

IN THE MATTER OF:

THE LOEWEN GROUP, INC. and
RAYMOND L. LOEWEN,

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA

Respondent/Party

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

**ARTICLE 58 SUBMISSIONS AS TO
RAYMOND L. LOEWEN'S ARTICLE 1116 CLAIM**

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I. Summary

1. These submissions are pursuant to leave granted by the Tribunal, and comment on the request made by the Respondent, The United States of America (the “United States”), for the Tribunal to issue a supplemental decision with respect to the Article 1116 claim advanced by the Claimant, Raymond L. Loewen (“Raymond Loewen”).
2. It is respectfully submitted that the Tribunal is obligated to render a supplemental decision pursuant to Article 58 of the ICSID Additional Facility Rules as to Raymond Loewen’s Article 1116 claim because it omitted deciding that claim in the Award dispatched to the parties on June 26, 2003.
3. In the course of deciding Raymond Loewen’s Article 1116 claim, the Tribunal must determine the merits of the claim and in so doing consider whether their *obiter dicta* as to the merits expressed in the Award require correction.
4. The Claimant submits that the Tribunal completely overlooked his Article 1116 claim, and that upon this being recognized, he is entitled to ask the Tribunal to return to the merits and decide the merits of his claim in accordance with all the submissions and to make all findings necessary to determine the claim.
5. The essence of the reasoning on the merits contained within paragraphs 215 to 217 of the Award is *obiter dicta*, is manifestly in error, and requires the evidence to be reconsidered. Uncontradicted and unchallenged evidence was placed before the Tribunal disclosing The Loewen Group, Inc.’s (“TLGI”) reasons for entering into the settlement agreement rather than attempting to pursue other alleged options and, in particular, the “Supreme Court option”. Indeed, the Carvill Declaration, a copy of which is attached as Exhibit A to this submission, directly addressed these questions and established proof to the standard set out by the Tribunal in paragraphs 215 and 216, namely that settlement was the only course which TLGI could reasonably have been expected to take in all the circumstances.

As stated in The Loewen Group's submissions concerning the United States' jurisdictional objections:

62. The advice received by Loewen confirms this analysis. According to the principal outside counsel for Loewen responsible for dealing with the *O'Keefe* verdict, the Company was advised that the likelihood of obtaining Supreme Court review was 'extremely remote', and that a collateral attack in federal district court was so clearly 'foreclosed' by the *Pennzoil* decision as to be possibly sanctionable. (See Carvill Decl. at 3-5.)

Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, dated May 26, 2000, para. 62

6. TLGI also filed, as part of its initial material, the Declaration of John Napier Turner, an independent director, a member of the Special Committee to consider the outcome of the Mississippi proceedings, and former Minister of Justice and Prime Minister of Canada, who testified that the Board of Directors sought, received, and acted upon the advice of its expert advisors, including Wynne S. Carvill, and those he had retained to advise TLGI.

Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, Declaration of Rt. Hon. John N. Turner, P.C., C.C., Q.C., Tab D

7. This evidence was not only before the Tribunal: it was not challenged by contrary evidence or even the subject of cross-examination by the Respondent.
8. While it might be understandable that Raymond Loewen's Article 1116 claim could be overlooked in the massive material and documentation submitted to the Tribunal, and in view of the fact that these Declarations were primarily the subject of argument during the hearings on the Respondent's objection to competency and jurisdiction, nevertheless Article 58 now invoked by the United States, permits parties to request that the Tribunal perfect an otherwise incomplete Award. This procedure being invoked, it is now the obligation of the Tribunal to decide Raymond Loewen's Article 1116 claim on all the material and submissions.

II. Article 1116 Claim

9. Pursuant to Chapter 11, Article 1116, an investor is entitled to commence a claim on his or her own behalf in respect of any breach of the NAFTA (the “Treaty”) which affects his or her own investment in an Enterprise.

10. In the present case, the Claimant, Raymond Loewen, filed a claim pursuant to Article 1116 in respect of the shares he held in the company: approximately 15% of the issued shares of the parent public company. He also filed pursuant to Article 1117 on behalf of the Enterprise – The Loewen Group, Inc.

