# CLASS ACTIONS AND PRIVATE LAW ENFORCEMENT

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## I. INTRODUCTION

A major task in the determination of effective law enforcement strategies is the delineation of the appropriate roles of public and private law enforcement mechanisms. As a general rule, the relationships and duties of private citizens *inter se* are regulated through private enforcement. For example, the State's role in the enforcement of contract, tort and property law has traditionally been limited essentially to providing a court system. On the other hand, the public law system is designed to establish rules of conduct to protect the general social welfare and has traditionally been enforced primarily by public officials who are charged with furthering the public interest in the prevention of breaches of these rules. [1]

However, this description of the respective functions of private and public law enforcement greatly over-simplifies the complex array and mixes of law enforcement strategies to be observed in most contemporary legal systems. Increasingly we observe the intrusion of public enforcement mechanisms into areas traditionally conceived of as falling within the domain of private law. For example, compensation schemes such as Workmen's Compensation, no-fault automobile insurance and universal disability schemes, environmental and consumer protection statutes, and a wide spectrum of other regulatory regimes dealing with economic activities of various kinds, increasingly displace or overlay private law rules with publicly enforced prohibitions or administrative regulation. Similarly, areas of law traditionally thought of as falling within the domain of public law increasingly provide additional private law oriented sanctions. Of course, historically the criminal laws of England were enforced by private parties and traces of this system

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* Law and Economics Programme, University of Toronto Faculty of Law. This paper is the revised text of some comments presented by Professor Trebilcock at the 1977 annual meeting of the Association of Canadian Law Teachers. A number of points raised herein are more extensively discussed in Prichard, "Private Enforcement and Class Actions", National Conference on Competition Policy, University of Toronto, May 12, 13, 1977; mimeograph.

1 See Landes & Posner, "The Private Enforcement of Law", 4 J. Leg. Studies 1 (1975).

have persisted to the present day. [2] Beyond this, however, prohibitory statutes increasingly are framed or interpreted so as to provide for private law sanctions for their breach to supplement public penalties. More generally, the Law Reform Commission of Canada has recently proposed much wider use of compensatory sanctions as options in the sentencing process in criminal sanctions. [3] This proposal implicitly recognizes the substitutability of compensation, traditionally conceived of as a major objective of the private law, for deterrence, traditionally conceived of as a major objective of the criminal law. Indeed, if every unlawful actor had to contemplate the absolute certainty of paying full compensation to everybody damaged by his misconduct, this would function as a complete system of deterrence. Conversely, if every unlawful actor had to contemplate the absolute certainty of public penalties fixed at a level that would remove all gains from his misconduct, there would be little need, from a deterrence perspective, for any private law system of compensation.

To narrow the focus more specifically to the subject of this paper, these trends are exemplified in recent amendments to the *Combines Investigation Act* [4], Canada's statute dealing with competition policy. Historically, this statute has been enforced entirely through the medium of the criminal law. However, amendments in 1975 [5] in section 31.1 provided for the first time that any person who suffers loss or damage as a result of violations of the Act may sue for recovery of the loss or damage suffered. Further amendments, contained in *Bill C-42* [6], before Parliament at this writing, would, in addition to instituting administrative review and control of certain practices, incorporate, in sections 39.1 through 39.23, a detailed procedural code for class actions under the Act to facilitate and expand utilization of the private right of action introduced in the earlier amendments. [7]

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2 See Radzinowicz, *A History of English Criminal Law*, v. 2 (1956), pp. 33-170; Kurland & Waters, "Public Prosecution in England 1854-79. "An Essay in English Legislative History", Duke L. J. 495 (1959); Sidman, "The Outmoded Concept of Private Prosecution", 25 Amer. U. L. Rev. 754.

3 Working Paper, *Restitution and Compensation* (No. 5, 1975); also Trebilcock et al., *A Study on Consumer Misleading and Unfair Trade Practices*, (Information Canada, 1976), pp. 85, 86, 302, 303.

