

**The Loewen Group, Inc. and Raymond L. Loewen**

**v**

**United States of America**

**(ICSID Case No. ARB(AF)/98/3)**

**DECISION ON RESPONDENT'S REQUEST  
FOR A SUPPLEMENTARY DECISION**

**INTRODUCTION**

1. On June 26, 2003, the Tribunal delivered its Award on Respondent's motion of January 2002, including its decision on the merits.
2. By its Award on Respondent's motion, the Tribunal decided unanimously:
  - "(1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.
  - (2) That it lacks jurisdiction to determine Raymond L. Loewen's claims under NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.
  - (3) TLGI's claims and Raymond L. Loewen's are hereby dismissed in their entirety.
  - (4) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat."
3. In its decision on the merits, the Tribunal concluded, again unanimously
  - "that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has

not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible"

and that

"the claims of Loewen and Mr Raymond Loewen should be dismissed in their entirety".

4. Material to the Tribunal's conclusions recited in the preceding paragraph were the following paragraphs in the Decision:

- "213. Entry into the settlement agreement no doubt reflected a business judgment by Loewen that, of the various options then open, settlement was the most attractive, in all probability because it provided certainty. Other alternatives involved financial consequences which would not have been easy to predict.
214. Respondent argues that, because entry into the settlement agreement was a matter of business judgment, Loewen voluntarily decided not to pursue its local remedies. That submission does not dispose of the point. The question is whether the remedies in question were reasonably available and adequate. If they were not, it is not to the point that Loewen entered into the settlement, even as a matter of business judgment. It may be that the business judgment was inevitable or the natural outcome of adverse consequences generated by the impugned court decision.
215. Here we encounter the central difficulty in Loewen's case. Loewen failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached. It is a matter on which the onus of proof rested with Loewen. It is, however, not just a matter of onus of proof. If, in all the circumstances, entry into the settlement agreement was the only course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy.
216. Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, we are simply left to speculate on the reasons which led to the decision to adopt

that course rather than to pursue other options. It is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take."

5. On August 11, 2003, Respondent filed a request for a Supplementary Decision pursuant to art. 58 of the ICSID (Additional Facility) Rules. By the its request, Respondent sought a supplementary decision clarifying the Tribunal's disposition of Raymond Loewen's claims under art. 1116 of NAFTA.

#### **PROCEDURE**

6. The Tribunal, by letter dated August 22, 2003, invited Claimants to submit observations on Respondent's Request on or before September 19, 2003.

7. Loewen, by letter dated September 17, 2003, informed the Tribunal that it did not intend to submit comments on Respondent's Request.

8. On September 19, 2003, Mr John R. Lewis Jr and Ms Christina Arangiosa of Montgomery, McCracken Walker & Rhodes LLP and Mr D. Geoffrey Cowper QC of Fasken Martineau Du Moulin LLP filed submissions as to Raymond Loewen's art. 1116 claim.

9. By letter dated November 27, 2003 the Tribunal informed the parties that it would proceed to deal with Respondent's request for a supplementary decision. The Tribunal directed Respondent to file a reply no later than December 19, 2003 and Raymond Loewen to file a rejoinder no later than January 9, 2004.

10. By that letter the Tribunal stated that it was then of the view that an oral hearing would be unnecessary but reserved its position on that question until it received the reply and rejoinder.

11. On December 19, 2003, the Attorneys for Respondent, Mr Mark A. Clodfelter, Mr Barton Legum, Ms Andrea Menaker and Ms Jennifer Toole (U.S. Department of State) and Messrs Joseph Hunt, Vincent M. Garvey and Ronald V. Wiltsie Jnr (U.S. Department of Justice) filed Respondent's reply.

12. On January 9, 2003, Raymond Loewen's rejoinder was filed.

13. On the submissions presented by the parties, the question arises whether an oral hearing is necessary. Respondent submits that an oral hearing is unnecessary. We agree with Respondent on this point. The issue raised by Respondent's request is clear and is to be resolved by reference to the materials before the Tribunal, including the transcript of the oral hearing on the merits, the Award, the request and the submissions which have been filed. Nothing would be gained by a further oral hearing.

