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Commentary

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COMMENTARY

*by Mr. William P. McKeown**

AS THE SOLE private practitioner from Canada on this panel this afternoon, albeit a somewhat tainted one, and in view of the fact there were no private practitioners on the panel this morning, I feel an obligation to play the role of the devil's advocate to a certain extent. I should state that in this field it is easier to criticize than to propose solutions. Having stated this, let me put it bluntly that the problems which have arisen between the United States and Canada have come about because each of the governments have different departments advocating different solutions, and the private companies are left in the position of having to make the choice of breaking one or more laws in one of the countries, or as was stated this morning by Mr. Baker, the choice of choosing between Canadian or American jails.

It concerns me that the Canadian government is proposing legislation under Stage II of the Competition Policy proposals to allow it to enter into an antitrust agreement with the United States, which in and of itself is a good thing, but at the same time another department of the government (probably the Department of Industry, Trade and Commerce) may be encouraging agreements between companies which are contrary to the antitrust laws. However, they would not be doing so under openly stated government policy. This is the problem with Mr. Stanford's arguments of this morning. He complained about the United States antitrust authorities going after Canadian companies carrying out government policy. However, in using the alleged uranium cartel as an example, there does not appear to have been an openly announced government policy at the time the uranium cartel was in operation. Surely, it is unreasonable to expect that American antitrust authorities or courts are going to respect a retroactive announcement of Canadian government policy. If the Canadian government wishes to openly advocate cartels at the time they are formed and obtain the passage of the necessary legislation from Parliament, then this would be a sovereign act which would provide a defence to any antitrust or combines prosecution in the United States or Canada.

At the present time, the Canadian government in Stage II of Competition Policy is proposing to permit specialization agreements under certain circumstances where they are approved by the Competition Board. These specialization agreements will be contrary to American law in some situations. It is not good enough to hope that the American authorities will take no ac-

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tion in such circumstances. The government needs to cary out negotiations with the United States now so the companies will know that their specialization agreements are valid in both Canada and the United States. It is not sufficient to let the companies get approval for the specialization agreements and hope that the United States courts will recognize the approval of the Competition Board as a valid defence to any antitrust action. My bias is in favour of expanding the antitrust or competition law jurisdiction but not at the expense of private companies. Governments must negotiate international agreements which offer protection to companies who comply with their own national legislation.

Since it is unacceptable for governments to propose secret cartels, I also believe it is improper for private companies to enter into cartel arrangements. This is why I favour the new and strenthened sections 32.1 and 32.11 found in Bill C-42. However, we should realize that we pay a price for sections such as these since Canada will be a less desirable place for investment by multinational firms. Although section 32.1 does not apply to agreements which are between affiliated companies only, it does apply when there may be only one non-affiliated company involved.

However, I would like to close by reiterating my concern that the governments do not try to make scapegoats out of the private companies. I fully support the proposals for Stage II in the international area, but the federal government must act as one in order to ensure that companies that comply with the Canadian law are not attacked under the United States antitrust laws.