4 R.S.C. 1970, C-23.

5 S.C. 1975, C-2.

6 The Bill was recently studied in the Fourteenth Report to the House of Commons of the Standing Committee on Finance, Trade and Economic Affairs (1977).

7 For another recent effort at comprehensive reform of class action rules, see the U.S. *Uniform Class Action Act*, 6 Class Action Reports 639 (1975).

The balance of this paper is devoted to an examination of these proposed class action provisions with two purposes in view: first, to assess the likely role of this form of private law enforcement in a competition policy context, and, secondly, to seek some more general insights into factors which should influence the choice of private law/public law enforcement strategies in other enforcement contexts, where present arrangements seem often to be more the accidents of history and ad hocery than the products of reasoned analysis.

## II. SUMMARY OF BILL C-42 CLASS ACTION PROVISIONS

The Bill provides that a representative plaintiff may bring a class action if he can satisfy the court in preliminary certification proceedings that: (1) members of the class are so numerous that joinder is impracticable; (2) there are questions of law and fact that appear to be common to the class and these predominate over any questions effecting only individuals in the class; (3) the representative party will fairly and adequately represent the interests of the class; (4) the proceedings are brought in good faith on the basis of a *prima facie* case; and (5) the class action is superior to any other available method for the adjudication of the issues between the defendant and class members. In determining (5), the court shall determine if class members have suffered a sufficient loss to warrant the cost of administering relief. The Bill provides that class status shall not be denied on the grounds only that: (1) the relief claimed is damages; (2) the damages require individual calculation; and (3) the claims arise out of separate contracts or transactions. These provisions significantly relax existing restrictions on the bringing of class actions as exemplified in decisions such as that in *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*[8] In a further modification of the common law, the Bill gives the court the power to order that notice be sent a class members of the pendency of the suit affording them an opportunity to opt out.[9]

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8 [1910] 2 K.B. 1021 (C.A.). See also *Johnston v. Consumers' Gas Co.* (1898), 23 O.A.R. 566; *Preston v. Hilton* (1920), 48 O.L.R. 172; *A. E. Osler & Co. v. Solomon*, [1926] 4 D.L.R. 345; *Shaw v. Real Estate Board of Greater Vancouver*, (1973), 36 D.L.R. (3d) 250 (B.C.C.A.); *Farnham v. Fingold*, [1973] 2 O.R. 132 (C.A.). Despite recent developments, these restrictions still appear to limit significantly the availability of the class action. See *Chastain v. British Columbia Power Authority* (1973), 32 D.L.R. (3d) 443 (B.C.D.C.); *Naken et al. v. General Motors*, (1976), 66 D.L.R. (3d) 205 (Ont. C.A.); *Cobbold et al. v. Time Canada Ltd.* (1977), 13 O.R. (2d) 567 (H.C.).

9 For detailed discussions of the present states of Anglo-Canadian and U.S. class action law, see Williams, *A Proposal for Class Actions Under Competition Policy Legislation* (Information Canada, 1976); Williams, "Consumer-Class Actions in Canada - Some Proposals for Reform", (1975) 13 Osgoode Hall L.J. 1; Note, "Developments in the Law - Class Actions", 89 Harv. L. Rev. 1319 (1976).

With respect to costs the Bill provides that no costs shall be awarded to any party to a class action except on: (1) the initial application for class status; (2) the settlement of individual issues subsequent to a class judgment; (3) an interlocutory motion; or (4) proceedings based on substantially the same facts on which the plaintiff was previously convicted. The Bill provides further that the reasonable solicitor and client costs of the representative class constitute a first charge on a *pro rata* basis on the amounts payable as compensation to class members.

Finally, the Bill provides for "substitute actions" by the Competition Policy Advocate (the public enforcement official under the *Combines Investigation Act*) in some situations where a private class action is not allowed.[10] Substitute actions are confined to situations in which a class action was denied because there was unlikely to be sufficient compensation claimable by individual class members to warrant the expense of administering relief. Moreover, the Advocate cannot claim relief in a substitute action if, prior to judgment, the defendant has been convicted of an offense on the same facts.

