

**In The Proceeding Between
The Loewen Group, Inc. and Raymond L. Loewen (Claimants)
and United States of America (Respondent)**

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (June 26, 2003)
Case No. ARB(AF)/98/3
42 INTERNATIONAL LEGAL MATERIALS 811 (2003)

Author's Note: In earlier proceedings, O'Keefe sued Loewen in a Mississippi trial court regarding a commercial dispute. They were sizeable competitors in the funeral home and funeral insurance business in Mississippi. According to Loewen, the state trial judge repeatedly allowed plaintiff O'Keefe's attorneys to make numerous, irrelevant, and prejudicial references to: (a) Loewen's foreign nationality (Canadian); (b) race-based distinctions between O'Keefe and Loewen; and (c) class-based distinctions between the wealthy Loewen Group, and O'Keefe, a supposedly less lucrative family-owned business.

The trial judge refused Loewen's request to give a jury instruction admonishing jurors that nationality, racial, and class-based discrimination were impermissible evidence. The original complaint sought \$5 million in damages. The jury awarded O'Keefe \$500 million in damages. Loewen was required to post a \$625 million bond, within seven days, if he wished to appeal—to keep the plaintiff from immediately taking Loewen's property to satisfy the judgment. That procedural decision effectively foreclosed Loewen from being able to appeal the judgment against him on its merits. With the sale of his Mississippi assets scheduled to start the next day, Loewen entered into a settlement with O'Keefe, under great duress, whereby he agreed to pay \$175 million.

Loewen filed this subsequent action in the ICSID tribunal, claiming that the Mississippi proceedings violated the North American Free Trade Agreement (NAFTA) prohibition on prejudice against a foreign investor in the courts of a NAFTA nation. Because of the important issues involved in this case, the governments of Canada and Mexico (the other NAFTA nations) attended the hearing on the merits.

Tribunal's Opinion:

...

VII. THE NATURE OF CLAIMANT'S CLAIM

39. . . . Claimants argue that

(1) the trial court, by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, violated Article 1102 of NAFTA which bars discrimination against foreign investors and their investments;

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(3) the trial court, by the way in which it conducted the trial . . . by permitting extensive nationality-based, racial and class-based testimony and counsel comments, violated Article 1105 of NAFTA which imposes a minimum standard of treatment for investments of foreign investors, including a duty of "full protection and security" and a right to "fair and equitable treatment" of foreign investors;

...

(6) the discriminatory conduct, the excessive verdict, the denial of Loewen's right to appeal and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated appropriation of investments of foreign investors.

40. Claimants allege that Respondent is liable for Mississippi's NAFTA breaches under Article 1105, which requires that the Parties to NAFTA shall ensure that all necessary measures are taken to give effect to the provisions of the Agreement, including their observance by State and provincial governments. Claimants also allege that, by tolerating the misconduct which occurred during the O'Keefe litigation, Respondent [US] directly breached Article 1105, which imposes affirmative duties on Respondent to provide "full protection and security" to investments of foreign investors, including "full protection and security" against third-party misconduct.

...

X. THE TRIAL

54. Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law. Whether this conclusion results in a violation of Article 1105 depends upon the resolution of Respondent's submissions still to be considered, in particular the submission that State responsibility arises only when final action is taken by the State's judicial system as a whole. [Loewen settled for a lesser amount than the trial court judgment, rather than appeal.]

...

(a) O'Keefe's nationality strategy

56. O'Keefe's case at trial was conducted from beginning to end on the basis that Jerry O'Keefe, a war hero and "fighter for his country," who epitomised local business interests, was the victim of a ruthless foreign (Canadian) corporate predator. There were many references on the part of O'Keefe's counsel and witnesses to the Canadian nationality of Loewen ("Ray Loewen and his group from Canada"). Likewise, O'Keefe witnesses said that Loewen was financed by Asian money, these statements being based on the fact that Loewen was partly financed by the Hong Kong and Shanghai Bank, an English and Hong Kong bank which was erroneously described by Jerry O'Keefe in evidence as the "Shanghai Bank." Indeed, Jerry O'Keefe . . . depicted ... [his] business under American and Mississippi flags and Loewen under Canadian and Japanese flags, stat[ing] that the Japanese may well control both the "Shanghai Bank" and Loewen but he did not know that [when entering into a business association with Loewen]. O'Keefe's strategy . . . was linked to Jerry O'Keefe's fighting for his country against the Japanese. . .

