

THE LOEWEN CLAIM

Opinion of Professor Sir Robert Jennings, Q.C. on some of the international law aspects of the claim of The Loewen Group to reparation damages for breaches of the North American Free Trade Agreement of 1991 and of the general international law governing State responsibility for the lawful treatment of alien investors.

1. My name is Sir Robert Jennings, Q.C. I am Emeritus Whewell Professor of International Law at the University of Cambridge, England. I am a former Judge and President of the International Court of Justice at the Hague. I am also a former President of the Institut de Droit International. In 1993, I received the Manley Hudson Gold Medal from the American Society of International Law.

2. I am asked by Messrs Jones, Day, Reavis and Pogue, of Washington D.C. for my opinion in the case of The Loewen Group, Inc. (a Canadian corporation), and Loewen Group International, Inc. (The Loewen Group's United States subsidiary corporation) (the two are collectively henceforward "Loewen"), and on their prospects concerning a reparation claim against the United States, under the NAFTA treaty, arising from the proceedings brought against them in a Mississippi State Court by Mr. J. O'Keefe and a number of other associated plaintiffs. Both Loewen and the plaintiffs in the Mississippi proceedings were and are engaged in the funeral homes business. I am assuming that for the purposes of this Opinion there is no need to set out the facts in detail as this has already been done in the Trial Transcript and related pleadings provided to the writer of this opinion. I shall where necessary therefore refer to these sources for the facts and for the trial proceedings, which commenced on 11 September 1995 in the Circuit Court of the First Judicial District of Hinds County, and ended finally on 2 November 1995. It will be convenient first to examine certain aspects of the Loewen claim as a whole.

The General Nature Of The Loewen Claim

3. A crucial point about the claim to arbitration of this potential dispute with the United States is that it would be brought under chapter 11 — the chapter dealing with investments — of the NAFTA trilateral treaty, to which Canada, the United States and Mexico are the sole parties. All three of these parties have a federal system of government. Accordingly it is provided in the treaty that the required standards for the treatment of investments from the investors of other parties apply both to the signatory Federal Government and to States or Provinces, and thus in the present case to the State of Mississippi as well as to the United States itself.

4. The relevant terms of the NAFTA Treaty will be examined below. For the moment it is important to emphasise that a claim brought under the treaty would be a claim against the United States as a party to the treaty. Moreover it would not be a claim forming in any way an appeal from the verdicts and judgment of the Mississippi Hinds County Court, but a new and different claim, not in contract, but for a delictual breach or breaches of the NAFTA Treaty. The Mississippi case would be in issue but only as the facts on which the new claim is based.

5. Furthermore, the claim against the United States, if and when it might be disputed by the United States, would thereupon give rise to a claim by right to the establishment of an arbitration tribunal to try and resolve that dispute; this right to arbitration being based upon alleged breaches of the NAFTA Treaty obligations and standards by the United States. When the arbitration tribunal is established, it will “decide the issues in dispute in accordance with this Agreement and applicable rules of international law” (Article 1131). This provision in my view does not mean that the arbitration proceedings may range over the whole area of state responsibility in general international law but only that part of general international law which is relevant, that is to say ‘applicable,’ to an alleged breach of the provisions of the treaty by the

United States. There is no doubt room for a broader view of the applicable law **remit** of an arbitration established under the Treaty and in any case it involves a grey area rather than sharp boundaries. Nevertheless, its possible qualification as suggested above, is a point to bear in mind.

6. It is well to be clear at the outset of this Opinion what will be the juridical character of the claimants' case against the United States. As already mentioned above, it could in no way take on the form of an appeal against the Mississippi decision. The story of the Mississippi decision then becomes simply the factual background of the *new case*, and the facts upon which the alleged breach of the treaty is founded. This is the position in international law quite apart from the legal fact that the United States Government does not now, I suppose, have any power to reverse or alter the decision of a Mississippi State court. It is necessary therefore to examine the Mississippi case to see how far it forms a basis for an allegation that what happened in Mississippi amounts to a breach of the treaty and/or of the general international law concerning the treatment of aliens insofar as that law is relevant within the meaning and intention of the provisions of the treaty.

