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Chair

Mr. Leon Benoit

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● (0910)

[*English*]

The Chair (Mr. Leon Benoit (Vegreville—Wainwright, CPC)): Good morning, everyone.

Pursuant to the order of reference of Wednesday, October 18, 2006, we're dealing with Bill C-24, An Act to impose a charge on the export of certain softwood lumber products to the United States and a charge on refunds of certain duty deposits paid to the United States, to authorize certain payments, to amend the Export and Import Permits Act and to amend other Acts as a consequence. I read that just to remind people that we're not here to debate the softwood lumber deal; that debate is over, or at least it's not before this committee. We're here to deal with Bill C-24, which is an implementation bill.

We have as a witness, from Baker and Hostetler, Elliot Feldman. Again, welcome.

And from Gottlieb & Pearson, international trade and customs lawyers, we have Darrel Pearson, senior partner; and at the table with him, Michael Woods.

So we will take the opening statements in the order that we have on the list here, starting with Mr. Feldman. Perhaps you could state who you're representing here at the committee today, as you appear, and then go ahead with your opening statements, and we'll get to the questioning.

Dr. Elliot Feldman (Trade Lawyer, Baker Hostetler): Thank you, Mr. Chairman.

I'm appearing on behalf of the Free Trade Lumber Council.

I'm pleased to appear before the committee as it deliberates over the implementation of the softwood lumber agreement. I want to express my personal gratitude for the scheduling adjustment that made it possible for me to appear. I know it took the cooperation and interest of all parties, and I'm participating today very much in that spirit.

I recognize that substantial exhaustion has taken over the softwood lumber file. There's a strong desire to believe the battle's over. Do be careful: it isn't over. Just last week the Coalition for Fair Lumber Imports told a U.S. court that it is certain there will be more litigation, and not necessarily in the distant future.

It's important that this legislation not only stabilizes but also strengthens the Canadian industry. I believe it can. Failure to strengthen the industry could haunt this Parliament beyond tonight's Hallowe'en.

The softwood lumber agreement—as initialled on July 1, signed on September 12, and even as amended on October 12—does not include a tax on refunds of cash deposits illegally collected on softwood lumber by the United States since May 2002. This money has earned interest, but while being held, not invested, importers of record could not choose to remove it from the United States. It has lost very considerable value because of an appreciating Canadian dollar.

The decision to settle the softwood lumber dispute with the United States, when it was taken and the manner it was pursued, was a government decision, not an industry decision. In light of the very significant financial losses suffered by the industry caused by the dispute, which the government broadly has acknowledged in its defence of the settlement, the government could have elected to waive all taxes of these refunds, including income taxes. After all, the settlement of the softwood lumber dispute was not supposed to be a revenue opportunity for the federal and provincial governments, and there's nothing in the agreement that requires any taxation of refunds.

The interest accumulated is much less than the loss in currency exchange, which was entirely beyond the control of the companies. The return of the principal is arguably not taxable income at all, merely the return of funds already belonging to the companies. Whatever tax treatment there is to be, Parliament should be conscious that there is nothing in the agreement about taxes on refunds. The decision to tax the refunds thus is independent of any legislative requirements to implement the softwood lumber agreement.

Bill C-24, in my view, contains at least one serious problem with reference to the tax on refunds—namely, accepting that the refunds apparently are to be garnished and taxed. The background to the tax is important for appreciating why I believe there's a problem.

The policy decision to impose a special charge appears to have been reached for two reasons: first, to assure that Canadian taxpayers, other than those in the softwood lumber business, would not have to fund any of the $1 billion guaranteed payment to the United States that is in the agreement; and second, to punish those companies that declined the government's offer of advance payment on refunds, preferring to wait for the United States to return cash deposits with interest.

According to the original plan in the agreement before it was amended, companies electing to participate in the EDC advance payment program would surrender to EDC approximately 20% of the funds due them. With participation of companies holding rights to 95% of the total returns due, the 20% premium to be paid would have funded in its entirety the $1 billion guaranteed payment.

Two problems arose. First, there was some grumbling about so-called free riders, those companies that would not receive advance payments but also would not contribute to the $1 billion payment. There was virtually no acknowledgment in these discussions that the EDC participants were striking a bargain, getting their money back more quickly in exchange for a fee. Instead, focus was on companies preferring to deal directly with the United States for their refunds.

It appears that some of the concern about fairness developed when it became apparent that EDC might not deliver funds much more quickly than the United States. But substantial EDC payments were made yesterday, comfortably ahead of schedule, which should dispose of that concern.

A further concern seemed to develop when it was understood that accrued interest on funds coming from EDC would stop on October 1 under the terms in the softwood lumber agreement, but that non-EDC participants would receive interest accrued up to the day their customs entries were liquidated. That concern also should be eliminated, for under U.S. law there can be a lag of no more than 30 days between the cessation of interest accrual and the payment of refunds. With the first EDC payment yesterday, 30 days after October 1, treatment would appear to be no more favourable on interest for the non-EDC participants.

Second, the government did not obtain participating pledges from holders of 95% of the refunds due. The October 12 amendments solved the problem of removing the related condition precedent, but not the problem of funding the $1 billion; hence, the special charge seems to have been conceived as a way to make the companies not participating in the EDC program nevertheless fund the $1 billion. Nothing, to my knowledge, was said about the reverse fairness that these companies electing to wait for refunds on a schedule determined by the United States without advances would be taxed anyway, thereby with no benefit.

The concept underlying the special charge, therefore, was to tax only the companies not participating in the EDC program, however fair or appropriate Parliament would think that might be, but that is not how Bill C-24 is drafted. The draft makes everyone pay the special charge. Moreover, the bill forbids refund of the tax to anyone, including EDC program participants.

The problem occurs because of drafting in two places, perhaps three.

Subclause 18(1) defines “specified person” to mean “a person that filed the documents and information required under the applicable United States law in respect of the importation of any softwood lumber product into the United States during the period beginning on May 22, 2002 and ending on September 30, 2006.” That definition effectively includes all importers of record of softwood lumber.

Subclause 18(3) imposes the special charge on all specified persons who receive a refund.

Subclause 18(4) then states: “The charge under subsection (3) is payable by the specified person even if the refund is issued to a designate of the specified person.” “Designate” is the term used for the escrow funds, so all importers of record, without exception—including, incidentally, non-Canadians not resident in Canada, whom importers from this legislation cannot lawfully reach—must pay the special charge. There are no exceptions. The EDC participants will have returned to them only about 82% of the refunds plus interest owed. On the money refunded to them, they will also pay the special charge, that is, they will pay the special charge in addition to the 18% they do not receive when they receive their payment from EDC.

The public promise from the government has been that these importers of record would receive refunds of the special charge, but clause 39 states: “Except as specifically provided under this Act or the Financial Administration Act, no person has a right to recover any money paid to Her Majesty in right of Canada as or on account of, or that has been taken into account by Her Majesty in right of Canada as, an amount payable under this Act.”

Nowhere in the act, and hence nowhere as “specifically provided under this act”, is there a provision for the refund of any funds collected under the special charge.

There's broad discretion in the Financial Administration Act, but it would take very creative and potentially controversial interpretation to construe any of it as “specifically providing for refunds of taxes” mandated in a law that postdates that act.

Paul Robertson testified before this committee last week that the solution to the problem is to be found in the Financial Administration Act, but he didn't say where or how. We might speculate, looking into the Financial Administration Act, at subsection 20(2), except that the language, “purpose that is not fulfilled”, might be hard to square with collecting enough money to fund the $1 billion; or perhaps in section 22, except that the discretion there would conflict with the “specially provided” language in Bill C-24.

● (0915)

Most likely the discretion is in subsection 23(2), which authorizes the Governor in Council to “remit any tax or penalty...where the Governor in Council considers that the collection of the tax...is unreasonable or unjust”.

Still, without an adjustment in the phrase “specifically provided” in Bill C-24, the mandate to “remit any tax or penalty” in the Financial Administration Act would not appear to reach a tax imposed later, for which there is no special provision, in fact, in the Financial Administration Act.

And there's a question of fairness—the very basis of the mandate in that act. EDC participants entered a bargain for early payment; others accepted potentially later payment and therefore declined the bargain. Rhetoric about free riders notwithstanding, it's not obvious that reliance on a clause about fairness would authorize remittance to one group and not the other. There is no other apparent rationale for these taxes, which cumulatively will exceed the $1 billion owed the United States.

In an effort to gain acceptance for the agreement, carrots and sticks were brandished like medieval weapons, but always with the common assumption that the refunds were to fund the $1 billion promised to the United States.

Buy why? When asked about loan guarantees, the government said the EDC could afford to advance all the money owed the industry, so presumably the government has other sources to fulfill its pledge.

Why not embrace the simplest and best solution to the writing of Bill C-24, to embrace the principle of no new taxes? Delete clause 18 in its entirety and use the Financial Administration Act not to create refunds on dubious authority but to waive the income taxes on the basis of authority indisputably there. The only tax this bill ought to require is the export tax required by the softwood lumber agreement.

I want to quickly address two other points. Mr. Robertson, when he appeared before this committee one week ago, acknowledged that individual companies have no recourse to the dispute settlement mechanism and that the mechanism was not designed to address any of their concerns.