Notice of Claim, dated October 30, 1998; *Memorial of The Loewen Group, Inc.*, dated October 15, 1999; *Memorial of Raymond L. Loewen*, dated October 15, 1999

11. Part II of the Award makes no reference to Raymond Loewen’s Article 1116 claim. Similarly, in paragraph 41(5) in reciting the Respondent’s objection to competence and jurisdiction, reference is made to the Article 1117 claims, but it is nowhere noted that no challenge was made to the Article 1116 claims made by Raymond Loewen as an investor. As observed in the United States’ request for a supplemental decision, the Award refers to Raymond Loewen’s claims in the plural, but disposes of those claims on a jurisdictional basis applicable only to Article 1117 terms set out in paragraph 239.

Memorial of United States on Jurisdiction, dated February 18, 2000, Part V, pp. 88-91

12. The United States never made any objection to Raymond Loewen’s standing to bring an Article 1116 claim. As expressly noted in the previous submissions:

The Government does not challenge Mr. Loewen’s standing to bring his claim under Article 1116.

Submission of Raymond L. Loewen Regarding Competence and Jurisdiction, dated May 25, 2000, para. F, p. 26

13. In the Counter-Memorial to the post-hearing objections, it was noted:

2. No objection has been made in the recent filing by the United States to Raymond L. Loewen's Article 1116 claim. Raymond L. Loewen has always been and remains a Canadian citizen.

3. Raymond L. Loewen respectfully notes that as there has been no objection to his claim pursuant to Article 1116 of NAFTA he requests that the Tribunal render its award on the merits of his claim.

Counter-Memorial of the Claimant Raymond L. Loewen on the U.S. Objection, dated March 29, 2002, paras. 2 and 3

14. The United States could not do so, of course, because the scope of the Treaty's guarantees include expropriation without compensation. Accordingly, the Treaty contemplates that an Article 1116 claim may well be taken for redress of a wrongful expropriation of shares. Of necessity, this means that claimants under Article 1116 may or may not continue to hold any shares in an Enterprise or an Investment at the time of the filing of the claim. In the present case, of course, Raymond Loewen alleges that the value of his shares was devastated by the wrongs committed by the state of Mississippi for which the United States is internationally responsible.

North American Free Trade Agreement, Chapter 11, Article 1110

15. Accordingly, the objection to Raymond Loewen's standing that carried over to the merits hearing was the objection to the Article 1117 claim. This was recognized by the Tribunal, as then constituted, in its earlier decision:

The objection on this ground, if upheld, would not be dispositive of the second Claimant's entire claim which is partly based on Article 1116.

Decision of Arbitral Tribunal on Hearing of Respondent's Objection to Competence and Jurisdictional, dated January 5, 2001, p. 22

16. The letter from the United States requesting an additional decision pursuant to Article 58 of the ICSID Additional Facility Rules elides over these realities and adopts the pretence that the Article 1116 claim was addressed and dismissed in the Award, notwithstanding the obvious gap in the reasoning which provoked the United States to apply for an additional decision under Article 58. Article 58, of course, allows the parties to request

an additional decision where the Tribunal failed to address a question. It does not permit the Tribunal to issue a supplemental decision to discuss, or further elaborate on, why it dismissed a claim. In the present case, in the absence of a supplemental decision, the Award would be imperfect and liable to be set aside in appropriate judicial proceedings. Such a process would, however, result in the Article 1116 claim being returned to this Tribunal for adjudication. For the reasons stated in this submission, Raymond Loewen is content to submit to this Tribunal addressing and answering his Article 1116 claim in accordance with the record and submissions.

III. Exhaustion of Local Remedies

17. Raymond Loewen accepts as decided the appropriate standard with respect to exhaustion of local remedies set out in the Tribunal's award at paragraphs 215 and 216 to the effect that it must be shown the settlement "was the only course which Loewen [TLGI] could reasonably be expected to take."
18. At paragraph 215, the Tribunal in its *obiter dicta* identified as "the central difficulty" in TLGI's case the failure to "present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option", and in paragraph 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.

Finally, in concluding that Raymond Loewen had failed to pursue its domestic remedies, the Tribunal stated: "notably the Supreme Court option".

ICSID Award, dated June 26, 2003, paras. 216 and 217

19. These conclusions, *obiter* though they are, are clearly wrong and entirely overlook the uncontradicted, uncontested and clear evidence on the point sworn to by Wynne S. Carvill, and supported by the equally clear evidence of a director of TLGI, John Napier Turner.