#### **ARTICLE 58(1)**

14. Article 58(1) provides:

"Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award."

15. Article 58(1) reflects art. 49(2) of the ICSID Convention which provides:

"[t]he Tribunal upon the request of a party ... may ... decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award."

#### **RESPONDENT'S CASE**

16. Respondent contends that, although the Award explicitly stated that all claims (including Raymond Loewen's claims) were dismissed on the merits, it did not state expressly that his art. 1116 claims were dismissed on the merits. Respondent concedes that the Award was not "silent" as to the question but argues that further explication would resolve a minor ambiguity and that art. 58(1) extends to such a case.

#### **RAYMOND LOEWEN'S CASE**

17. Raymond Loewen contends that the Tribunal omitted to decide his art. 1116 claim in the Award and that it is obligated to render a supplementary decision under art. 58. Raymond Loewen submits that the Tribunal overlooked the claim and that, in the course of determining it now, the Tribunal should consider whether its "obiter dicta" as to the merits require correction, as Raymond Loewen argues.

18. Central to the submission is the argument that paras 215-217 of the Award are in error and that the Tribunal overlooked the declarations of Mr Wynne S. Carvill and the Rt Hon John N. Turner. These declarations were before the Tribunal and were relied upon by Claimants at the oral hearings.

### **DISCUSSION**

19. We agree that, apart from the dismissal in the Award of June 26, 2003 of all the claims "in their entirety", there is no distinct reference in the Award to a discussion of Raymond Loewen's claim under art. 1116. We agree also that, as there was no jurisdictional objection to his claim under art. 1116, that claim fell to be determined by the decision on the merits.

20. But the dismissal of all the claims "in their entirety" following the examination of the merits was necessarily a resolution of the art. 1116 claim. That dismissal was a consequence of the reasoning expressed in paras 213-216. We therefore reject the argument that the Award did not deal with the art. 1116 claim.

21. It follows that Respondent is correct when it argues that Raymond Loewen is asking the Tribunal to reconsider its decision to dismiss that claim and to reconsider the reasoning (described by Raymond Loewen as "obiter dicta") which led the Tribunal to dismiss the claim. In the context of the dismissal of Loewen's claims, that reasoning was not merely "obiter dicta". It was the reasoning on which that part of the Award was based and it is not open to the Tribunal to reconsider it. There is no logical basis on which the Tribunal can draw a distinction between the relationship of that reasoning to the dismissal of the Loewen claims on the one hand and to the Raymond Loewen claim under art. 1116 on the other hand.

22. While the Cargill and Turner declarations were relied upon to support a view contrary to that reached in paras 215-216 of the Award, they did not satisfy us, in all the circumstances, that the settlement agreement was the only course for Loewen to take. The declarations did not purport to present a comprehensive record or account of TLGI's Board's consideration of the option which it should pursue. Nor did the declarations record or identify the information presented to the Board on which it arrived at its conclusion that it should pursue the settlement option. The declarations did not ground an

inference that the settlement option was the only available alternative or that certiorari petition and the bankruptcy petition were not available remedies.

**CONCLUSION**

23. The request should not be granted because Raymond Loewen's art. 1106 claim was dealt with.

**ORDERS**

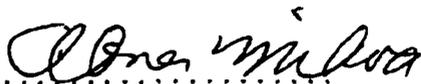
1. The request is refused.
2. That each party shall bear its own costs and shall bear equally the expenses of the Tribunal and the Secretariat.

Done at Washington DC.



.....  
Sir Anthony Mason  
President of the Tribunal

Date: 17 August, 2004



.....  
Judge Abner J. Mikva  
Arbitrator

Date: 17 August, 2004



.....  
Lord Mustill  
Arbitrator

Date: 6 September 2004