Last spring, not long before the initialling of basic terms on April 27, the United States Department of Commerce illegally modified the scope of the products covered by the anti-dumping and countervailing duties to include end-matched lumber. The Department of Commerce rejected the request of private companies for a review of this illegal scope determination. Subsequently, this amended scope became part of the agreement and is now part of Bill C-24 in two different places, pertaining both to the special charge and to the export tax.

We consider the inclusion of this product an error, and I'm setting out here how to fix it. I'm also indicating why it's particularly important to do so. The two companies most affected requested NAFTA panel review. The two governments, Canada and the United States, have failed to fulfill their NAFTA obligations and have not named panellists. The NAFTA secretariat, failing to meet its obligation to name panellists from the rosters when the governments failed to name them, has neither acted nor responded to pleadings.

There is a cure available in Bill C-24 for this problem—

● (0920)

The Chair: Mr. Feldman, how much longer will your presentation be?

Dr. Elliot Feldman: Three minutes, roughly.

The Chair: Okay, go ahead.

Dr. Elliot Feldman: It contains provisions to ensure that illegal actions of the United States Department of Commerce are not expressly endorsed by the Government of Canada and this Parliament, and that private companies deprived of access to dispute resolution within the agreement are not abandoned with no recourse. Their case, Wynndel Box vs. Gorman Bros., is the last of the litigation involving private companies that indisputably has not been mooted by the softwood lumber agreement and cannot be resolved without government involvement. It's in everyone's interest not to leave their case festering as an embarrassment to both governments, apparently afraid to let the challenge be heard before a NAFTA panel.

Assuming our advice is not followed, and the relevant part of clause 18 is not deleted, as I've suggested this morning that it should be, then to subclause 18(1), in the definition of “United States duty order,” paragraphs (a) and (b), after the words “as amended”, the following words should be added: “but disregarding the final scope ruling made on March 3, 2006.” One of the amendments to which the language refers is the amendment that added “end-matched lumber illegally after five years” to the scope of the orders. The addition of those words would mean that refunds of duty deposits on end-matched lumber would not be subject to the special charge.

The minister then has discretion over the export control list. Pursuant to section 6 of the Export and Import Permits Act, at the direction of Parliament, he should exercise that discretion, consistent with clause 112 of Bill C-24, to strike end-matched lumber, because it never should have been included. Because of its inclusion in annex 1A, Parliament must direct the minister to fix the problem. These two steps would effectively extinguish the pending litigation, saving both countries from the embarrassing way in which they have been treating their obligations to name NAFTA panellists, remove the last issue affecting private companies, who have no rights in dispute resolution within the agreement, and deny the United States a final illegal act in defining the products covered by the agreement.

Finally, this agreement entered into force on October 12, not October 1. Throughout Bill C-24 there are references to October 1 as the effective date. All these references should be corrected so that the bill conforms with the facts. Regarding interest accrued to participants in the EDC program only until October 1, Parliament should consider requiring a correction. On the U.S. side of the border, interest in fact accrued until October 12, when the orders were revoked. Moreover, U.S. law requires interest accrual until the liquidation of entries. For purposes of the legislation going forward, clause 10 needs to be amended because it provides for calculation of surcharges based on an October 1 effective date. The easiest option would be to waive the surcharge for October. An alternative would be a pro-rated calculation of the surcharge for October. Either way, without an adjustment there is a risk of a retroactive surcharge based on a partial month of data, which would be contrary to the intentions of the bill.

Thank you for my extra time, Mr. Chair. I'd be happy to do the best I can to answer questions or discuss other parts of Bill C-24

● (0925)

The Chair: Thank you, Mr. Feldman.

Mr. Feldman, do you have a list of the members of the Free Trade Lumber Council with you?

Dr. Elliot Feldman: No, I don't.

The Chair: Could you get one for the committee, please?

Dr. Elliot Feldman: I could certainly arrange to do that.

The Chair: How many members are there, roughly?

Dr. Elliot Feldman: I have no idea of that either. I'm sorry.

The Chair: Okay.

Mr. Harris.

Mr. Richard Harris (Cariboo—Prince George, CPC): I haven't received anything on Mr. Feldman's credentials. Is he an associate of...?

I see, so you're not an associate of the Free Trade Lumber Council.

Dr. Elliot Feldman: I'm their counsel.

Mr. Richard Harris: You're their counsel, right. So you're not in the business; you're their counsel. Thank you.

The Chair: Mr. Pearson, go ahead with your presentation, please.

Mr. Darrel Pearson (Senior Partner, Gottlieb & Pearson, International Trade & Customs Lawyers, As an Individual): As to the reason for our participation and our role here today, in answer to your question, in general it can be said that Gottlieb & Pearson has been representing the Canadian importing and exporting communities in Canada since 1969, and of course, we're committed to that task. Today we serve the role more properly described as amicus curiae, so we have no client per se. These comments are the comments of myself and my firm.

I have a few introductory remarks and then I'm going to focus on three technical aspects of the legislation and seek to be of assistance to this committee.

As we review Bill C-24, the focus of our attention must shift to assisting Canada's softwood lumber industry by facilitating the softwood lumber export business to the United States, which is consistent with the 2006 treaty, the SLA, under a new legislative regime. Under the assumption that Bill C-24, as it will be amended, will pass into law, Parliament must create a law that is transparent, as user friendly as possible, and does not constitute a non-tariff barrier to trade.

In my view, the committee should focus on ensuring that the statute and regulations to be promulgated are as devoid of ambiguity as possible, do not cause undue, unnecessary financial and/or administrative hardship, and facilitate and do not obstruct trade. This calls for more precision than is evident from a reading of the bill. We should also be ensuring that the bureaucracies that will support the implementation of the treaty receive adequate resources to assist exporters and to enforce the law fairly and reasonably.

We understand this committee will consider suggestions intended to help ensure that technical aspects of the legislation are addressed. While comments are technical and while the industry has endured disruption and hardship in the past, the technical interpretation of the implementing legislation will have immediate as well as long-lasting effects on the industry's competitiveness and investment decisions.

So in that context, I wish to offer the following observations from our review of the bill, focusing on three elements: first, the industry; second, the charging section and related sections; and third, exporting from a region.

Starting with the industry, the draft bill, in our view, fails to adequately define the industry and softwood lumber in clauses 2 and 12 of the bill, and in what will be new section 8.4 of the Export and Import Permits Act. Clarity of definition of key terms and phrases is critical to the issue of both jurisdiction and the scope of taxation. For this reason, more precision is required.

Clause 2 simply defines the phrase “primary processing” as “the production of softwood lumber products from softwood sawlogs.” Softwood logs are not defined. Softwood lumber products are likewise not defined, but rather are to be merely named or listed in accordance with new section 8.4 of the Export and Import Permits Act.

In turn, the phrase “primary processing“ is not defined except that we may infer that it is a form of process that changes undefined softwood logs into undefined softwood lumber products. While these terms and phrases may be understood by some, if not many, in the industry in a general colloquial sense, clear definitions—that is, legal precision—is critical to permitting all the stakeholders to understand their application, and specifically to the implementation of the charging and related clauses, clauses 10 through 17 of the bill.

There is similarly a lack of definitional precision as to what constitutes the phrase “semi-finished” or “finished” softwood lumber products. The bill does state that “remanufactured” in clause 12 contemplates “changes in thickness, length, width, profile, texture, moisture or grading, has been joined together by finger jointing or has been turned.” Remanufacturing can ostensibly create semi-finished or finished softwood lumber products, and this does not address the possible distinction between the two. In other words, what degree of change by remanufacture creates a semi-finished versus a finished softwood lumber product?

● (0930)

Without a clear definition of softwood lumber products and the other phrases, the problem is compounded. Precision in definition is relevant to jurisdiction as well as to the calculation of the base of taxation, because the phrase “export price” is determined by reference to these key terms and phrases: “softwood lumber products”; “primary processing” and “last primary processing”, which I'll return to in a moment; and “remanufacturing”.

The meaning of “last primary processing ” in relation to softwood lumber products should be clarified, particularly as the phrase “primary processing” is defined to mean production of logs to softwood lumber products. That is a clear inconsistency that has to be addressed. The reference is paragraph 12(2)(a).

Those are comments about the industry and the key phrases that will help define processing, etc., as well as the products. I'd like to turn to the charging section now, clause 10.

One pays a charge if one exports a softwood lumber product, which is undefined except that it will be named on a list. The term “product” is simply too vague. It is not clear in the proposed legislation when, at what point in time, or at what time in processing one moves from a softwood log to a product. The list will not address this issue, and since primary processing is left without a specific definition, the degree of processing offers no help in establishing the meaning.

Second, the time of export is measured relative to loading, but the legislation fails to address what specifically constitutes the act of exporting or who is exporting. The reference is clause 5.

Third, clause 9 offers an exception to exports that pass in transit through the United States, and applies to goods that pass in transit through other countries en route to the United States, but there is no definition of “in transit”. For example, does this mean in customs control, or does it contemplate goods entered into a free trade zone or entered for consumption and re-exported without sale or modification in the extreme?

