk of strategic behaviour is great. Nevertheless, the prospect of paying a respondent's costs on an interim application will not likely be enough to deter much strategic behaviour.

An undertaking by the plaintiff to pay any damages that the respondent sustains as a result of the interim injunction being granted but overturned on the final adjudication would likely be a more effective deterrent against strategic behaviour than any costs rule. An undertaking for damages is frequently required in private law cases and in theory it addresses the risk of strategic behaviour. It

---

222 For discussion of the differences and merits of these tests see Robert Sharpe Injunctions and Specific Performance 2nd ed (Aurora: Canada Law Book, 1992) at 2.130-2.380.

223 RJR Macdonald v. Canada (A.G.) (1994) 111 D.L.R.(4th) 385 (S.C.C.).

could be made mandatory in cases of private applications concerning reviewable practices. In order to be effective, the undertaking would have to be enforceable and damages calculable. A mandatory requirement for an undertaking could cause some equity problems by preventing small firms, consumers and public interest groups from obtaining interim relief. One commentator has observed that "in Australia perhaps the most significant constraint on private litigants in injunction proceedings is the requirement to give the Court undertakings as to damages. Any application for relief would need to factor in the cost such undertakings may impose."[224] Exempting plaintiffs not directly affected by the impugned activity from the requirement for an undertaking would be a possibility. Nevertheless, respondents would be concerned about strategic behaviour not only from their competitors and consumers, but also from public interest groups. Although its administration is not without its difficulties, the plaintiff's undertaking to pay damages is an important procedural tool which could substantially reduce the risk of interim remedies being used for strategic purposes.

iv) Treble and Multiple Damages

Given the important role of treble damages in American antitrust actions, the availability of damages and the structure of damage awards is likely to have important symbolic and practical implications for the future of private enforcement of Canadian competition law. American courts have accepted the treble damage award as part of the private Attorney General theory of enforcement discussed above. For example, Chief Justice Burger has stated:

> Congress created the treble damage remedy of section 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.[225]

The treble damage award encourages private enforcement by giving those with less than substantial damages an incentive to take action. Without such an incentive, public enforcement or enforcement by ideologically-motivated public interest litigants will be necessary in cases where the costs of enforcement are greater than the rewards available from the remedies. Nevertheless, there is no-way to know

---

224 "Private Right of Action: Some Comments on the Australian Experience" at p.14.

225 Reiter v. Sontone 442 U.S. 330 at 344 (1979)

when the treble multiplier yields too much, too little or the optimal amount of deterrence. As Herbert Hovenkamp argues:

> Viewed in the most favourable light, the treble damages rule must be characterized as a guess that single damages provides too little deterrence and would permit too many antitrust violations to go unchallenged.[226]

From the perspective of corrective justice, treble damages represents an unjustified windfall to the plaintiff. As discussed in the second section of this study, the fine is a better instrument of deterrence if only because the resources devoted to public enforcement can be more carefully controlled than those devoted to private enforcement.

Many commentators have concluded that treble damages has distorted American antitrust law and the litigation process.[227] By definition, these awards divert resources into enforcement that exceed the social harms caused by the practices. The data on under-enforcement of antitrust laws is not now and may never be determinate enough to assure policy makers that multiplying damages threefold or by some other factor is necessary to deter unapprehended violations. Unlike fines that are controlled by public prosecutions, treble damages may produce overdeterrence as numerous private enforcers seek the reward of high damages. Treble damages are not always necessary to promote private enforcement. Those affected by reviewable matters may have enough incentive to enforce the law even if they are restricted to single damage awards or even prospective relief to ensure compliance for the future. In reality, very little is known about optimal levels of deterrence in the antitrust field and what incentives would be needed to produce the desired amount of private enforcement. Nevertheless, to the extent that multiple awards are necessary, it may be best to experiment with multiple awards of litigation costs. This at least directly addresses the costs of private enforcement and does not give injured parties a perverse incentive to maximize their damages.

v) Single Damages

Section 36 of the Act allows plaintiffs to recover damages "equal to the loss or damage proved to have been suffered by him" because of conduct contrary to Part VI of the Act or a failure to comply with an order of the Tribunal. There has been little experience with awarding damages under this section. Damages are currently not available as a remedy for reviewable practices under Part VIII of the Act. Damages are available under the Australian Trade Practices Act, 1974 and are generally