Although it is not expressly stated in the Bill, it is important to note that as a general rule of evidence, the requisite standard of proof in these class actions will be the civil and not the criminal standard of proof. In addition, a prior criminal conviction for breach of the Act is *prima facie* evidence of the facts on which the conviction was based in a subsequent private civil suit against the same party.

## III. AN EVALUATION OF THE PROPOSED PROVISIONS

In this portion of the paper, we wish to address, first, the question of why and how private civil actions, facilitated by class procedures, can contribute to the proper enforcement of a statute like the *Combines Investigation Act*. Then, secondly, we wish to consider whether the proposed procedures are designed in a way that will allow the class action to fulfill its appropriate enforcement role.

In order to evaluate critically the Bill's class action procedures, it is essential that the rationale for, and role of, class actions be understood. If we conclude that they have a useful role then we should facilitate them by efficient and effective procedures. If no useful role can be identified, then wide enabling procedures clearly become unattractive.

As suggested in our introductory comments, a private civil action for breach of the Act is in many ways a substitute for a public criminal prosecution. A successful suit can be thought of as a

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10 Cf. The U.S. *Antitrust Parens Patriae Act*, 6 Class Action Reports 647 (1975).

"conviction", and the possibility of such a suit as raising the probability of "conviction". The damages award can be thought of as a "fine". Civil actions brought without a prior criminal conviction increase the probability of "conviction" while suits which rely on a prior criminal conviction function only to increase the level of "fine". It is important to note the relationship between the "conviction" rate and the level of "fines", because in terms of economic analysis, the optimal level of deterrence will, broadly speaking, involve a penalty equal to the gains from violation divided by the probability of conviction.[11] Thus if a violator could anticipate a gain of $100 from a particular violation of the Act, and faces a 10% probability of apprehension and conviction, the optimal penalty, applying this calculus, would be $1,000. The short point sought to be made here is that *a priori* there is a high rate of substitutability between private civil actions and criminal prosecutions in achieving this optimizing calculus because both affect "conviction" rates and the level of "fines".

In examining factors which should influence the choice between the two broad enforcement options, the approach we take is to compare the relative efficiency of public and private enforcement and then to incorporate into the evaluation other considerations such as compensatory objectives, the role of prosecutorial discretion, and institutional limitations on public enforcement mechanisms.[12]

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11 See Posner, *Economic Analysis of Law* (1972), at 360 *et seq.*

12 The analysis which follows draws upon a considerable body of literature on private enforcement and its role in antitrust policy. The leading works include Breit & Elzinga, "Antitrust Enforcement and Economic Efficency: The Uneasy Case for Treble Damages", 17 J. Law & Econ. 329 (1974): Breit & Elzinga, "The Instruments of Antitrust Enforcement", 23 Emory L.J. 943 (1974); Breit & Elzinga, "Antitrust Penalties and Attitudes Towards Risk: An Economic Analysis", 86 Harvard L. Rev. 693 (1973); Elzinga & Breit, *The Antitrust Penalties* (1976); Dam, "Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest", 4 J. Leg. Studies 47 (1975); Landes & Posner, "The Private Enforcement of Law", 4 J. Leg. Studies 1 (1975); Mashaw, "Private Enforcement of Public Regulatory Provisions: The Citizen Suit", 4 C.A.R. 29 (1975); Becker & Stigler, "Law Enforcement, Malfeasance and Compensation of Enforcers", 3 J. Leg. Studies 1 (1974); Becker, "Crime and Punishment: An Economic Approach", 76 J. Pol. Econ. 169 (1968); Stigler, "The Optimum Enforcement of Laws", 78 J. Pol. Econ. 526 (1970); Posner, "An Economic Approach to Legal Procedure and Judicial Administration", 2 J. Leg. Studies 339 (1973); Posner, *Economic Analysis of Law* (1972) pp. 320-385; Handler & Blechman, "Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach", 85 Yale L.J. 626 (1976); Withrow & Larm, "The 'Big' Antitrust Case: 25 Years of Sisyphean Labor", 62 Cornell L. Rev. 1 (1976). For Canadian commentary see *Proposal*; Skeoch & McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (1976) pp. 322-333.