A great deal of the comments I'm offering you come from our experience in litigating and interpreting other forms of customs legislation. These are the very types of issues that have unfortunately had to be resolved by the courts unnecessarily.

Finally, the proposed legislation provides for region-based commitments and regional exceptions. Subclause 11(2) provides that a softwood lumber product is deemed to be exported from the region where the product underwent its “first primary processing”—there's a new phrase. This last phrase could be a corollary to the “last primary processing” phrase, but is no more precise than “last primary processing”. The legislation needs to address the meaning of “primary processing” of a lumber product, particularly as it specifically provides that the processing converts a log to a product. Again we have a contradiction in the usage of the terminology. This creates a potential problem in relation to counting volumes for quota purposes; the application or exemption from the charge; and the calculation of the charge amount due to the timing, the reference price, and volume quota factors. I'll elaborate very briefly.

Export prices are dependent on an FOB value where the last primary processing took place, and that could be different from where the product is exported. The bill contemplates that the region of export can be different from the physical location of export due to the deeming provision, or it could be the same in certain regions.

Export allocations are to be issued to benefit recipients with preferred rates of charge, but there is no reference to the mechanism of the allocations. We know there's going to be some form of quota regime, but we don't have any information concerning how that will work. There is no structure to that, except the delegation of that authority to the minister.

● (0935)

Proposed subsection 6.3(2) of the Export and Import Permits Act, provided for in clause 111 of the bill, requires more precision as to the entitlement for quota, under what conditions it is to be transferable—because there will be economic rents associated with the transfer of the quota, which we've seen in every other quota regime—and we also have to address whether or not there are any situations in which the transfer could be cross-regional.

Discrimination between independent and non-independent remanufacturers and the determination of export price are accomplished through the use of these phrases: “last primary processing”, “last processing”, and “remanufacturer”. If only primary processing is involved, the export price is the FOB value where that processing occurred; if remanufactured by an independent manufacturer, the export price is the FOB value where the last primary processing took place, possibly back one step; if the remanufacturer is not independent, the export price is the FOB value where the last processing occurred, but that begs the question as to whether the last processing is the same as remanufacture.

As to the concept of independence, the minister certifies independence under clause 25, but there is a void of factors or considerations and the bill contains no definition. There is a provision for related persons, but that, I believe, is not intended to be applicable.

If the considerations, as per the treaty, are exclusively tenure rights or relationships with those withholders of tenure rights and/or purchasers from the Crown, these should be spelled out in the definition in the statute. If there are broader considerations, these should be indicated generally so as to circumscribe the authority of the minister.

One last point: the export price in the absence of a determinable FOB value is, according to paragraph 12(2)(d), a market price determined in a sequential manner in arm's-length transactions. Unlike other customs and special import measures legislation that account for differences in quantities and trade levels through adjustments, this bill does not do so; nor does it provide for the means of selection where there's a choice within the price category. This will lead to uncertainties and disputes.

Thank you, Mr. Chairman.

The Chair: Thank you very much, Mr. Pearson.

Okay, we'll go to questioning now, and we'll start with Mr. Temelkovski, for seven minutes.

Mr. Lui Temelkovski (Oak Ridges—Markham, Lib.): Thank you very much, Mr. Chair.

Thank you to the presenters. They were great presentations.

Mr. Feldman, you mentioned right at the top that there are some differences between the currencies; you mentioned the currencies' exchange rates. There will be a loss in the money coming back due to the currency exchange. Can you comment a little bit more about that?

● (0940)

Dr. Elliot Feldman: Thank you for that question.

The deposits started being made in 2002. The Canadian dollar was not as valuable then as it is now, but the money was handed over to the U.S. Treasury then and held all that time. As it comes back, it comes back against the very highly appreciated Canadian dollar. The rough estimates are that there's a 38% loss over that period in the exchange rate. So the companies are getting back a lot less than they deposited, because the money was held while the Canadian dollar appreciated—and they're getting it back in U.S. dollars.

Mr. Lui Temelkovski: Is it your understanding that other agreements would take into consideration exchange rates, or do they usually use a currency with some plus or minus factors to it?

Dr. Elliot Feldman: Apart from the settlement in Mexican cement, I'm not aware of any agreements like this one where money held in the U.S. Treasury as a cash deposit against projected customs duties was later returned at a much later date, subject to an agreement. That is, money does come back, but not in the context of an agreement; it comes back as a result of the judicial process, as might have been the case here, but isn't.

So as I understand your question on whether there are other agreements that take into account this difference in currency exchange, apart from the Mexican cement settlement, I don't know of any agreements like this one. The Mexican cement agreement involved $150 million left behind; the rest of the money came back. I don't believe there was a currency adjustment, but I have no idea how that money was treated by Mexican tax law, which is the question I'm putting before you—how that money is to be treated here under the tax provisions.

Mr. Lui Temelkovski: I studied finance in the past, and I worked in the financial industry for 20 years.

The currency exchanges are fluctuating so much that one must take extraordinary precautions to make sure nobody is short-changed in the process, especially if they're working on a fair playing field. How could somebody draw up an agreement like that?

Dr. Elliot Feldman: As the chairman indicated, I'm not here to address the agreement per se.

If you invest and you get it wrong on a currency exchange, that's your own risk. I believe Canadian tax law recognizes that. But here, there was no investment made. You weren't at your own risk. The money was taken from you and held. You had no option to remove it or exchange it, or change the currency. Because of that limitation, this circumstance is peculiar. I think the tax treatment of the money coming back should therefore recognize that peculiarity.

Mr. Lui Temelkovski: What if the currency had changed the other way?

Dr. Elliot Feldman: You may have opted to consider it the other way, but that didn't happen.

Mr. Lui Temelkovski: So it's wise to have some sort of catch in there that will neutralize the fluctuation either up or down.

Dr. Elliot Feldman: I think in instances where your money has been held against your will and it's been found that it never should have been held in the first place and you're entitled to get it back, the tax law ought to recognize the problem.

Mr. Lui Temelkovski: Thank you.

Mr. Pearson, you stated an awful lot of definitions. One very crucial one, softwood lumber, is not defined. I guess when one is looking at softwood lumber and you're comparing oak to walnut, maybe walnut would be softwood. Unless you define it specifically, what I heard you say is that it would create problems down the road, and it will create opportunities for litigators.

● (0945)

Mr. Darrel Pearson: That's correct. If I could add to that, as I understand it, the list set out in the treaty—I can't help but discuss that momentarily—has cross references to the harmonized system of tariff classification, as well as a non-exhaustive list of products. In other words, if that treaty legislation is to be ultimately adopted as the control list by the Export and Import Permits Act, we will still have a great deal of vagueness in terms of what constitutes a softwood lumber product.

Tariff classification is not as much of a science as we would hope it to be; it's a bit of an art as well. Frequently there are disputes concerning tariff classification. Whether or not a softwood lumber product falls within a specific tariff classification will be debated and established by the courts, not by Parliament. I don't think that's what was intended by this agreement. Likewise, the non-exhaustive list that's contained in the treaty is not limiting, so that's an additional problem.

Finally, there is consistent use of the word “product” in the context of processing—primary processing, last primary processing, etc.—throughout the legislation. In my view, as a result of that language, there will be a significant amount of dispute as to the scope of the agreement. We will be litigating these issues. This will cause uncertainty, which is the problem when you're trying to assist an industry to come out of this four or five years of difficulty.

Mr. Lui Temelkovski: This is my last point , Mr. Chair.

One noticeable omission was that you didn't reference anything to the calculation of the tariff, or the amounts. It seems that the definitions were quite vague, but there is no vagueness in terms of the collections and the remittances.

Mr. Darrel Pearson: Well, the rates are not vague, because they're specified. But the export price, which serves as the base of taxation...I did mention a number of difficulties with the price as well. The amounts will therefore be subject to the vagaries of the determination of the export price, and we'll have issues and litigation on that point for certain.

Mr. Lui Temelkovski: Thank you very much.

The Chair: Thank you, Mr. Temelkovski.

Monsieur Cardin, seven minutes.

[*Translation*]

Mr. Serge Cardin (Sherbrooke, BQ): Thank you, Mr. Chairman.

Good morning gentlemen and thank you for being here today.

To begin with, I must admit to you that there has been a time lag. This is unfortunate, particularly as I share virtually all of the concerns about which you have informed us. The fact remains that we are now studying Bill C-24, which is based on a signed agreement that almost has force of law. We are dealing here with statutes that would apply in Canada.

We at the Bloc Québécois had discussed many subjects, including the exchange rate. We had also discussed the tax treatment that could be applied if new amounts were received. The tax status can vary almost dramatically from one company to another. Some may be penalized indirectly, depending on the tax treatment applied. What you have been informing us of today should have been negotiated under the agreement. As it happens, the bill under review today implements the agreement. The process is therefore already underway.

Would you say that there was genuine consultation on the part of the government with a view to preparing and formulating this agreement? Given that the agreement has been signed and that what is at issue now is passing Bill C-24, it could be said that it is the end of the process.

At the beginning, the government told us repeatedly that 90 per cent of companies were in favour of this agreement. Were specialists like you able to contribute to the drawing up of this agreement?

● (0950)

[*English*]

The Chair: Monsieur Cardin, first of all, we're not going back into discussion of the agreement. Secondly, Mr. Feldman appeared before the committee a couple of times on the agreement, so he certainly was involved.