---

226 Federal Antitrust Policy supra at p.599.

227 Elizinga and Brett The Antitrust Penalties (New Haven: Yale University Press, 1974).

assessed on tort principles. There is a concern that damages may be difficult to assess in some cases because of the difficulties of proving reliance.[228]

The case for allowing private litigants to receive damages for harms caused by reviewable matters is compelling. Damages can achieve corrective justice between the plaintiff and the respondent. In addition, they can give plaintiffs an incentive to litigate and will offset the costs of litigation. This latter factor may be especially important if a successful plaintiff is not entitled to recover the full cost of investigation and litigation. Damages are also a more flexible regulatory instrument than compliance orders. If the Tribunal erred and found pro-competitive behaviour to be a violation of Part VIII, a damage award would only force the respondent to compensate for the harm suffered by the plaintiff. A compliance order, enforced by the Tribunal's contempt power, would force the respondent to cease the practice.

Damages can also be defended as a supplement to a compliance order. Andrew Roman has argued that without the power to award damages, a defendant will have little incentive to comply with competition law before the Tribunal issues a compliance order because:

> even if the practice is eventually stopped the anti-competitive conduct will be a success. The person refusing to deal gets away with it, without any cost, while the victim receives no compensation for his injuries. That is an unjust result. It also fails to deter others from engaging in this practice.[229]

In short, damages can be defended on the basis that they achieve corrective justice, they provide incentives to litigate and that when used alone or in conjunction with other remedies, they are a valuable regulatory instrument.

Damage awards do, however, have some shortcomings. Roman's argument discussed above cuts both ways. In other words, if only compliance orders are used respondents may be less deterred from engaging in pro-competitive behaviour because of a risk that damages could be awarded should the Tribunal conclude the practices constitute a violation. Compliance orders because they offer only prospective relief would in one sense be less punitive than damages given the difficulty that a respondent might have in knowing before the fact whether a reviewable practice would be a violation.

---

228 Australian Law Reform Commission Compliance with the Trade Practices Act, 1974 (1994) at pp.65-68 which recommends statutory amendments to make clear that the assessment of damages should be guided by the purpose of the legislation, not common law analogies.

229 Andrew Roman Consumer Enforcement of Competition Laws (Ottawa: Public Interest Research Centre, May, 1989) at p.31.

Damages for antitrust injuries present a danger of duplicate recovery from a respondent of losses that fall along a chain of distribution. As discussed in the section on standing, the Tribunal would have to take steps to avoid this risk by, for example, requiring non-parties to join in an action to ensure that they did not bring a later action that can impose duplicate recovery on the respondent.

Another limitation on damages as an antitrust remedy is that they may be difficult to establish. In one s.36 misleading advertising case, for example, it was found that even though the defendant had engaged in misleading advertising, the plaintiff had not proven that the advertising was the reason why she purchased the home.[230] Damages might be particularly difficult to establish if the Tribunal follows American law and requires the plaintiff to demonstrate an antitrust injury. This would require the plaintiff to establish that its loss was not attributable to any factor other than the anti-competitive behaviour. Proof of an antitrust injury may not be necessary where a violation only occurs if there is a substantial lessening of competition. This would include most reviewable matters, but perhaps not refusals to deal under s.75 of the Act. Even if antitrust injuries had to be established, the magnitude of the damages may encourage some litigants to undertake the complex investigations often necessary to establish damages.[231]

vi) Compliance Orders

Orders to secure compliance in the future are the primary remedy currently available under Part VIII of the Act. Section 75 allows the Tribunal to order a respondent to either accept a person as a customer or to remove restrictions on an article within a specified time if a practice is determined to constitute a refusal to deal. Section 76 allows the Tribunal to order a supplier to cease consignment selling and s.81 allows the Tribunal to order a supplier to cease engaging in delivered pricing. Sections 77 and 79 allow the Tribunal to order that exclusive dealing, tied selling or practices that constitute abuse of a dominant position cease in the future, as well as broader remedies to restore or stimulate competition in the market or overcome the effects of the abuse in the market. Section 92 grants the Tribunal broad remedial powers with respect to mergers including the drastic remedies of divesture and prohibition of the merger as well as less drastic remedies that will alter the merger. Section 99 allows the Tribunal to rescind an order to dissolve a