20. In his Declaration, Mr. Carvill, a distinguished member of the U.S. Bar, a graduate of Harvard Law School, a law clerk to the United State Court of Appeals, a leading counsel and a partner in a distinguished firm, testified to his personal involvement in the assessment of the options identified by Loewen in the face of the Mississippi proceedings which have now been held to be a violation of the minimum standard of justice in international law.

Declaration of Wynne S. Carvill, Exhibit A, paras. 1 and 3

21. Mr. Carvill and his firm were not involved in the discovery or trial of the *O'Keefe* matter, but he was the principal outside counsel responsible for coordinating a response to the Mississippi developments.

Declaration of Wynne S. Carvill, Exhibit A, paras. 2 and 3

22. He assessed the outcome at trial, retained new counsel to assist in post-trial motions and appeals, interviewed and selected a specialist counsel to consider possible appeals to the United States Supreme Court, participated in the decision to retain and discharge bankruptcy counsel, coordinated settlement discussions and eventually represented Loewen in the negotiations which resulted in the settlement.

Declaration of Wynne S. Carvill, Exhibit A, para. 3

23. In short, Mr. Carvill is not only a useful witness but was the central professional witness who addressed the very issue of whether a motion to the Supreme Court was considered a reasonably available and adequate remedy open to TLGI.
24. With respect to the option of an appeal to the Supreme Court of the United States, in his Declaration, Mr. Carvill addressed the general issue of consideration of relief in the Federal Court system and, in essence, testified that all the options were reviewed and rejected on professional and rational grounds including:

- (a) Collateral attack on the Federal District Court was foreclosed by the commanding *Pennzoil* precedent such that an attorney signing the pleadings might have been subject to sanctions for doing so. In any event, they viewed a collateral attack in Federal Court as prejudicing whatever chances existed for relief from the

Mississippi Supreme Court which was throughout seen as the best alternative;

Declaration of Wynne S. Carvill, Exhibit A, para 6; Submissions of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, May 26, 2000, para. 62

- (b) An action based on constitutional grounds was carefully considered, but could only have been raised through an appeal on the merits and not through a collateral attack in the Federal District Court. In particular, there was no evidence on which it could be said that the Mississippi Supreme Court's decision on the bond was infected by anti-Canadian bias which might raise a constitutional issue meriting pursuit;

Declaration of Wynne S. Carvill, Exhibit A, para. 7; Submissions of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, May 26, 2000, paras. 59 to 62

- (c) Very serious consideration was given to the possibility of direct appellate relief, but in the circumstances was concluded to be "an illusory choice";

Declaration of Wynne S. Carvill, Exhibit A, para. 8

- (d) Supreme Court specialists were retained and advised that the chance of success was "extremely remote";

Declaration of Wynne S. Carvill, Exhibit A, para. 8; Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, para. 62

- (e) The advice received at the time was consistent with the expert witness statement of Laurence H. Tribe;

Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, Reply Statement of Laurence H. Tribe, Tab B

- (f) In particular, the timing was made extremely difficult because the company did not know how much time it would have to seek relief. Indeed, "conceivably, on any court day we could receive an order lifting the stay effective within a matter of days unless the bond were increased to \$625 million. Mr. Carvill also carefully identifies the company's analysis of bankruptcy considerations.

Declaration of Wynne S. Carvill, Exhibit A, paras. 12-14; and Final Submission of Raymond L. Loewen Concerning the

Jurisdictional Objections of the United States, dated July 27, 2000,
p. 23

25. In accordance with the standard set by this Tribunal at paragraph 216 of its Award, Mr. Carvill's uncontradicted and, indeed, unchallenged evidence clearly meets the burden of establishing that the settlement option, in accordance with TLGI's determination at the time, was indeed "the only reasonable option".
26. Mr. Carvill's Declaration was supported by a declaration filed by an outside director of The Loewen Group, Inc., a former Prime Minister of Canada, and a distinguished lawyer, John Napier Turner.