Go ahead, gentlemen, but please stick to the Bill C-24 questions.

Dr. Elliot Feldman: I certainly don't want to be part of a revisionist history. The industry was not at the table, did not participate in the negotiations, and is not signatory to the agreement.

We were consulted fitfully. We received drafts on very short time horizons. We were not consulted about Bill C-24. We received no drafts of Bill C-24. We received no explanations of the intentions or ideas behind Bill C-24 at any time. So as to the bill, from me at least and I think also from Mr. Pearson, you're getting a fair reading from reviled lawyers—it's lawyers, after all, who are going to have to deal with the bill—and we're reading it back to you as best we can, interpreting what the draft says as best we can, but not having been consulted at all, at any stage, about this bill.

[*Translation*]

Mr. Serge Cardin: Do Messrs. Pearson or Woods have anything to add to this aspect of the question?

[*English*]

Mr. Darrel Pearson: I certainly didn't appear before this committee and I wasn't involved in the process. My comments relate exclusively to the bill. I've obviously read the treaty and my comments are not intended to ask Parliament to do anything that is contradictory to my understanding of the treaty.

The comments I made are exclusively in relation to the structuring and legal process that will take that bill and allow it to become law in this country. So I'm not addressing inconsistencies or matters relating to policy at all. It's strictly legal, not business.

[*Translation*]

Mr. Serge Cardin: As the chairman and Mr. Feldman said, we are not going to rewrite history, but the fact remains that this agreement and this bill have been erected on relatively weak foundations. There has been confirmation that consultation, whether with industry or lumber specialists, was not as extensive as we might have believed.

In any event, we are studying Bill C-24 and know that under the current circumstances, everything in the agreement needs to be complied with. In passing, I should add that if you are ready for an election, let us know. We could then improve Bill C-24 to address your concerns and ensure that certain subjects are covered more readily and more openly, whether we are talking about the exchange rate, tax treatment or definitions. Indeed, Mr. Pearson told us with respect to the definitions that it is the courts that will have to rule when the time comes for clarifications on these matters.

Does your knowledge of the act enable you to tell us whether industry representation can be assured on the softwood lumber committee, as provided for in the act, which is responsible for supervising the implementation of the agreement, for coordinating its further elaboration, for establishing working groups to examine certain aspects of the act and, indirectly, the implementation of the agreement, in greater detail? To ensure that there is industry participation, along with the involvement of regional and provincial governments, should such participation not already be provided in the act?

● (0955)

[*English*]

Dr. Elliot Feldman: There may be two or three ways in which I'd like to approach your question.

First, the agreement does not dictate to Parliament what Parliament has to do. That is, Parliament has a choice over this legislation. If there were no Bill C-24, the agreement would fall apart. But it wouldn't be as if the two federal governments were able to come together and tell Parliament it must pass this bill. To the contrary, the architecture of the agreement is that this legislation was supposed to precede. And what preceded was the ways and means motion, which is a temporary act, not this definitive legislation.

So without advocating any position at all, I'm merely trying to clarify for you that when you say this is done and you're now compelled to adhere to the terms of the agreement through this legislation, I don't think that's exactly so.

You could elect not to pass this bill. If you did that, you would undo the agreement, because the bill is supposed to be about the export tax, and the export tax is absolutely a condition of the continuation of the agreement.

The main point I've raised this morning is that the other taxes—the surcharges, the income tax, and so on—were not part of the agreement, and there's no obligation to pass those in relation to the agreement.

But as to the export tax, if you elected not to pass that, which is your prerogative, you would undo the agreement. But it's not as if the two governments could dictate to Parliament that you have to pass this bill.

The Chair: *Merci, Monsieur Cardin*.

Mr. Harris, seven minutes.

Mr. Richard Harris: Thank you, Mr. Chairman.

Mr. Feldman, Mr. Pearson, and Mr. Woods, welcome to our session this morning.

Mr. Feldman, I wanted to start with you. You're representing the Free Trade Lumber Council?

Dr. Elliot Feldman: Today I am, yes.

Mr. Richard Harris: Are you being paid to be here by that organization?

Dr. Elliot Feldman: Yes, my expenses.

Mr. Richard Harris: Have you represented them before?

Dr. Elliot Feldman: I've represented them continuously, yes. But I've not appeared before this committee on their behalf.

Mr. Richard Harris: I see.

You talked about tax treatment, and I gather from your comments that it's your opinion the tax treatment on the refunds should in some way be forgiven, for a number of reasons, which you stated.

I would have to assume that under tax law, when those moneys were paid out they were claimed as a business expense by the softwood manufacturers as a cost of doing business, so they would have received a tax writeoff in that case. Under the tax law, to arbitrarily deem those refunds to be tax free would be, in one sense, a particular industry in Canada having it both ways.

Don't you think that would set a huge precedent for every other type of industry in the country for any future circumstances they may have that in some way could be related? Wouldn't that just throw the whole Canadian tax law into chaos? I mean, honestly now.

Dr. Elliot Feldman: No, I appreciate the question, and I did anticipate it, as I'm sure you will also appreciate.

For the purpose of clarity, although I've appeared before this committee as an expert before, I've represented a lot of companies in this dispute over a long period of time. I offer that information because, over the course of this dispute, many companies have asked me for advice as to whether they could take the deposits as a tax deduction.

● (1000)

Mr. Richard Harris: Did you respond to them that that would be having it both ways and that it would create—

Dr. Elliot Feldman: It wouldn't be both ways, until your question now. Over the course of the litigation, I was asked that question by many companies, and I first had to stipulate, of course, that I'm not a Canadian tax lawyer. But I offer that information to advise you that I'm aware that some companies did and some companies didn't. Not everyone claimed a tax deduction from those deposits, in part because of the expectation that they would get the deposits back through the course of the litigation.

So you're right, there would be a question raised for those companies that had a tax benefit already, to have an additional tax benefit, as to at least the deduction and possibly the interest earned, but the correction I offer is that it's not true of everybody. Therefore, it would be appropriate to make the adjustment in recognition also, as in my answer to Mr. Temelkovski, of the peculiar circumstance that this money was held hostage while it was losing value.

Mr. Richard Harris: I think we can all agree that since the expiry of the last softwood lumber agreement, a number of years have gone by. The previous Government of Canada, in that four- or five-year period, wasn't able to come to an agreement, and that's a shame. That hurt our industry, there's no doubt about that.

But from purely a tax point of view, I think your suggestion, while it might be a nice thing to do, would throw the current Canadian tax laws into a form of chaos and would set a very tough precedent for the government to have to deal with. While that may make tax lawyers across the country pretty happy with countless hours of billing fees challenging the tax department from that point on, to whenever the world ended—I'm sure it would keep going—it wouldn't be good for our tax law.

Dr. Elliot Feldman: I understand you to be—

Mr. Richard Harris: I want to move to another thing, if I can.

I'm sure that if I had the lawyers representing some of the largest... well, let's just name a few: Canfor, the largest softwood company in Canada, and some of the other ones that have signed on to this deal, West Fraser Timber being probably in the top five in Canada, and some of the other mills that are good business people, such as Lakeland Mills, Carrier Lumber, Dunkley Lumber, Tolko Industries—and I'm talking about B.C. companies because B.C. does supply the majority of softwood lumber to America. If we had their lawyers here, those companies that have seen the benefit of this agreement and have signed on to it, that know there are going to be the bonus points, that they're going to have to eat something but, at the end of the day, get the deal done, if we had them argue, I'm sure this would boil down to an argument between the lawyers.

As you know, 92% of the industry has bought into this deal and the package. We talk about ambiguities in the agreement defining what a softwood product is. Well, the industry has pretty well figured that out over the last 100 years or so. The only ones who seem to have a problem defining softwood lumber and what a product is, what remanufacturing is, what a primary mill is, what primary manufacturing is, appear to be the lawyers, not the industry. They know what they're doing.

Mind you, lawyers are paid to find ambiguities. It's not only what you do, but it's what's good for business.

The Chair: Mr. Harris, perhaps we could get back to Bill C-24 and the issues surrounding that.

Mr. Richard Harris: That's what I'm going to get back to.

The Chair: Thank you.

Mr. Richard Harris: While your testimony is appreciated, because you do provide another side of it, couldn't it be successfully argued that if we had lawyers representing the major manufacturing companies, softwood lumber, major exporters who have bought in, if we had them sitting here, we would likely get two different stories?

That's all I want to say.

Dr. Elliot Feldman: I'd be pleased if I could have a moment to answer this question, Mr. Chair.

I'm not quite sure what Mr. Harris means by “signed on”. West Fraser did not participate in the purchase and sale option and didn't participate in the EDC program. No company in Canada could formally sign on to this agreement. There were only two parties, two capital P parties, to this agreement.

● (1005)

Mr. Richard Harris: When I say signed on, I mean to support.

Dr. Elliot Feldman: And the special charge was not part of that package as you've referred to it. It's not part of the agreement and it was not part of what anyone in the industry endorsed, so—

Mr. Richard Harris: Excuse me, Mr. Chairman, the industry asked for that special charge to level the playing field.