. This strategy was calculated to appeal to the jury's sympathy for local home-town interests as against the wealthy and powerful foreign competitor.

60. An extreme example of appeals to anti-Canadian prejudice was evidence given by Mr. Espy, former United States Secretary of State for Agriculture who, called to give evidence of the good character of Jerry O'Keefe, spoke of his (Espy's) experience in protecting "the American market" from Canadian wheat farmers who exported low priced wheat into the American market with which American producers could not compete and later, having secured a market, then jacked up the price. . . .

61. The strategy of emphasizing O'Keefe's American nationality as against Loewen's Canadian origins reached a peak in Mr. Gary's closing address. He likened Jerry O'Keefe's struggle against Loewen with his war-time exploits against the Japanese, asserting that he was motivated by "pride in America" and "love for your country." By way of contrast, Mr. Gary characterized Loewen's case as "Excuse me, I'm from Canada."

62. . . . Mr. Gary characterized Loewen as a foreign invader who "came to town like gang busters. Ray came sweeping through ... " Mr. Gary likened Loewen to the Canadian wheat farmers. Loewen would "come in" and purchase a funeral home and "no sooner than they got it, they jacked up the prices down here in Mississippi."

(b) O'Keefe's racial politics strategy

65. Claimants' case that O'Keefe engaged in a strategy of racial politics is largely based on the efforts of O'Keefe to suggest that O'Keefe did business with black and white people alike whereas Loewen did business [only] with white people. [The trial judge, eight of twelve jurors, and both parties' lead lawyers were African-American.]

(c) O'Keefe's appeal to class-based prejudice

68. Claimants further complain that Mr. Gary repeatedly portrayed Loewen as a large, wealthy foreign corporation and contrasted Jerry O'Keefe as a small, local, family businessman. . . . There were a number of references by O'Keefe's counsel emphasizing this contrast. These references culminated in Mr. Gary's closing address in which he incited the jury to put a stop to Loewen's activities. Speaking of Jerry O'Keefe, Mr. Gary said:

He doesn't have the money that they have nor the power, but he has heart and character, and he refused to let them shoot him down.

You know your job as jurors gives you a lot of power. . . . You have the power to bring major corporations to their knees when they are wrong. You can see wrong, make it right. Suffering and stop it.

Ray comes down here, he's got his yacht up there, he can go to cocktail parties and all that, but do you know how he's financing that? By 80 and 90 year old people who go to get to a funeral, who go to pay their life savings, goes into this here, and it doesn't mean anything to him. Now, they've got to be stopped. . . .

Do it, stop them so in years to come anybody should mention your service for some 50 odd days on this trial, you can say 'Yes, I was there', and you can talk proud about it.

XVII. EVALUATION OF THE TRIAL

119. By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr. Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.

121. . . . The question is whether the whole trial, and its resultant verdict, satisfied minimum standards of international law, or the "fair and equitable treatment and full protection and security" that the Contracting States pledged in Article 1105 of NAFTA. This question is addressed in paras. 124-137.

123. . . . [W]e take it to be the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice. . . .

XVIII. NAFTA ARTICLE 1105

124. Article 1105 which is headed "Minimum Standard of Treatment" provides:

1. Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The precise content of this provision, particularly the meaning of the reference to "international law" and the effect of the inclusory [*sic*] clause has been the subject of controversy.

125. On July 31, 2001, the Free Trade Commission adopted an interpretation of Article 1105(1). The Commission's interpretation is in these terms:

Minimum Standard of Treatment in Accordance with International Law

(1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

(2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

(3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

128. The effect of the Commission's interpretation is that "fair and equitable treatment" and "full protection and security" are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. . . .