The Judgment And The Jury's Verdicts In The Court In Hinds County

7. The Mississippi case in the court below was doubtless one which Mr. Gary for the plaintiffs must regard as one of his greatest triumphs of advocacy of a certain kind. It was a scandalous performance done with great skill, experience and knowingness. From the first moment he made it clear how he was going to play his hand. His two aces were to be (i) the latent prejudice of a small, remote and not at all well-off, African-American community against strangers from a strange land many hundreds of miles to the north of even the north of the United States, and who were moreover 'Canadians'; and (ii) the gratifying self-importance it might lend a jury from such a community if they were given to believe from the outset that this was a very special case involving unimaginable sums of money and that their gratifying role in

the matter was to realize and experience their potential powers to award damages of such amounts as had hitherto been wholly beyond both *their experience* and even *their most unlikely fantasies*. (Trial Transcript at 42, 5809 (hereinafter "Tr.")).

8. Counsel for the plaintiffs single-mindedly persevered with these two themes from the first moments of his encounter with the jury, namely in the initial proceedings, before the trial proper started, at the challenging of possible members of the jury, and before any part of the substance of the case should have been put in issue at all. In the challenge procedure Mr. Gary managed to mention that this case "is, for the most part, 75 percent, 80 percent punitive damages" (Jury Selection Transcript at 157 ("hereinafter "Jury Sel. Tr.")); and that a juror should be excused if he or she had a "problem" with punitive damages (Jury Sel. Tr. at 157-58, 163, 166); and that a juror should be excused if "he couldn't bring back a verdict of 650 million dollars." (Jury Sel. Tr. at 159, 161) This was a truly astonishing beginning to a relatively straight-forward, small-scale contract matter involving total sums of a few million dollars at the most. (Tr. at 665, 677, 2367)

9. Thus, the strongest aspect of any claim on behalf of Loewen for breach of the treaty and of international law, is its sheer, almost bizarre, merit in terms of the intentional flouting of the most ordinary requirements of justice. Of a 500 million dollar judgment in a case involving property and assets in dispute of only a few million dollars, one might almost say *res ipsa loquitur*. The transcript of the proceedings shows clearly and consistently that the quite ruthless and blatant working up of both racial and nationalistic prejudice, particularly against "Canadians" (that term being used as a self-explanatory pejorative one), was the weapon by which counsel for the plaintiffs was able to bring about the bizarre verdict of the jury. A revealing interlude early in the case was when the respondents understandably objected to two exhibits put in by the plaintiffs: family portraits of the O'Keefes, one of them a large group of several generations of O'Keefes, all the persons depicted in both groups, other than the plaintiff

himself, being persons who were in no way parties to the case. (Tr. at 3-4) The purpose was clear: to bolster the feeling of jury that the plaintiff was "one of our own boys," essentially adopted as a "member" of the African-American community, local for generations, and to be contrasted with Canadians who were none of these things. (Tr. at 3-4) The Judge rejected the objection without giving reasons or attempting in any way to answer the argument presented by the defendants. (Tr. at 4, 6) Later in the trial the Judge stated in the clearest terms that what he called "the race card" had been played. (Tr. at 359597) He stated it simply as fact but did not express regret at this state of affairs; nor indeed did he do anything to control the use of the "race card" by the plaintiffs' counsel, or to warn the jury against attaching importance to his persistent theme of prejudice and racial and local fear and suspicion; especially of Canadians — who came all the way from the north to exploit the good people of Mississippi and Hinds County. (E.g., Tr. at 54, 58) One of the most surprising ruses was in the references of counsel to the visit of the plaintiff to one of the defendants in Vancouver. (E.g., Tr. at 63, 64) This visit was portrayed as a wholly unnatural and seemingly rather cruel thing for the defendants to have required of anyone from Mississippi to venture so far. These incidents of a certain kind of advocacy might seem in themselves, and taken in isolation, perhaps even petty; but they serve to illustrate the tone and method of the plaintiffs' case, which was steadily maintained throughout the seven weeks of the hearings, always without any serious attempt by the Judge to control it, or to warn the jury against it.

10. The final stages of the trial became even more a travesty of the elementary notions of justice. The plaintiffs were asking for some 26 million dollars of compensatory damages. (Third Amended and Supplemental Complaint at 79-82) This enormous sum, estimated by the plaintiffs' counsel as mere compensatory damage, was reached by a concatenation of headings of damage, including a series of such headings for breach of contract; also the tort of "fraudulently, maliciously and intentionally interfer[ing] with" a contract