Dr. Elliot Feldman: Excuse me. You asked about—

The Chair: Let Mr. Feldman answer the question, please.

Dr. Elliot Feldman: You asked whether you had lawyers representing any of the major companies. I've been representing Tembec and Domtar for five years—they're considered major companies—and a host of other companies within the associations I represent, some of whom you'd also regard as major companies, I'm sure. And I talk with the counsel of the companies to whom you're making reference almost every day.

So would we have a large debate about some of these questions? I think there'd be consensus that the special charge is not appropriate as to the refunds, and I emphasize that point because your previous statement seemed to focus on the issue of the income tax—and I've referred to different taxes here—because this bill contains an implied income tax, the special charge, and the export tax. This has become a large revenue bill, even though my understanding was that it was supposed to be the implementation of the softwood lumber agreement, and there are elements here that are not implementation of the softwood lumber agreement. That's the main point I'm making.

So when you say there were companies who supported or endorsed or agreed to reaching an agreement in some fashion, the special charge and the tax arrangements weren't part of anything about which they were saying yes, let's get on with it.

The Chair: Mr. Harris, just a short question, if you have one.

Mr. Darrel Pearson: Excuse me, Mr. Chairman, may I have 60 seconds to reply to Mr. Harris? I believe he addressed me as well. I think he did. He certainly was looking at me.

The Chair: Go ahead.

Mr. Darrel Pearson: I want to make sure it's understood, Mr. Harris, that like you, I'm here as a public servant. I'm not here representing clients. And as to your comment respecting the industry understanding these terms, I think as a parliamentarian you would appreciate that much of the legislation that's promulgated by the House is not understood, even by the business people whom it's intended to cover, because it's legalistic, and my comments were addressed to the legalisms of the statute, not to policy.

Also, as to the role of the courts, it wasn't my intention to suggest that this was all going to be about wasting a lot of time in litigation. My comments are addressing the needs of supporting the industry, to provide them with clarity—and not just the big boys, but all the boys...and girls.

So my intended purpose here was not only to clarify that, but also to make sure that it's not just the people who are invested in this industry today who have clarity, but those who may wish to invest in our industries in the future.

Thank you.

The Chair: Thank you, Mr. Pearson.

Mr. Harris, if you have a short question.

Mr. Richard Harris: I have a question for Mr. Feldman.

You know the industry wanted a means of levelling the playing field between those who made use of the EDC provisions and those who chose not to, and the industry, in consultation with the government, came up with the special charge of 18% to level the playing field, as the industry put it itself.

Industry had an option either to use 100% of the EDC provisions or not, and those who didn't had reasons. They felt it would be of better interest to their business not to use it, and those that did use it did so for reasons they felt would be of benefit to their business. That's a free choice they had. They weren't bullied into it by any means.

So I don't understand your argument that those that freely chose not to use the provisions of EDC are in some way being penalized when they knew up front they had two choices, and they knew what those choices were.

● (1010)

Dr. Elliot Feldman: It's frustrating when there's reference to the industry, because there has not been, in the last five years, a single organization representing the industry of Canada. The consultations with the industry have been inconsistent and were sometimes narrowed to select CEOs. The trade associations frequently have been bypassed.

In the so-called consultation about levelling the playing field on the special charge, neither the industry nor the government ever revealed who was part of those conversations. There was no association or organization of industry that participated in those discussions. And I can certainly say that many of the clients I represent had nothing to do with those conversations and weren't consulted.

In addition, although you say that there was no bullying about the EDC, I can testify that I have clients who were pressured considerably by officials of the government to participate in the EDC program to enable the government to reach its 95% target as a condition precedent. That target, as we know, wasn't met, and the agreement was amended on October 12 accordingly.

So it's not true that there was no pressure about using the EDC facility. But my remarks today are focused on the bill in terms of the bargain that was reached. The bargain that was reached was that those who participated in the EDC received an advance payment, and those who didn't participate did not receive an advance payment.

And the evidence is what happened yesterday, and I applaud the EDC's performance yesterday. They made their payment within two weeks. They said they wouldn't do it in less than six to eight weeks. I congratulate them, but that only proves the point, because those who were not participating in the EDC process have not received payments yet.

Mr. Richard Harris: But if they had, they would have.

Dr. Elliot Feldman: But that was the bargain. The bargain wasn't necessarily to also, therefore, pay an additional charge.

The Chair: Your time is up, Mr. Harris.

I would like to encourage everyone to focus on Bill C-24. Let's stick to the subject at hand. We have the gentlemen here for less than an hour, so let's get on with the questioning.

Mr. Julian, go ahead, please. You have seven minutes.

Mr. Peter Julian (Burnaby—New Westminster, NDP): Mr. Chair, thank you very much.

I am delighted that you are here today, Mr. Feldman, Mr. Pearson, and Mr. Woods. It's very important. This committee has to do its due diligence on Bill C-24, and the concerns you're raising are very significant and are something the committee needs to take into consideration.

I'm very pleased to follow Mr. Harris, because Mr. Harris raised the issue that he thinks other people may say other things about Bill C-24.

Now, we know, Mr. Chair, that in the last few days a number of organizations, municipalities, and industry representatives have written to the clerk to indicate that they want to be heard on Bill C-24. So I will raise a notice of motion. We have three notices of motion we sent to the clerk this morning prior to this committee. But I'll read mine out so that it's on the record:

> That the Standing Committee on International Trade hear testimony from those organizations, businesses and municipalities that have recently written to the Committee to request to testify on Bill C-24, and that they be heard either in person, or by video, or telephone conference before the beginning of clause by clause consideration of Bill C-24 by this Committee.

That's a notice of motion for the beginning of the meeting on Thursday, Mr. Chair, and it's a good segue from Mr. Harris's comments.

I'd like to come back now to a point you raised, Mr. Feldman. In this turn, I'm going to concentrate on you. Mr. Pearson, I'll come back to you for questions on my next tour.

Mr. Feldman, you raised the issue of the payments that have been made. Essentially, the taxpayers picked up $950 million yesterday in payments out to companies. I certainly applaud this, as you did, and that the government has finally acted. They should have acted nine months ago and done this. We've said all along that the government had the power to take taxpayers' money and apply it to help the industry, and indeed, yesterday they proved that they can and that we were right on that matter.

Since the industry is receiving those taxpayers' funds, the issue, of course, is due diligence on taxpayers' money. We had a judgment on October 13 that essentially awards all the money back to Canada, as a taxpayer. And given that the taxpayers are picking up the tab, I guess the question would be what would happen—you referenced the fact that this committee and Parliament have the right to turn Bill C-24 down—if we indeed did turn down Bill C-24. How would that judgment of the Court of International Trade apply, and when would the taxpayers essentially get the money back that has been forwarded or advanced through EDC?

● (1015)

Dr. Elliot Feldman: There are at least two parts to your question, because there's the collection of the money and there's the return of the money.

As to the collection of the money, there's more than one factor in play. The United States has now withdrawn its extraordinary challenge to the NAFTA panel that decided there was no subsidy. The secretariat of NAFTA has filed a notice of panel completion. We have questioned the notice for technical reasons; nevertheless, that panel is complete, and now it is formal and official, if you will, that there is no subsidy on Canadian softwood lumber, as decided by the NAFTA process.

Consequently, the countervailing duty order, had it not been terminated by the United States on October 12, would have been revoked by virtue of the notice of panel completion arising from the withdrawal of the extraordinary challenge. That would have necessarily ended the collection of countervailing duties. It would not have led to the return of the money, because the orders apply on the same entries; that is, there is a dumping order and a countervailing duty order, and since they apply to the same entry, removing the countervailing duty order doesn't liquidate the entry. There's still an anti-dumping order on the same entry.

But the decision of United States Court of International Trade on October 13 said that there was no threat of injury and finalized that question. That applies to both orders. The court decision is subject to appeal, and we'll know whether it's being appealed in mid-December. There is an expectation, of course, that it will be appealed. Both Canada and the United States moved to dismiss the decision and therefore effectively, although not technically, to vacate the decision.

We don't believe that decision will be dismissed. We think that the legal argument seeking dismissal is erroneous, because they presumed that the action of revoking the orders on October 12 mooted that decision on October 13, but because the entries had not been liquidated, that decision is not mooted. We've had one session with the court on that question, and it appears that the court agrees, so it's subject to appeal. The appeal to the Court of Appeals for the federal circuit, as I've testified here before, could take about a year.

This very strong unanimous decision of a three-judge panel led by the chief judge of the court will not be overturned. I say that with confidence. Consequently, at that time, when the Court of Appeals would uphold the decision, then money would be returned.

The last dangling question is where we would be with respect to the anti-dumping order. We believe that the court would enjoin further collection of the anti-dumping duties pending the appeal because of the decision and because of the elimination now of the countervailing duty order. We think that within a brief period of time, collections would have stopped. Collections of the countervailing duty, which is the lion's share of the money, about 8% of the 11%, would have stopped now already, and then money would not be returned for about 12 months.

The Chair: Mr. Julian, we still have some time.

Mr. Peter Julian: Thank you very much, Mr. Chair.

This is very relevant. I know where you're going. But the reality is that Parliament has the opportunity to amend, adopt, or reject legislation. My questions are in the line of what would happen if Parliament rejected this legislation.