(a) *Efficiency*

(i) *Investigative Efficiencies*

A number of factors here favour public enforcement. First, there are probably returns both to scale and specialization associated with a single enforcement agency. Secondly, only a public enforcement agency is likely to be entrusted with the wider investigative powers necessary for effective scrutiny of possible misconduct. Thirdly, public enforcement does not suffer from the problem of appropriability inherent in private enforcement. [13] If a number of private enforcers are spending resources investigating a possible offence, each runs the risk that some other private enforcer will file a civil action first and thereby appropriate all the rewards since rewards are provided through the court-awarded lawyers' fees following a successful suit or settlement. This competition to file first to gain the private benefits of investigation results in a bias towards the early filing of poorly investigated claims and away from the necessary investment in investigative activities. On the other hand, private enforcers will often be parties to the transactions in question and thus be better able to detect and have stronger incentives to identify violators.

(ii) *Prosecutorial Efficiencies*

Public enforcement is favoured by the fact that no proof of damages is required. In some cases this will be a significant advantage, in others not. For example, in a price fixing case, damages may be fairly readily proved, whereas in a misleading advertising case an assessment of damages is likely to involve each member of the class proving reliance on the misleading advertisement.

Private enforcement is favoured by the fact that the lower, civil, standard of proof applies, which in turn may increase the "conviction" rate and may lead to less restrictive interpretations by the courts of impeachable types of conduct than tend to obtain in a criminal law context.

(iii) *Efficiencies of Sanctions*

In theory, fines imposed through public enforcement mechanisms are the ideal form of correction. Their level can be flexible so that they can be set to reflect the fact that the probability of conviction is likely to be less than one, whereas damages are limited to the damage suffered and cannot generally take account of the

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13 Posner, *Economic Analysis of Law* (1972) at 378-79.

"conviction" rate. Again, publicly enforced fines avoid the need to prove the amount of damage caused by the violation in the way that damages in civil suits must be proved. Finally, fines avoid any costs of distributing the penalty, whereas damages can be expensive to distribute to individual members of the class.

(b) *Compensation*

Considerations of equity argue for permitting a party or class of parties who have suffered damages from unlawful behaviour to recover compensation from the violator. But equity here, as elsewhere, is not costless. In evaluating the costs and benefits of permitting civil compensation, three types of claims can usefully be differentiated.[14] First, there are those which, whether brought either individually or as a class, are so small that the costs of ensuring compensation exceed the compensation due. *Bill C-42* does not allow private class actions in these circumstances, although the Competition Policy Advocate may bring a substitute action and have the global damages suffered by the class, where quantifiable, paid into the Consolidated Revenue Fund. Of course, if the deterrent function of privately brought class actions is thought to be predominant and there are efficiency considerations favouring them over public enforcement, it is not clear that the non-achievement of significant compensatory objectives should be fatal to the bringing of a private class action. Here, depending on the costs rules that govern, the incentive to bring such a suit will rest almost wholly with the lawyer for the class. Special provision would have to be made for the disposition of a class recovery in such a case, perhaps similar to that proposed for the Advocate's substitute action. The question of the resulting role of lawyer as entrepreneur arguably promoting simultaneously his private self-interest and the public interest in effective deterrence of anti-social behaviour is adverted to later in this paper.

The second class of claims that can be identified is individually significant claims which individuals would be economically justified in pursuing either in individual civil suits or as members of a class. Here, class actions desirably economize on judicial resources and parties' transaction costs by consolidating such claims for a single determination.