---

230 Petley v. Van Arnhem Construction Ltd. (1982) 67 C.P.R.(3d) 212 (Small Claim Ct.)

231 McDonald observed in the context of s.36 actions: "Plaintiffs may or may not receive indirect government assistance in proving the offence, but they will almost invariably be on their own in establishing their resulting loss or damage. In some types of cases this will be at least as complex as proving the offence." "Private Actions and the Combines Investigation Act" in Prichard et al Canadian Competition Policy: Essays in Law and Economics (Toronto: Butterworths, 1979) at p.208-209, Similarly Musgrave noted that "surveys and economic and accounting evidence will often be required" to establish damages in misleading advertising and price maintenance cases but observes that under s.36 a plaintiff can obtain the full costs of investigating a claim. "Civil Actions and the Competition Act" (1994) 16 Adv. Q. 94 at 110

merger or dispose of assets if specified conditions are met within a reasonable period of time. All of these provisions are united by a common focus on preventing further violations and ensuring compliance in the future, not repairing past violations. This makes sense if the Director is the only plaintiff because the Director's only interest is securing compliance in the future.

Compliance orders will likely play an important role under private enforcement, but it should be recognized that the private plaintiff has different incentives from the Director. A private plaintiff that is affected by a reviewable practice will request a compliance order when that is necessary to improve its own situation. Attempts will be made by a private plaintiff to obtain the remedy that is most advantageous to its own interests even if the remedy requested goes beyond the objectives of the Act. On the other hand, the Director is primarily interested in obtaining a remedy that best fulfils his or her regulatory objectives in both the individual case and other cases. Because of his or her regulatory mandate, the Director will be more concerned that a remedy could be too harsh on a supplier and others in the supplier's position and deter pro-competitive behaviour in other cases. The Tribunal will have to be especially vigilant to scrutinize the remedial requests of private plaintiffs with care to ensure that they comply with the purposes of the Act as opposed to the strategic objectives of plaintiffs who may continue to compete or deal with respondents. This concern would also apply if private applicants were allowed to request cease and desist orders, orders respecting marketplace information and the publication of information with respect to misleading advertising.[232] The Tribunal would have to ensure that the remedies ordered do not impose unnecessary costs on respondents. It should also consider any representation that the Director might make on an intervention concerning the broader effects of particular remedies and in particular any concerns that such remedies might deter pro-competitive behaviour in other cases.

vii) Consent Orders

Section 105 of the Competition Act allows an application by the Director to be preempted if the Director and the respondent "agree on the terms of the order." The Tribunal "may make the order on those terms without hearing evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested." The Director or a party to the consent order may apply to the Tribunal to rescind or vary the order on consent or where circumstances have changed.[233]

If private enforcement was allowed, a decision would have to be made whether to extend this provision to actions commenced by private parties. A

---

232 It has been proposed that the Director, but not private applicants, be able to request these remedies from the Tribunal. Competition Act Amendments Discussion Paper June 1995 at pp.16-17.

233 Competition Act s.106.

plaintiff and a respondent could always settle a case, but a consent order differs because it goes beyond a contractual settlement and allows the settlement to be enforced as a court order. If consent orders were allowed between private parties, the Tribunal would have to engage in a more searching review of the settlement to ensure that its terms comported with the broader purposes of the Act. For example, a Tribunal which ratifies a consent order should take care to ensure that its order does not impose costs on third parties. This concern about the terms of a proposed consent order not being consistent with the purposes of the Act is an example of a more general concern that settlements in private actions may be collusive or motivated by strategic objectives shared by both private parties. As suggested above, private enforcement will always present a risk of collusive settlements, but these can be addressed by requiring the Tribunal to approve settlements. If the Tribunal has to approve settlements, there seems to be no reason why it should not be allowed to make consent orders provided that the settlement accords with the purposes of the Act.

viii) Class Actions

Under s.36 of the Act, the availability of class actions depends on the various rules used in each province and in the Federal Court. With the exception of Ontario, Quebec and British Columbia, which have each introduced legislation encouraging class actions, the rules in the other jurisdictions generally restrict class actions under the leading precedent of Naken v. General Motors.[234] If private applicants were to be encouraged to bring class actions with respect to reviewable matters, the Competition Act would have to be amended to provide some mechanism for class actions perhaps patterned after the Ontario, Quebec or B.C. legislation or earlier proposals.[235] Class actions could be a valuable instrument for enforcing civil misleading advertising provisions because the loss suffered by each consumer would often be insufficient to justify the cost of litigation. As discussed above, some of the costs of such litigation could be mitigated by employing one-way pro-plaintiff cost rules and contingency fees subject to a multiplier to reflect the risk of litigation. Class actions would allow the aggregation of consumer claims that might not be economically feasible to litigate on an individual basis.