The Chair: Just keep in mind that you have about 40 minutes left, and these gentlemen have agreed to come to deal with the bill. Go ahead with that caution in mind.

Mr. Peter Julian: This is one of those scenarios around the bill. I just want to then be very specific, that if Parliament chose to reject this bill, essentially we wouldn't be paying these punitive duties, and essentially over a 12- month period we have a reasonable anticipation of getting all of the money back.

● (1020)

Dr. Elliot Feldman: That is correct.

Mr. Peter Julian: Yes. Thank you for that. That's important for us to know as a committee, and certainly important for parliamentarians to know as well.

I'd like to come back to your testimony about clause 18, because this is very disturbing, of course, that essentially what we've been told the bill contains would mean that companies would be getting 82¢ back on the dollar. But with the special charge and the fact that there is really no provision for a refund on the special charge, what is your estimate of the actual amount of money on the dollar that companies would be getting back? I think it would be a surprise to many softwood companies to know the difference.

Dr. Elliot Feldman: Unless the phrase “"specifically provided” is changed, which certainly could be done, and unless, therefore, there was reliance not on the Financial Administration Act but on something internal to this legislation, then those who've received 82%, under the terms of the bill, would face an additional tax on the 100% of 20%. Where they gave up the 18% is not in the bill; they gave it up in the purchase and sale option. This gave the government authority to return it to them—less than 100%—and they gave it up in the irrevocable power of attorney, which authorized U.S. Customs authorities to turn the money over to the Government of Canada instead of to them.

So it's not in the bill; it's in those other two documents. By virtue of those transactions, the bill says they pay on all of the refund. All of the refund that in fact went to the Government of Canada is 100%, but they're getting 82% under the terms of the purchase and sale agreement that they signed with EDC.

Mr. Peter Julian: So what do you believe is the net impact of that double charge?

Dr. Elliot Feldman: I did this out once. Roughly, I think they come out with something like 67%—maybe it's a bit higher, but it's something like that, I think.

The Chair: Okay, Mr. Julian, you're quite a bit over time already. Go ahead with a short question, then we'll go to the Liberals.

Mr. Peter Julian: Exclusive of income tax?

Dr. Elliot Feldman: Yes, the income tax is another issue, but essentially, because of the way this legislation is currently crafted, the softwood companies would be getting 67¢ back on the dollar, and that's not even including the exchange laws.

Mr. Peter Julian: Those who participate in EDC?

Dr. Elliot Feldman: Yes.

The Chair: Thank you.

Now we'll go to the official opposition. Mr. Maloney, for five minutes.

Mr. John Maloney (Welland, Lib.): Mr. Pearson, sometimes a portion of your presentation here today dealt with the ambiguity of the definition sections. Do you have any suggestions for us that would clarify some of those ambiguities?

Mr. Darrel Pearson: Well, they would be most appropriately dealt with through consultation with the industry. I'm not a specialist in defining those terms, because they are in fact terms that are industry-based. What would have made a lot of sense...and although it's not the most efficacious way of approaching the issue, perhaps you can deal with the issue through regulation as well, but it's not a great way of doing it, from a legalistic point of view. Consultation with the industry...I don't have a list of softwood lumber definitions for you, for example.

Mr. John Maloney: I will follow on with Mr. Harris' line of questioning. The industry has existed for a long time. We've had softwood lumber agreements, there's a history, so would this not already be established?

Mr. Darrel Pearson: You're assuming that the same people are going to be involved on Tuesday who were involved last Sunday, and that's just an improper assumption. It's not a static industry, number one. In fact, we're reading all the time about changes—potential consolidations, investment decisions, bankruptcies, receiverships. It's an industry that is in flux, and this legislation is going to last for three plus three years, potentially. So six years from now, I suspect, you'll be dealing with all kinds of different people who may have, today, relatively no knowledge of the industry. I don't think that's a particularly helpful way of approaching legislative definition, to assume that those who will use the legislation, because they're in the business, know what it means. It hasn't been in the area of customs since we had our first customs act and our first customs tariff. It's simply not the case.

For example, we've had disputes about tariff classification, not to get too mundane, over all kinds of different products, and I'm sure Mr. Feldman has had experiences in his country as well. The people who bring appeals to ascertain the meaning of those words, for purposes of taxation, have been in the business for decades. So it's not a proper way of approaching it, from a legalistic point of view.

● (1025)

Mr. John Maloney: I'm going to ask the opinion of both the legal counsel there.

I've been concerned about a specific clause, clause 75 of the bill, which purports to pierce the corporate veil to make officers and directors of a corporation libel for the actions of that corporation. My concern is due process.

Perhaps you wouldn't mind glancing at that clause. I've been told this is a normal clause that goes into legislation of this nature. I'm also confused about the last sentence, whether or not the person has been prosecuted or convicted. That's a little ambiguous to me, and I have yet to have anyone explain it to me.

Mr. Feldman.

Dr. Elliot Feldman: If I may, Mr. Maloney, rob 30 seconds of your time to amplify something that Mr. Pearson just said, the meaning of "softwood log" was debated through the last round of litigation. In Ontario this has been a particularly difficult debate because a softwood log is defined as a log that goes into a mill and gets processed into softwood lumber. The same log might have gotten processed for pulp or paper. If it goes into a pulp or paper mill, it's then a pulp log, and that definition is not the definition that applies necessarily in other provinces. When Mr. Pearson says we need to define "softwood log", it certainly is not a known quantity. It's been a heavily litigated and disputed issue.

Mr. John Maloney: Thank you for your comments.

Dr. Elliot Feldman: Let me come to your question now.

I reviewed some of the discussion in last week's hearing; I had the privilege to do that thanks to whoever sent me the transcript. I saw that you had raised this question before.

My annotated version—you can see all the red and green tabs—has a lot of tabs related to the tax provisions on which I have consulted our American tax folks. A lot of the provisions here are not common in the United States, but I've been told, as you were told, that they are common here in Canada, so it is hard for me to address the question in terms of what the normal tax law is in Canada.

Some of these provisions seem to us quite draconian. Documents and records of companies are subject to search and seizure, sometimes on pretexts that have really nothing to do, it seems, with the enforcement of the provisions of this act, which are supposed to be about the export tax. But some people have said that's just normal in Canadian tax law. If they're normal in Canadian tax law, why they have to be recited here again in this bill I also don't know, but I'm told that's normal too.

The best I can answer is that it is fairly alien to American practice and experience as to tax provisions.

On your question of piercing the corporate veil, some of these items seem draconian, and they seem invasive as to searches of records and in the difficulty of maintaining proprietary rights over some of these records that in American tax law would be more protected. In the end, it is a matter both for this committee and Parliament as to the tax provisions that are passed here. I don't think I can enlighten beyond that.

Mr. Darrel Pearson: I might be able to offer something in that respect.

The vast majority of these types of provisions—I'm creating a basket for ones that I didn't deal with, basically—are quite common in respect of Canada's import-related and taxation-related statutes. I believe they are repeated for good purpose.

However, insofar as clause 75 is concerned, the last phrase there is peculiar, and I suspect, although there are probably people in a better position than I right this moment, that it relates in part to the retroactive nature of this proposed legislation. It hasn't received assent, and I suspect that if activities even today were such that someone had already committed an offence per se, it may have been written in language such that, whether or not the person has been prosecuted or convicted, it would cover off the potential retroactivity.

That's the best I can do. That phrase is a little odd, but it may relate to the somewhat odd approach that has been taken with the promulgation of the bill.

In that respect I have a very brief comment. A lot of the things I have spoken about might have been looked after and been less contentious if they had begun with promulgation of policy and regulations to support the bill. Unfortunately, you're not at that stage. It has been done in reverse.

● (1030)

Mr. John Maloney: Thank you.

The Chair: Thank you, Mr. Maloney.

We'll go to Mr. André, but first, in terms of the definition and the tariff classifications, the agreement itself seems to have a fairly comprehensive definition. Annex 1A has pages of definition. Is there a problem not having that definition in Bill C-24, in your view? What's the issue here?

Dr. Elliot Feldman: Thank you for that question.

Parliament has the option of incorporating Annex 1A. I wouldn't encourage Parliament to do that, because it's the American definitions of all the terms. Annex 1A is crafted out of the provisions of the orders, and Parliament is under no obligation to simply endorse or embrace the way the United States chose to define all the terms—but it could.

The Chair: And the point is that it is defined in the agreement fairly comprehensively.

Dr. Elliot Feldman: The United States has defined those terms, and you have a choice—

The Chair: And they've been agreed to by Canada.

Dr. Elliot Feldman: But you have a choice, because this legislation does not presently incorporate Annex 1A as your definitions.

The Chair: Okay.

Mr. Pearson, go ahead.

Mr. Darrel Pearson: When you use the term “comprehensively”, I suspect it's because it's a long list.

But with respect, Mr. Benoit, from the point of view of a customs attorney, it's not comprehensive; it's vague. And from the point of view of the industry, it will be vague. I mentioned this at the beginning, just because there are references to tariff items.... Tariff items are subject to broad interpretation, and then the rest of the language uses terms such as “including”, and so forth, which leave things rather open-ended.