*Submission of The Loewen Group, Inc. Concerning the
Jurisdictional Objections of the United States, Declaration of Rt.
Hon. John N. Turner, P.C., C.C., Q.C., Tab D*

27. In that Declaration, Mr. Turner confirmed that a group of senior management and outside advisors including Wynne Carvill considered simultaneously the several options and remedies available after the *O'Keefe* verdict, including settlement, financing and appeal bond, and pursuing federal court collateral relief or appeal to the U.S. Supreme Court. He declared that:

The Board was advised by Mr. Carvill that, after consulting with several experts in the area and fully considering all avenues of possible relief in the U.S. federal court system, the possibility of relief from the U.S. Supreme Court was extremely remote and the likelihood of a collateral attack was so remote that the lawyers would run a risk of being sanctioned under U.S. procedural rules for filing such a case. The Board was also advised that any efforts in federal court would greatly prejudice the Company's chances of obtaining bonding and other relief in the Mississippi state courts. Such relief in the Mississippi state courts was the primary strategic objective at that time.

*Submission of The Loewen Group, Inc. Concerning the
Jurisdictional Objections of the United States, Declaration of R.
Hon. John N. Turner, P.C., C.C., Q.C., Tab D, para. 14*

28. Much of the material considered whether TLGI was required to seek Chapter 11 bankruptcy protection for the simple reason that it was alleged by the United States to be a necessary step under international law.
29. The Tribunal in its Award has expressly rejected the submission of the United States that TLGI's consideration of its options could not take into account business judgment. As stated by the Tribunal:

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 nature outcome of adverse consequences generated by the impugned court decision.

ICSID Award, dated June 26, 2003, paras. 213 and 214

30. As there is no basis on which to assert that TLGI was an "impecunious claimant" as contemplated by the Tribunal under paragraph 209, it is submitted that the United States' submissions as to Chapter 11 bankruptcy protection have been disposed of in the decision of this Tribunal. All that remains to be decided with respect to Raymond Loewen's Article 1116 in light of all the evidence is whether the reasons for not pursuing an appeal to the U.S. Supreme Court satisfy the standard determined by this Tribunal. The evidence clearly shows that based on the advice it had received, entry into the settlement agreement was the only course which TLGI could reasonably be expected to take.

IV. Conclusion

31. Raymond Loewen is keenly aware of this Tribunal's earnest desire to determine these claims in all their procedural and substantive complexity in accordance with reason and

justice. He accepts that the Tribunal simply overlooked his Article 1116 claim and overlooked the evidence of Wynne S. Carvill and the Rt. Hon. John Turner. While this matters not in the result to TLGI, it very much matters to Raymond Loewen.

32. Raymond Loewen also acknowledges that the Tribunal has publicly acknowledged the puzzling outcome of its Award and the international reaction that could result from its condemnation of the judicial proceedings in Mississippi without providing any remedy to any party after all these years and expense. What is now apparent is that the dismissal of all claims was not necessary or appropriate. This Tribunal still has the authority and duty to demonstrate that the NAFTA does indeed have teeth, that international law does indeed follow principle, and that Raymond Loewen, still a Canadian, has a right to be compensated for his losses apart from TLGI's claims.

ICSID Award, dated June 26, 2003, para. 241

33. The Tribunal noted in its dismissal of the claims that this has been an exhausting and expensive process. Indeed, Raymond Loewen's resources are exhausted, both personally and financially. He now sits at the door of this Tribunal with a final hope that justice at long last will be done.
34. The Tribunal should, pursuant to Article 58 of the ICSID Arbitration (Additional Facility) Rules, issue a supplemental decision declaring that it has jurisdiction over Raymond Loewen's Article 1116 claim, that it has reconsidered the evidence relating to exhaustion of local remedies, and finds liability proven against the Respondent, the United States, with damages to be assessed.

V. Procedural Matters

35. Article 58 contemplates that the Tribunal will determine the procedure for the consideration of any supplemental decision. The errors set out above are sufficiently clear and controlling that Raymond Loewen asks that these be considered his submissions on these matters both as to jurisdiction and merits. He reserves the right of reasonable written reply to the United States' submissions in response to these submissions.

36. Should the Tribunal determine that any further oral hearings are necessary or would be useful, it is submitted that they should be confined to the issue of fact concerning whether there was any reasonably available and adequate option other than entering into the settlement agreement on the basis of the existing record. Counsel for Raymond Loewen will appear, if requested, before the Tribunal to address oral submissions on that question. Raymond Loewen asks that any oral hearing on the question be set for hearing in the near future in accordance with the convenience of counsel and the Tribunal.
37. Finally, Raymond Loewen stands before this Tribunal as the only remaining Claimant and asks that the Respondent be required to post any additional fees required for the determination of these matters.

Respectfully Submitted,

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