129. It is not in dispute between the parties that customary international law is concerned with denials of justice in litigation between private parties. Indeed, Respondent's expert, Professor Greenwood QC, acknowledges that customary international law imposes on States an obligation "to maintain and make available to aliens, a fair and effective system of justice." . . .

130. Respondent submits that, in conformity with the accepted standards of customary international law, it is for Loewen to establish that the decisions of the Mississippi courts constituted a manifest injustice. Professor Greenwood states in his Second Opinion:

the awards and texts make clear that error on the part of the national court is not enough, what is required is "manifest injustice" or "gross unfairness" (Garner, "International Responsibility of States for Judgments of Courts and Verdicts of Juries amounting to Denial of Justice," 10 BYIL (1929), p 181 at p 183), "flagrant and inexcusable violation" (Arechaga, ["International Law in the Past Third of a Century", 159 "Recueil des Cours" (1978) at p 282]) or "palpable violation" in which "bad faith not judicial error seems to be the heart of the matter" (O'Connell, International Law, 2nd ed, 1970) p 498). As Baxter and Sohn put it (in the Commentary to their Draft Convention on the Responsibility of States for Injuries to Aliens) "the alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice.

131. In . . . the International Court of Justice in *Elettronica Sicula SpA (ELSI) United States v. Italy* (1989) ICJ 15 at 76: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."

132. Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.

133. In the words of the NAFTA Tribunal in *Mondev International Ltd v. United States of America* ICSID Case No. ARB (AF)/99/2, Award dated October 11, 2002, "the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'."

134. If that question be answered in the affirmative, then a breach of Article 1105 is established. Whether the conduct of the trial amounted to a breach of municipal law as

well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal [trial] courts.

135. International law does, however, attach special importance to discriminatory violations of municipal law. . . . A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law [*italics added*].

136. In the present case, the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.

137. In the light of the conclusions reached in paras. 119-123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. However, because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 is established. . . .

XIX. THE CLAIM OF BIAS

138. Claimants' argument that Judge Graves and the jury were actually biased against Loewen is not made out. There is no direct evidence of bias on the part of Judge Graves or the jury. Nor do the jury interviews demonstrate that the jury was biased. The interviews reveal that the jury took an adverse view of Loewen's conduct based on evidence which included testimony of Loewen employees and former employees. Nor does the evidence warrant the drawing of an inference of bias against the jury, though there is strong reason for thinking that the jury were affected by the persistent and extravagant O'Keefe appeals to prejudice. Although the trial judge's conduct of the trial is explicable by reference to bias, the evidence does not support a finding that he was biased against Loewen. We take the view that the judge, for reasons which do not clearly appear, failed to discharge his paramount duty to ensure that Loewen received a fair trial.

XX. NAFTA ARTICLE 1102

139. Article 1102 bars discrimination against foreign investors and their investments. Article 1102(1) and (2) requires each Party to accord investors and investments of another Party "treatment no less favorable than it accords in like circumstances to its own investors" or their investments. With respect to a state or province Article 1102(3) requires "treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms part."

The effect of these provisions . . . is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself. We agree also with Professor Bilder when he says that Article 1102 is direct only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial.

140. A critical problem in the application of Article 1102 to the facts of this case is that we do not have an example of "the most favorable treatment accorded, in like circumstances" by a Mississippi court to investors and investments of the United States. . . . What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made.

...

142. Having reached the conclusion that the trial and the verdict were improper and cannot be squared with minimum standards of fair international law and fair and equitable treatment, we must now consider the question whether, in the light of subsequent proceedings, the trial and the verdict alone or in combination with the subsequent proceedings amounted to an international wrong.

...

XXVI. DOES THE SETTLEMENT AGREEMENT OPERATE TO RELEASE ALL CLAIMS AGAINST RESPONDENT?

205. It is convenient to deal here with an argument based on a release of claims provided for by the settlement agreement. Respondent submitted that, on its true construction, the settlement agreement operated to release all claims by Loewen, including the NAFTA claims in issue in this arbitration, against Respondent, notwithstanding that Respondent is not a party to the agreement.