By the way, if we do know what these terms are—and the industry is well aware of what these products are—why not deal with them? I guess that's what we're saying.

The Chair: Thank you, Mr. Pearson.

Mr. André, five minutes.

[*Translation*]

Mr. Guy André (Berthier—Maskinongé, BQ): Good morning, Messrs. Feldman and Pearson. I will speak in French because I can express myself better in that language. Thank you for being here today and for giving us different points of view about this bill.

You are no doubt aware that the Conseil de l'industrie forestière du Québec and all Quebec industries supported the agreement: the figure generally given, Mr. Harris, is 92% of industries in support. Nevertheless, this support was unenthusiastic, as you know. The demands of the various parties for support to industry through loan guarantees and other means gradually created a form of pressure. We are now reaching the final stage. The agreement was signed on July 1, in Geneva, where I was as well. The companies were exhausted. In Quebec, they wanted to be reimbursed. They were experiencing major job losses, suffering from a lack of support and similar problems. Here we are now with Bill C-24. We in the Bloc Québécois will support it because we have been told to do so by Quebec industry and our party is responsive to its members.

According to what you said, this bill does not fully reflect the agreement. You spoke about tax treatments under the agreement that were not included in the bill. I undertand what you are saying, of course. My colleague Mr. Cardin, who is not here, told you that your testimony was interesting, but that we had reached a different stage. Criticism must be taken into account. We are trying to move forward, because the pressures are enormous. The companies, who have begun to receive reimbursement, first had to complete a form, which was anything but easy. We know that the process is lengthy and that there are issues involved in all of this.

The companies want to be reimbursed. No one wants to go back before the courts: that would be going round in circles, unless there is an election, as Mr. Cardin was saying. Even then, it would not deal with the company issue.

Are there any amendments you would like to make to this bill, without casting doubt on all of the contents and the fact that the companies want reimbursement?

● (1035)

Dr. Elliot Feldman: Thank you. I believe that what what involved was in fact several questions.

[*English*]

Let me take the last statement first. I suggest that you simply delete section 18. If I remember the sequence of events correctly, I was here on the day that Monsieur Guy Chevrette said that if the government were to provide them loan guarantees they would not endorse this agreement. It was on the basis of his saying that because they didn't have the loan guarantees they did endorse the agreement, I believe, that the Bloc Québécois then said okay, then we support the agreement. If I remember the sequence correctly, that occurred before there was any discussion of a special charge. So the Bloc Québécois agreed to the agreement that would provide money, not a special charge that would take it away.

You could most help the industry and most easily amend the bill without undoing the agreement by deleting article 18 of the agreement.

I need to add that you're in an interesting sequence as well. The United States has revoked the orders and can't go back to restore them. The money is all coming back regardless of what this Parliament now does, for whatever reason that the United States revoked the orders. We all have our own theories about that—and if someone wants to indulge me I'll be happy to elaborate—but regardless, it has happened. The orders are revoked, the money's coming back, and there is no restoring of the orders. Whatever you do in Parliament as to that development doesn't matter; taxing the refunds does, and you don't have to. It was never part of the agreement. It was never part of the Bloc's pledge when it supported the agreement.

The Chair: Mr. Pearson, do you want to respond to that as well—the specific changes you would make?

Mr. Darrel Pearson: I think I've covered in detail the areas that require more precision.

The Chair: There's nothing beyond that?

Mr. Darrel Pearson: No.

The Chair: Thank you.

Monsieur André, your time is up.

Mr. Menzies.

Mr. Ted Menzies (Macleod, CPC): Thank you, Mr. Chair.

Thank you, gentlemen, for coming today. I appreciate the comments and recognize that they are mostly constructive, in that we want to make sure this bill is solid—as you specifically noted, Mr. Pearson—and this industry, which has been hobbled with litigation for an awful lot of years, doesn't have to go right back to court to face challenges on something as simple as definitions.

Mr. Pearson, I would like you to share a copy of your comments with this committee. I wish we'd had them before to follow along as you raised them, but I appreciate them and accept them as constructive.

You talked about clause 5, time of loading. What is your concern there, and what you do suggest to improve that?

● (1040)

Mr. Darrel Pearson: By the way, we are preparing a French-language version of my notes, so they will be provided to the committee.

Mr. Ted Menzies: I appreciate that. Thank you.

Mr. Darrel Pearson: Clause 5 establishes the time at which a softwood lumber product is considered exported. It says it's at the time when the product was last loaded aboard a conveyance for export. That time will vary depending on how the business is being done, obviously.

What's missing is what actually constitutes the act of exporting, which is required in order for you to have a sense of when you are loading for export.

Mr. Ted Menzies: But if it's on a transport vessel, if it's off-loaded, then it's not exported, right?

Mr. Darrel Pearson: It could be loaded on an interim vessel that would be taken to the port, for example, on a through bill of lading. It has already potentially begun its exportation at that point. Or does the legislation intend to capture the moment when the goods move from the intermediate transportation mode to the boat—if it's going by boat?

We don't know exactly when the exportation takes place. Is it when the exporter signs off on the “B13” documentation and hands that over to Customs? It needs to be more precise in terms of what act actually constitutes exportation.

The other point I made was that there is no definition as to who is considered to be the exporter. I think this is relevant in connection with establishing a number of issues, including responsibility for payment of the export tax. It's not as simple in that case as saying, well, it's the person who put it on the boat. My goodness, there are hundreds of people, and maybe several companies, involved in dealing with that.

Mr. Ted Menzies: Does ownership not substantiate that?

Mr. Darrel Pearson: Well, it could, if it were defined that way. For example, the Customs Act contemplates that an importer and owner will be two different people. Likewise, an exporter and owner could be two different people. There is an exporter who may be the exporter of record, who's responsible for ensuring that there's been an export declaration made to Customs. He would be defined on the documents as the exporter. There are a lot of different ways this could be handled. It just needs to be handled.

Mr. Ted Menzies: Thank you.

I believe you referred to clause 9, with respect to the exemption for passing through. What would take the ambiguity out of that?

Mr. Darrel Pearson: A definition of the phrase “in transit”.

Mr. Ted Menzies: It's as simple as that, is it? There's a legal phrase that would definite that?

Mr. Darrel Pearson: Well, we'll leave it to the people who help you put those definitions together to say whether it's easy or not. But a proper definition that provides clarity could absolutely be prepared.

Mr. Ted Menzies: Okay.

I know definitions are very important. I forget which lumber it was—one, two, three, or four—where we were exporting lumber that had added value in that there was a hole drilled in one end. It was exempted because of that. We know people are ingenious in the way they get around that.

Mr. Darrel Pearson: Advertently or inadvertently.

Mr. Ted Menzies: I'm not suggesting it was whichever form.

Economic rent regarding quotas is something I hadn't given a lot of thought to. Can you share your concerns about that?

Then I believe Mr. Harris has one quick question.

● (1045)

Mr. Darrel Pearson: It's not a concern insofar as it's just a statement of fact. When there's a limit on the volume of product that can be either imported or exported, subject to some form of penalty or taxation or absolute volume, it creates an additional value in the ability to actually do the exportation or the importation. You may have excess inventory or you may have shortages of inventory. The fact that the bill contemplates that there will be transfers of quota or entitlement suggests that there will be payments for that.

Mr. Ted Menzies: It creates a value to the quota.

Mr. Darrel Pearson: Over and above the value of the lumber product.

Mr. Ted Menzies: Okay.

Mr. Darrel Pearson: Generally, they've been considered to be harmful.

The Chair: Mr. Harris, I'll give you one question. The time is up.

Mr. Richard Harris: This is to Mr. Feldman.

Mr. Julian suggested there's an opportunity for a double taxation in reference to those that chose the EDC provisions over those that didn't. He suggested that because this piece of legislation lacks a particular reference to remission—I think that's the word he used—those who did not choose the EDC route would get 100% and remit approximately 18%; whereas the ones who chose EDC would receive 82%. Mr. Julian has suggested that because there is an omission in this legislation, there is an opportunity for those who chose the EDC route to be charged an additional 18%. Where specifically is that omission or that area of ambiguity, and how would you fix it?

Dr. Elliot Feldman: Thank you for that. Obviously we need to clarify here.

Mr. Julian is absolutely correct that this is my preoccupation, if you will. It's what I consider to be the principal defect in the bill. The bill as written does double-tax the EDC participants. The first is not technically a tax because it's part of the purchase and sale agreement—

Mr. Richard Harris: When you say double-tax, what you mean is that—

Dr. Elliot Feldman: They get the 82.5% under their purchase and sale agreement and the irrevocable power of attorney that they signed over to the United States and to Canada. Through those two agreements they're getting back less than 100%. They're getting back roughly 82.5%. But then their refund is absolutely subject to the special charge under the terms of the bill. There's no exception in the bill, in clause 18, to the special charge. Indeed, it's detailed here, which I can walk you through very quickly.

Subclause 18(1) defines specified persons, those therefore who are going to be subject to the charge. Then if you look at subclause 18 (3), it says that the special charge will be imposed on all specified persons. And all specified persons are persons getting refunds.