Class actions may also be used with respect to some reviewable matters where joinder of multiple plaintiffs is not practicable. In Alta. Pork Producers Marketing Bd. v. Swift et al.[236], the Alberta Court of Appeal upheld a class action on behalf of all pork producers in the province who had marketed pork through the marketing board alleging damages for conspiracy to lessen competition in the pork industry.

---

234 (1983) 144 D.L.R.(3rd) 385 (S.C.C.).

235 A Proposal for Class Actions Under Competition Policy Legislation (Ottawa: Information Canada, 1976)

236 (1984) 53 A.R. 284 (C.A.)

Although the class was estimated to be between 2,000 and 10,000 people, the case was held to be relatively simple to manage because the board had records of all producers and the extent of their sales. Damages could be readily calculated and allocated to each producer. If either the class or the damages had been more difficult to identify, then the courts, applying Naken, would have refused to allow the case to proceed as a class action even if it was not economically viable to litigate as individual cases.

In some cases concerning reviewable matters, the class of plaintiffs could be identified on the basis of the respondent's business records. The damages suffered by the plaintiff class may frequently be more difficult to calculate. A class action procedure should allow common issues concerning liability to be litigated first as between the representative plaintiff and the respondent. More fact- specific issues of damages can be litigated at a later stage with the participation of other members of the class if necessary. Previous reform proposals have suggested that even if damages cannot be economically determined with respect to each member of the class, they should be exacted from the respondent in order to prevent unjust enrichment and to deter anti-competitive behaviour. The undistributed award could be placed into a common fund either for the benefit of the class in general[237] or simply to finance further enforcement efforts.[238]

The general fund and fluid recovery approaches to assessing damages were implicitly rejected by the Director in recent proposals to allow the Director to seek restitution orders for breaches of proposed civil misleading advertising provisions. It is proposed that restitution orders only be made if the Director, (or presumably a representative plaintiff should private enforcement be allowed), establishes "that a clearly identifiable individual or group had suffered a readily determinable financial loss caused by the misleading advertising in question and that losses were significant on an individual basis."[239] This approach privileges the obligations of achieving corrective justice between the respondent and those whom it harmed over the goals of deterring misleading advertising and ensuring that the respondent is not unjustly enriched by its illegal activities. Allowing a more flexible common fund or fluid recovery approach has distinct regulatory advantages. As Williams argues: "A successful class action has the potential for bringing compensation to every person injured by a combines offence, but the prevention of unjust enrichment and deterrence are two no less important objectives."[240] The

---

237 See Class Proceedings Act S.O.1992 c.6 s.26.

238 Neil Williams "Damages Class Action under the Combines Investigation Act" in Dept. of Consumer and Corporate Affairs A Proposal for Class Actions under Competition Policy Legislation (Ottawa: Information Canada, 1976) ch 11.

239 Bureau of Competition Policy Discussion Paper Competition Act Amendments June 1995 at p.16. The Consultative Panel subsequently recommended that no restitution orders be allowed but rather a civil monetary penalty. Report of the Consultative Panel on Competition Act Amendments April, 1996 at pp.16-24.

240 "Damages Class Actions under the Combines Investigation Act" supra at p.141.

assessment of fluid recovery or common fund damages will not convert the damage award into a punitive fine. The damages to be paid into the fund will only equal the defendant's gains that are attributable to the illegal practice. This damage in itself may be difficult to establish if antitrust injury requirements are applied. Whether more flexible forms of recovery are allowed or not, private class actions will not obviate the need for public action including an application by the Director seeking civil or criminal fines.[241]