206. . . . The answer to Respondent's submission is that when the settlement agreement and the release are read in their entirety and in context, we do not regard them as releasing Loewen's NAFTA claims. They lie outside the ambit of the claims dealt with.

[The tribunal here examines the various remedies which were available to Loewen's, before lodging this claim in an international tribunal.]

...

217. Accordingly, our conclusion is 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.

...

XXXI. CONCLUSION

241. We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen [Group] and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have . . . criticised [*sic*] the Mississippi proceedings in the strongest terms. There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

242. This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial

separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation [referring to the remedies that Loewen could have pursued, before coming to this tribunal]. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.

, *Notes and Questions*

1. What is the International Minimum Standard for NAFTA cases?
2. This opinion states: (a) “we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law” (para. 54); (b) “By any standard of measurement, the trial involving O’Keefe and Loewen was a disgrace. By any standard of review, the tactics of O’Keefe’s lawyers, particularly Mr. Gary, were impermissible” (para. 119); and (c) “It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice” (para. 123); (d) “Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety” (para. 131); (e) “Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough (para. 132); (f) “the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant” (para. 136); (g) “the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment” (para 137); and (h) “There was unfairness here towards the foreign investor (para. 241). *Why did the Claimant Loewen lose?*
3. Reread para. 138. Do you agree?
4. Reread para. 242. If you were the judge, would you: (a) make the same gratuitous statement; or (b) not make it, because it would adversely affect investor confidence in NAFTA’s dispute resolution process?
5. In a famous decision by a US-Mexican claims tribunal, a US citizen had been held in Mexico for nineteen months without being brought to trial. The Mexican Constitution then provided that anyone in his position had to be brought to trial within

twelve months. The conditions of his detention were rudimentary. Forty prisoners were held in a small cell, with only a bucket for toilet facilities. The American consular official had two good reasons for attempting to expedite the trial. Mexico claimed that Roberts was not to be treated any differently than any Mexican citizen. This equal treatment of all prisoners was the defense to this claim against the Mexican government, which was being espoused by the US.

The commission awarded Roberts \$8,000.00—a large sum of money in 1926. The commission tendered the following articulation regarding the International Minimum Standard applicable to this category of denial of justice:

Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a minimum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case. . . . That test is, broadly speaking, whether aliens are treated in accordance with ordinary [minimum] standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment.

If Mexico did not have the financial ability to treat its prisoners better in 1926, was this international commission imposing an unfair standard?

6. In the US, jail conditions are sometimes terrible, even in modern times. US courts have effectively fashioned a minimum constitutional standard for the treatment of prisoners. Consider the following 1976 Alabama case, for example:

There can be no question that the present conditions of confinement in the Alabama penal system violate any current judicial definition of cruel and unusual punishment, a situation evidenced by the defendants' [State of Alabama and its Board of Corrections] admission that serious Eighth Amendment [cruel and unusual punishment] violations exist. . . .

Confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.

The conditions in which Alabama prisoners must live, as established by the evidence in these cases, bear no reasonable relationship to legitimate institutional goals. As a whole they create an atmosphere in which inmates are compelled to live in constant fear of violence, in imminent danger to their physical well-being, and without opportunity to seek a more promising future.

Pugh v. Locke, 406 F.Supp. 318, 329 (Dist. Ct. Ala, 1976), *cert. granted in part, judgment reversed in part*, on other grounds, *Alabama v. Pugh*, 438 U.S. 781 (U.S. Ala. 1978).

7. You will revisit the International Minimum Standard (IMS) in the context of the Iraq War (Chapter 10) and Human Rights (Chapter 11). The scope of the IMS varies with the context. As to prisoners of war, for example, see Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders (Geneva, 1955), and approved by ECOSOC Resolutions 663 C (XXIV)(July 31, 1957) and 2076 (LXII)(May 13, 1977), available at: <http://www.unhchr.ch/html/menu3/b/h_comp34.htm>.