When you look at subclause 18(4), it says the following: "The charge under subsection (3) is payable by the specified person even if the refund is issued to a designate of the specified person." The designate here is EDC. Even if the money is transferred not directly to the company but instead is transferred to EDC, the charge applies, as explicitly as it could be, under subclause 18(4).

The government has said, "We don't mean to impose that charge, so you'll get it back in a refund or a remission." I've gone to clause 39 in the bill to see how you get it back. Clause 39 says you can't get back any money under this bill unless it's specified in the bill. Well, there's nothing specified in this bill or under the Financial Administration Act to get that money back.

In your hearing last week, I observed how the government officials who appeared relied upon the Financial Administration Act, but abstractly. They said the authority is there, and somehow they can get the money back. So they're supposed to pay it but then get it back under the Financial Administration Act. But the Financial Administration Act does not provide the cure. I've walked through the sections of the Financial Administration Act for that purpose.

How do you fix it? I can make two suggestions.

One, delete clause 18 altogether. Alternatively, you must change the term "specifically provided" in clause 39 so that there is an amendment here that says you don't pay it—that means correcting subclause 18(4) so that you have a provision that says it won't be paid, because under subclause 18(4) everyone pays it, no exceptions—or else in clause 39 you adjust the language of "specifically provided" so that you indeed specifically provide within this act that there's to be a refund of that money.

So you have several ways in which you can fix it. As it reads now, there's absolutely double-tax.

● (1050)

The Chair: Thank you, Mr. Feldman.

Mr. Julian, five minutes.

Mr. Peter Julian: Thank you very much, Mr. Chair.

To come back to your comments, Mr. Pearson, about the loose or vague language contained within the draft legislation, my question back to you is this: how probable would there be litigation arising from this to clarify the loose language, and how soon might this litigation arise?

In other words, if we don't do our due diligence on Bill C-24, when would litigation possibly arise, coming out of the loose or vague language?

Mr. Darrel Pearson: Inasmuch as this legislation is not law but is already regulating trade in software lumber, I would suspect it could be at any time.

Mr. Peter Julian: So we could be looking at legal cases arising if we do not clarify all the terms you've mentioned.

Mr. Darrel Pearson: Yes.

Mr. Peter Julian: Okay. Thank you for that.

I'd like to come back to Mr. Feldman on two points.

Mr. Pearson, you've already commented on the punitive—Mr. Feldman termed it draconian—nature of this legislation: the 18 months of imprisonment for people who are just trying to sell softwood and create jobs in their communities; inspection without warrant; the provision allowing the government to go after commercial customers and directors individually, and also going after transferred moneys at any time. So a person who set up an educational trust for their kid could presumably, the way the legislation is drafted now, see those funds taken by the government.

A lot of folks feel this is an unjust political tax because there are political reasons why this agreement is in place.

I'd like your comment on the draconian nature of this legislation, and I'd also like to indulge you. You mentioned you had some theories around the revocation of the orders, and I would love for you to provide more comment on that.

Dr. Elliot Feldman: On the first point, my reference to the draconian nature of the bill is to the provisions of enforcement. As I commented earlier, and as Mr. Pearson seems to be concurring, there is a view that this is not abnormal for Canadian tax law, and it's hard for me to go much beyond that. It would be abnormal in U.S. tax law, and some of these provisions seem extreme to us. I think that, as this is a piece of independent legislation, it would not be unreasonable for you to examine those provisions independently of what's alleged to be "normal" in tax law, and you've just recited some of those instances that seem to be quite extreme. Indeed, you could put aside an educational trust and have it seized years later under the terms as written.

Our principal speculation is that the revocation came when it did under extreme pressure from the coalition, which wanted its $500 million and was getting anxious about getting its money. It was supposed to be at the head of the queue, and the United States therefore made a strategic and possibly erroneous calculation that it could revoke the orders and everything else would necessarily fall into place. In the normal course of things, I don't believe the United States would have revoked the orders without everything already in place, so there were both presumably private undertakings of the Government of Canada accompanying the secret negotiations that amended the agreement, and we are aware of quite intense pressure from the coalition to get its money.

● (1055)

Mr. Peter Julian: We've been referring to this as the proceeds of trade crime, this money that was unjustly taken because it contravened trade agreements, and essentially in regard to those proceeds of trade crime, there was such anxiousness to access it that the United States may have finally provided justice in this case.

Dr. Elliot Feldman: In terms of revoking the orders, yes.

Mr. Ron Cannan (Kelowna—Lake Country, CPC): Mr. Chair?

The Chair: Go ahead.

Mr. Ron Cannan: Please clarify which clause we are speaking to, Mr. Julian, for my records.

Mr. Peter Julian: We are speaking to Bill C-24, Mr. Cannan.

Mr. Ron Cannan: Any specific clause?

Mr. Peter Julian: As I mentioned earlier in reference to the chair, we have three possibilities as parliamentarians. One is to accept the legislation, which clearly is not going to fly because there are various problems that have been identified; the second is to amend or amend substantially this legislation; and the third is to reject this legislation.

I think it's important that parliamentarians keep an open mind about the possibility of amending or rejecting—

Mr. Ron Cannan: Absolutely. I have an open mind. I just wanted to clarify which bill or which portion of the bill you were referring to, the specific clause.

The Chair: Mr. Cannan, Mr. Julian has explained.

Please continue, Mr. Julian.

Mr. Peter Julian: I'd like to come back to another question for both of you, which is around the administrative and legal costs that would be deducted from payments made to the provinces, which is contained in clause 99 of the legislation. I reference that for Mr. Cannan so he can pull open his clause-by-clause analysis.

Would you have any sense of what might be deducted? The fear here, of course, is that because it's done by the minister and the provinces are not involved at all, there could be a substantial deduction of funds for moneys that were promised to the provinces, and that's the only reason some provinces decided to support the agreement.

So would you have any sense of where the government might be going on that based on past practice?

Dr. Elliot Feldman: I believe the administrative costs in the past were in the 1% range. But here the government has also said that it wants to rely on these proceeds for legal costs. It could be associated with the dispute mechanism. The agreement said that a portion of the $1 billion was to be assigned to the cost of managing the dispute mechanism, but not to the legal costs. If I understood the testimony of government officials last week, they would expect provincial governments to carry some of those costs where the provinces were involved. I don't know if there is any precedent for that. The mechanism does not provide for anyone but the federal governments to engage in the dispute process. There is no provision for provincial governments, private counsel, or provincial counsel to engage in any of the disputes.

In the past, where disputes have arisen under these agreements, they have been disputes raised by the United States questioning the conduct of Canada, and they've focused on provincial practices. It's not easy to foresee what will happen going forward, but presumably the anti-circumvention clause would be the principal source of dispute. These would be claims brought by the United States. It would be the Government of Canada's obligation to defend these claims, but it may seek to deflect to provinces. In these cases, the provinces would carry the cost of the dispute while the mechanism would be funded by the money taken from the $1 billion. If the Government of Canada actually does the defence, it presumably would be drawing on resources from the export tax. Then your question becomes, how much would they spend on that? If they use their own lawyers, they spend internally and in theory it's already in the treasury. But then, they could also hire private counsel. There have been reports about how much the Government of Canada tends to spend on private counsel, which I can tell you is a bit more than the private sector spends.

The Chair: Mr. Julian, your time is up, and our time at committee is up. Was there a question to Mr. Pearson?

● (1100)

Mr. Peter Julian: My question was to both.

The Chair: Mr. Pearson, do you want to answer that as well?

Mr. Darrel Pearson: I have not had the pleasure of being retained by the Canadian government, so I didn't share in those numbers. I would reiterate my point that, particularly in respect of the cost of administration, the public service should have funds sufficient to properly enforce this legislation, so that the industry can benefit from it.

The Chair: Does anyone have one final pressing question here?

Mr. Harris.

Mr. Richard Harris: First of all, I would like to thank the witnesses today for their legal opinions about Bill C-24. Every opinion is of benefit. The arguments will come from opinions.

Mr. Feldman, in respect of your opinion on Mr. Julian's suggestion about the double charge, a company like Canfor stands to get about $870 million back. If your opinion is correct, they could be facing an additional $156 million charge. If they had concerns about it, do you not think that as we speak they would be landing with a planeload of lawyers? Don't you think that if they had these concerns they would be doing due diligence the instant this bill was off the presses?

Dr. Elliot Feldman: First, I'm not aware that many counsel have read this bill. Companies like Canfor, especially upon signature in September, and probably earlier upon initialling in July, pretty much retired their counsel from looking at any of these procedures and have trusted the government to get it right. I'm not aware that their lawyers have read the bill at all.

Secondly, I am aware that there have been quite a few private conversations between companies, government officials, and ministers on various aspects of the bill. I'm not party to any of those private conservations. Whether there's a private conversation on the subject you're raising, I don't know. What I can add, however, is that not a single lawyer I have consulted and asked to examine these problematic sections of the bill—and there are several—have disagreed with the conclusion I've reached. There is a problem in the way it's been drafted. You can fix it. If you choose not to fix it, you have a problem.

The Chair: Thank you very much, Mr. Feldman, and thank you also, Mr. Pearson and Mr. Woods, for coming today. It was very much appreciated. I'm sure some government officials will be hard at work over the next day or so, having a look at what you've steered us to. Thank you very much.

This meeting is adjourned.

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