Several safeguards will need to be built into any procedure that allows private litigants to bring class actions with respect to reviewable matters. First, the representative plaintiff should be certified by a member of the Tribunal as being capable of representing the class and bringing a valid claim. This certification hearing could be merged with the summary judgment procedure discussed above. Strategic behaviour by representative plaintiffs could be partially deterred by awarding the defendant costs should the case not be certified or survive summary judgment.[242] Once the class was certified the Tribunal would have to determine if any settlement adequately serves the members of the class. This would address the incentive that the representative plaintiff and his or her lawyers might have to enter into a settlement with the respondent that secures their fees but does not provide adequate compensation or deterrence.[243]

ix) Summary

The remedies available on an application by a private plaintiff will likely determine the efficacy of this enforcement device. Preventing the Competition Tribunal from awarding interim relief or damages will make litigation less attractive and may produce countervailing pressures to expand common law actions to include conduct that can be assessed as a reviewable practice. There is a risk that private plaintiffs will seek interim relief for strategic reasons and that such relief may restrain pro-competitive behaviour. This risk may justify preserving the Director's exclusive monopoly over requests for interim relief, at least in the merger

---

241 Jennifer Whybrow for example concluded that "in cases involving large classes with small losses, some form of public action is the most efficient solution to provide for maximum deterrence and the prevention of unjust enrichment which are desirable goals of private enforcement." "The Case for Class Actions in Canadian Competition Policy: An Economist's Viewpoint" in Dept. of Consumer and Corporate Affairs A Proposal for Class Actions under Competition Policy Legislation (Ottawa: Information Canada, 1976) at p.237. For a defence of why the Director should be able to bring a substituted class action on behalf of consumers who do not have the incentive to bring an action see Michael Trebilcock et al. A Study on Consumer Misleading and Unfair Trade Practices (Ottawa: Information Canada, 1976) at pp.269ff.

242 As was contemplated in Neil Williams "Damages Class Action under the Combines Investigation Act" in Dept. of Consumer and Corporate Affairs A Proposal for Class Actions under Competition Policy Legislation (Ottawa: Information Canada, 1976)

243 ibid at p.101.

context. There is a danger, however, that denying a private applicant, especially a smaller company or a customer, interim relief may make the remedy at the end of a full hearing inefficacious. The doctrine for granting interim relief can be tightened and plaintiffs can be required to undertake to pay damages that respondents suffer because of the grant of interim relief that is subsequently overturned. If interim relief is not available, respondents might have to pay damages, at least for injuries that they inflict during the litigation process.

More generally, damages can both compensate private applicants for harms caused by reviewable practices and give them an incentive to bring an action especially if a no-way cost rule is employed. Compliance orders will remain an important remedy, but the Tribunal should take great care in ensuring that plaintiffs do not obtain orders that go beyond the purposes of the Act. Settlements and consent orders will also play an important role, but again the Tribunal will have to be vigilant because settlements between private parties cannot be assumed to accord with the purposes of the Act in the same way as settlements with the Director. Finally, class actions could play a valuable role by aggregating claims that on an individual basis are not viable, but it may be difficult to assess and distribute damages without a common fund or fluid recovery approach. The most liberal class action approach, complete with one-way cost rules and contingent fees subject to a multiplier, will not obviate the need for public enforcement in many cases of economically non-viable claims.

IV. CONCLUSION

This study has examined the strengths and weaknesses of private enforcement of competition law with particular attention to the reviewable practices contained in Part VIII of the Competition Act. Nevertheless, many of the design issues identified in this paper would also apply to private actions which are presently allowed under s.36 of the Act with respect to criminal competition offenses and failures to comply with an order of the Competition Tribunal. Should private parties be allowed access to the Competition Tribunal with respect to reviewable matters, there may be a case for also allowing or even requiring private parties to utilize the same procedures for s.36 claims. One reason why there have been so few reported s.36 cases may be that private parties are deterred by the loser-pay cost rules employed and uncertainty about whether injunctions are available. In addition, the dangers of strategic behaviour and disruption of public enforcement policies identified in this study with respect to reviewable matters would also apply to s.36 matters. In our tentative view, the procedures discussed in this paper for private actions concerning reviewable matters are also appropriate should the Tribunal be given either concurrent or exclusive jurisdiction to hear s.36 actions.

Most design features for a private action will flow from what remedies are available in a private cause of action and what reviewable matters are enforceable by way of a private action. The most controversial remedies will be damages and

interim remedies while the most controversial causes of actions will be mergers and misleading advertising.