The third class of claims involves the intermediate situation where individual claims would not be worth litigating individually

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14 These categories are based on those stated in Note, "Developments in the Law - Class Actions", 89 Harv. L. Rev. 1319 (1976) at 1356.

but, in terms of compensation are worth enforcing through a class action. These newly facilitated claims, unlike those in the second category, or those in the first category forbidden by *Bill C-42*, represent a net increment to the workload of the civil courts. The objection is made that on the assumption that, at least in the short-run, judicial resources are fixed, these new claims will displace or defer other suits that would otherwise have been allocated the judicial resources now allocated to these new class actions, and thus the equity effects, when netted out, may not be positive. [15]

This argument is, of course, correct to a point, but there seems to be no *a priori* reason for assigning a lesser social valuation to these new claims than to those already in the system. In theory, one might seek to determine how many units of judicial resources are required to process old and new types of claims of a given quantum of damages, but even if this measurement was feasible, many would feel that claims on the resources of the legal system should be determined against a somewhat broader set of criteria than this. Moreover, as we have already noted, class actions cannot be evaluated wholly or even primarily against their contribution to the achievement of compensation objectives. The deterrent function is central and presumably, in theory, should also be weighed against the deterrent functions being served by civil suits displaced from, or deferred in, the court lists as a result of the introduction of enabling class action procedures. Further, to the extent that private civil actions replace public prosecutions, there should be a corresponding saving of judicial resources in the criminal justice system.

(c) *Prosecutorial Discretion*

The availability of individual and class private rights of action for breaches of the *Combines Investigation Act* breaks the government's monopoly on the Act's enforcement and thus negates much of the existing public prosecutorial discretion. This, of course, may be desirable if the enforcement authorities are complacent or improperly motivated but may be less desirable, particularly in an area of complex economic regulation such as that with which the Act is concerned, if the exercise of prosecutorial discretion in particular cases represents the legitimate weighing of wider enforcement strategies and priorities and the advancement of broader economic objectives. Appropriate exercise of prosecutorial discretion also permits continuous marginal adjustments of policy to be made,

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15 See Dam, "Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest", 4 J. Leg. Studies 47 at 49-54 (1975).

without constantly engaging further legislative time which is likely to be impracticable.[16]

(d) *Institutional Limitations*

Much of the argument in the *Proposal*[17] upon which the class action provisions in *Bill C-42* are based is premised on the failure of public enforcement of the *Combines Investigation Act.* Critics have noted that enforcement of the Act has been characterized by an inadequate allocation of enforcement resources, a complaints-oriented, reactive, investigative policy, an unagressive prosecutorial tradition, restrictive judicial interpretations of the Act, and hopelessly inadequate levels of penalties.[18]

To the extent that these features of the enforcement tradition are regarded as failures (rather than intentional policy goals), and to the extent that they do not seem likely to be substantially mitigated in the foreseeable future, then to that extent the case for a significant role for private law enforcement in this area becomes stronger. However, analysis to this point discloses some substantial advantages possessed by public over private enforcement, and we would urge that the first priority in improving the enforcement of the Act should be to look to ways of strengthening the various elements of the public enforcement process. Constitutional doubts as to the ability of the Federal government to range much beyond criminal sanctions in the competition policy area would seem to underscore this imperative. In this respect, perhaps a mandatory fining formula capturing even crudely the optimizing calculus outlined earlier, for example, fines of three times the gains from violations, might be a substantial start.

Assuming, however, that, for whatever reasons, an aggressive public enforcement policy is not politically or otherwise feasible, then the need for a substantial role for private enforcement mechanisms under the Act is easily made out. In so acknowledging, we would note in passing that this kind of judgment would not

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16 Some of the advantages of the constructive exercise of prosecutorial discretion could, of course, be preserved by requiring that the relevant public enforcement agency receive notice of the commencement of all class actions affecting its enforcement domain and conferring on the agency the right of intervention in certification proceedings to speak to the larger public policy implications of a suit. Grounds for refusing to certify would have to include a residual clause to the effect: "or is demonstrated by the Competition Policy Advocate to the satisfaction of the Court to be otherwise not in the public interest".