A. Damages

1. Standing rules should allow those who are materially affected to bring an action to ensure that even indirect purchasers can bring claims for damages. Restricting standing to direct purchasers, as is done in the United States, would be in tension with the purpose of the Competition Act in protecting ultimate consumers.

2. If damages are not available, even broader standing rules will be required. Public interest litigants who are not materially affected by an impugned practice should be able to bring an action because of the importance of encouraging enforcement.

3. If damages are available, steps will have to be taken to prevent duplicate recovery.

4. If damages are available, there will be less of a concern about using costs rules to make litigation attractive for plaintiffs. In particular, one-way pro-plaintiff costs rules may not be necessary and no-way costs rules can be preserved at least for cases which survive summary judgment.

B. Interim Remedies

1. If private applicants can obtain interim remedies, the Tribunal will have to be cautious in ensuring that such remedies do not restrain pro-competitive behaviour. Requiring the plaintiff to undertake to pay damages should the interim remedy be overturned would be one means of addressing the risk of strategic behaviour.

2. If private applicants cannot obtain interim remedies, the case for awarding damages, at least damages sustained by the plaintiff during the litigation process, becomes stronger.

C. Mergers

1. The Director can either preserve his monopoly over interim remedies or the test for granting injunctions to private applicants could be tightened and the plaintiff be required to undertake to pay the respondent's damages.

D. Misleading Advertising

1. Costs rules will have to be carefully tailored so as not to deter consumers with small claims. At the same time, competitors may bring actions for strategic reasons which may be partially addressed by a loser-pay costs rule.

2. If misleading advertising was made a reviewable matter, the case for a class action procedure would also be more compelling.

The rest of the design features for private actions can be grouped around two themes: preserving the virtues of the Director's enforcement policy based on prosecutorial discretion and countering the risk that plaintiffs will undertake litigation for strategic purposes.

E. Preserving the Director's Enforcement Policy

1. Plaintiffs will have to notify the Director before commencing a private action. The Director will have to decide whether to commence his or her own action, intervene in the private proceeding or simply allow the private action to proceed. If the proposed proceeding has important policy implications, the Director will commence his or her own action or perhaps intervene in the private action to present his or her views to the Tribunal. The Tribunal will then have the benefits of the Director's view and evidence.

2. In merger cases where an advance ruling certificate has been issued, the Director should be allowed to stay a privately commenced proceeding by giving reasons to the Tribunal. This will protect the Director's enforcement policy while allowing the private action to promote the Director's accountability.

3. A consent agreement negotiated with the Director could also pre-empt a private action but any party who did not agree to the settlement should be allowed to make representations to the Tribunal before it issues its orders.

4. Limitation periods can be crafted to discourage private actions that follow on from the Director's enforcement efforts. Where the Director has pre-empted a private action by bringing his or her own action, private parties could be allowed to intervene in the action and even to seek compensation should the Director establish liability.

F. Combatting Strategic Behaviour

1. Actions undertaken for strategic reasons can be deterred by allowing the Tribunal to order the plaintiff to pay the respondent's costs for cases that do

not survive summary judgment.

2. A mandatory summary judgment rule will require plaintiffs to present affidavit evidence to support theirs claims and ensure that litigation is not delayed for strategic reasons. If summary judgment is not granted, this procedure can help manage the case.

3. A single member of the Tribunal can supervise discovery to protect against discovery abuse and ensure that discovery is used only for the legitimate purposes of the Act.

4. The Tribunal will approve all settlements to ensure that the private parties have not reached a collusive agreement that is inconsistent with the purposes of the Act.

5. Interim remedies can be restricted by requiring the plaintiff to undertake to pay the respondent's damages should the relief be overturned after a full hearing.

6. The Tribunal should scrutinize consent agreements and requests for injunctions to ensure that they accord with the purposes of the Act.

In short, the case for allowing private party access to the Competition Tribunal is compelling. Plaintiffs can seek corrective justice in the Tribunal and in doing so supplement the enforcement resources of the Director and promote accountability for the Director's decisions not to proceed with reviewable matters. The major weaknesses of private enforcement, namely its ability to disrupt the Director's enforcement policy and to allow private litigants to impose strategic costs on others, can be addressed by careful design of the private right of action.