17 Williams, *A Proposal for Class Actions Under Competition Policy Legislation, supra.*

18 See Stanbury and Gorecki, "Canada's Combines Investigation Act: The Record of Public Law Enforcement", National Conference on Competition Policy, University of Toronto, May 12, 13, 1977; mimeograph.

necessarily hold in all areas of the legal system where class actions might conceivably be assigned a role. This poses a serious problem in designing general, across-the-board, class action legislation.

(e) *Do the Provisions Achieve their Purpose?*

If we accept the need for strong private law enforcement mechanisms under the *Combines Investigation Act*, how well do the proposed class action provisions serve this end?

In most respects, we regard the provisions as well-conceived and well-framed, and as effectively removing or reducing most of the disabilities that have until now afflicted the evolution of Anglo-Canadian class action law.[19] However, in the balance of our comments we wish to focus on one aspect of the provisions that seems to us to be seriously deficient and to carry the potential for substantially undermining the constructive features of the provisions. We refer to the question of legal costs. The question of costs poses special problems in the class action context.[20] Existing rules produce the following results. If a class action succeeds, the class representative, while of course not liable for the other side's legal costs, remains liable for the legal costs of the class and is not entitled to require contribution from other members of the class. If his own claim is relatively small, it will not be worth pursuing in the face of this prospect. *A fortiori* if the class action fails, in which the event the class representative will become liable for two sets of costs. These rules operate as daunting disincentives to the bringing of class actions.

*Bill C-42*, in response to the costs problem, proposes, in effect, a no-way costs rule, instead of the usual two-way costs rule, and in the event of a successful suit, permits the lawyer for the class to collect his costs, on a *pro rata* basis, from all members of the class.

This proposal, while well-intentioned, fails to grasp fully the risks faced by a class representative and his lawyer. Under the pro-

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19 For a discussion of these, see Williams, *supra*, n. 17.

20 We do not deal here with the important question of whether notice of the pendency of a class action and of the right to opt out should be required to be given to members of the class and on what terms. *Bill C-42* leaves this matter in the discretion of the court in certification proceedings, the discretion to be exercised against criteria to be laid down later by regulations. The *Proposal* recommended that the court be directed to consider both the cost of giving notice in relation to the size of class members' claims and whether class members are likely to suffer substantial prejudice in the absence of notice. A random survey of a sample of class members to test at reasonable cost support for a suit was also suggested in some circumstances. We are generally supportive of the *Proposal's* recommendations. The cost implications of notice requirements seriously affect the incentives of class representatives and their lawyers to institute suit. These implications are too important not to be resolved in the Bill itself.

posal, if the suit succeeds, the lawyer is assured reasonable solicitor and client costs from the class for his services with respect to that suit. But if the suit fails, the lawyer is not entitled to receive his fees from the other side, and can only look to the class representative for payment. Few class representatives will accept this risk. Understandably, few lawyers will accept the risk of non-payment in this event. Given the complicated and time-consuming nature of most class actions, and the uncertain outcome of such actions in areas of complex economic regulation such as competition policy, the risk of failure, whoever *de facto* bears it—class representative or lawyer—will deter most suits.

We would propose two alternative solutions for consideration, both involving contingent fee components. [21]

The first would be to retain the traditional two-way costs rule, which is economically sound in that it ensures that the losing party bears the full costs that his conduct has inflicted on the other party, but with the following modifications. In the event of a class action being successful, the class would recover its damages from the defendant and its lawyer his costs from the defendant reflecting the value of time invested in the suit multiplied by a factor to compensate him for the risk of non-compensation in the event of the suit having failed. If the suit in fact fails, the lawyer for the class would have no claim for costs against the class or its representative, and in respect of the defendant's costs, we would propose that he be made personally liable for these (to discourage unmeritorious suits), thus freeing the class or its representatives of any such liability. The compensation received by the lawyer for the class in successful suits must, of course, reflect the risk of this liability.

The second alternative would be to adopt the no-way costs rule proposed in *Bill C-42*, but provide for compensation to the lawyer from the class fund in successful suits on a basis which reflects the risk of non-compensation in the event of an unsuccessful suit, where no costs would be recoverable (to discourage unmeritorious suits).

The advantage of the second alternative over the first is that it reduces the variance in risk faced by the lawyer for the class by removing liability for the defendant's costs in the event of an unsuccessful suit and reducing his costs recovery in successful suits accordingly. In small legal markets such as exist in Canada, the limited volume of class actions may prevent desired diversification of risks

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21 A further alternative proposed by the Ontario Task Force on Legal Aid, (Ministry of the Attorney-General, 1974), Chap. 11, is the financing of some class actions through provincial legal aid programmes.

by legal firms through the spreading of risks across a number of suits. The advantage of the first alternative over the second is that it faces a defendant, if liable, with the full social costs of his misconduct, and the plaintiff, if unsuccessful, with the costs that he has unjustifiably inflicted on the defendant. By merely manipulating the multiplier applied to the value of the lawyer's time under either alternative, perhaps by regulation, government could very simply regulate the volume of class actions.

Contingent fee arrangements are, of course, anathema to many people inside and outside the legal profession. While there are, no doubt, aspects of such arrangements that call for careful scrutiny, e.g. judicial supervision of settlements and the scale of costs recoveries, the sweeping rejection of them in principle often advocated by critics seems unreasoned. First of all, six provinces of Canada permit contingent fee arrangements of one kind or another, without apparently producing the social hari-kari forecast by the critics. [22] Secondly, even in jurisdictions, like Ontario, which do not permit contingent fee arrangements, in fact much civil litigation is *de facto* conducted on such a basis, e.g. a substantial fee in the event of success, disbursements only in the event of failure. Moreover, the Taxing Master explicitly recognizes that the results obtained in litigation are a factor to be weighed in taxing a lawyer's bill of costs. [23] Thus, some of the objections to contingent fees seem a little precious. Thirdly, and more importantly, throughout our economy we observe specialized risk bearers, through product warranties, offering to assume risks — at a price — that other people would prefer not to bear. By specializing in risk bearing, these firms are able to diversify away some of the risks assumed in a way that the individual risk bearer is commonly unable to do. The lawyer under a contingent fee arrangement is performing exactly the same function. In return for the prospect of a higher fee in the event of a successful suit, he agrees to absorb all the costs of a losing suit and absolve his client from them. In principle, and subject to safeguards against

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22 Williston, "The Contingent Fee in Canada", (1967), 6 Alta. L. Rev. 184; Arlidge, "Contingent Fees", (1974), 6 Ottawa L. Rev. 374; Bulbullia, "Contingent Fee Contracts: Policy and Law in New Brunswick", (1971), 49 C.B.R. 603; Lovekin, "The Contingent Fee", (1961) Chitty's L.J. 97. The status of contingent fees is at present under review in at least two provinces. In Ontario, the Law Society of Upper Canada is considering the removal of the present prohibition (*National*, August, 1975, p. 9) while in Manitoba the Law Society is studying whether contingent fees should be discontinued in that province (*National*, August, 1975, p. 12). For a comprehensive discussion of contingent fees in the United States see MacKinnon, *Contingent Fees for Legal Services* (1964).

23 *Re Solicitor*, [1972] 3 O.R. 433.

identifiable forms of abuse, what could possibly be objectionable about this?

The failure of *Bill C-42* to recognize, and accept, the implications of the entrepreneurial role that the lawyer will inevitably play in orchestrating most class actions — *if we need them* — is a crippling shortcoming. The absence of any modification of the rules relating to maintenance, champerty, and solicitation of business, compounds this shortcoming. In framing *Bill C-42*, the incentive structures facing class representatives and their lawyers have simply not been realistically analyzed. The incentive structure facing the class lawyer, whose stakes in a suit will often be greater than those of most class members, is the most critical, albeit unexalted, aspect of this analysis. The reluctance exhibited by the Federal government in *Bill C-42* to harness realistic enforcement procedures in the service of important substantive rights reflects a persistent tendency in Canadian law-making to turn enlightened substance into futile gesture by a myopic focus on the elegance of laws as framed and not on the efficacy of laws as enforced.