(Jury Verdict Form at 2-3); and breach of contract that “was willful, intentional and intended with such insult, abuse or malice as to amount to an independent tort” (Tr. at 5711; Jury Verdict Form at 3); and “breach of implied covenants of good faith arising out of the . . . contracts” (Jury Verdict Form at 4); and the heads of damage as defined by the plaintiffs’ counsel even extended to damages for a supposed antitrust offence (Jury Verdict Form at 7-8). Then there were of course items for “expenses associated with litigation, mental anguish, intentional infliction of emotional distress, and that’s awesome in this case, . . . that’s awesome in this case” (Tr. at 5543); also the supposed cost of expert witnesses: “You’ve heard of testimony where even experts have been paid some 40 to 50 million dollars.” (Tr. at 5543) (Even had this absurd sum been correct, it could only have referred to experts called by the other side). Counsel for the defendants did indeed make an objection, to which the Judge replied by asking for the basis of the objection. (Tr. at 5543-44) Counsel not unreasonably said the basis was that no witnesses had been paid 40 to 50 million dollars. (Tr. at 5544) The objection was simply ignored and **counsel for** the plaintiffs merely continued to the jury: “40 or 50 thousand, members of the jury. You heard the experts. You heard their testimony.” (Tr. at 5544) And he went back to his initial warnings to the jury that they should ask to be excused if they were uncomfortable “sitting on a case that could exceed 850 million dollars” in damages. (Tr. at 5544-45) (At the beginning of the case he had in fact spoken of 650 million dollars to 850 million dollars. (Jury Sel. Tr. at 17, 18)) By this means Counsel seduced the jury into moving easily between thousands and millions of dollars; both categories way beyond their day to day experience or even imagination. Later he inflated the idea of damages by bringing in seemingly anybody who might ever have dealt with any of the defendant persons or companies involved; for he spoke of “the intentional infliction of emotional distress of 70 some odd million.” (Tr. at 5713) Again the Judge made absolutely no attempt either to control Mr. Gary or to correct the impression he was making. Nor did he in his directions to the jury. (Tr. at 5506-38) The

summing up reads like that of an experienced judge, but there was not the slightest attempt to redress or warn the jury against the bizarre untruths and fantasies that had been put to the jury by plaintiffs' counsel. There was *not* even any reference to the jury of the playing of the "race card."

11. The jury returned a verdict in favour of the plaintiffs under all heads and assessed grossly disproportionate sums of damages under each head. Though relatively modest compared with the 850 million dollars which counsel had been suggesting to them just before they retired (Tr. at 5544-45), and had presented to them as if it were a sum carefully calculated by actuaries (Tr. at 5567-68), the jurors no doubt found themselves easily supposing that the sum they returned in their first verdict (\$260 million) was moderate and even cautious.

12. The worst was, however, yet to come. At the very beginning there had been agreement between Judge and counsel on both sides that there would be, indeed had to be, a bifurcated process; which meant that the jury should first return a verdict assessing compensatory damages and that there should be a distinct and later procedure for assessing the punitive damages, if any (Pretrial Proceedings Transcript at 6-7). The Judge now confessed that he had forgotten this requirement. (Tr. at 5752-53) The jury, however, had passed the Judge a note from the foreperson saying that they had not known of this two-step process; and indeed how should they for the Judge had not mentioned it to the jury. (Tr. at 5752-53) They also said they had intended their verdict to comprise \$100 million compensatory damages and \$160 million punitive damages. (Tr. at 5739) To avoid having a further proceeding the plaintiffs now offered the defendants a settlement for \$260 million. (Tr. at 5738) The defendants naturally refused this offer and moved for a mistrial on all issues, stating that the jury had "completely ignored the instructions of the Court, particularly regarding the burden of proof," and that "the verdict on its face evinces bias, passion and prejudice against the defendants." (Tr. at 5738-39) The Judge dealt with this in four words: "That motion is denied."

(TF. at 5739) He gave no reasons for denying the motion. As it actually happened, the defendants' motion for a holding of mistrial was dealt with in what could hardly have amounted to more than two minutes. The counsel for the plaintiffs did not even intervene before the Judge peremptorily denied the motion. This is hardly due process in any jurisdiction.

13. The upshot was that, after a very confused intervention by the Judge, he decided that the court must now begin the second stage of a bifurcated procedure. So the jury sat again to hear counsel yet again on the subject only of punitive damages. No doubt they now started with the impression that the already outrageous sum of 260 million dollars in total damages in a breach of commercial contract case involving only a few million dollars, was not thought adequate by the court, and they must think again with that sum as only the beginning of their calculations. They were of course left in no doubt that this was the view of counsel for the plaintiffs, who harangued them once more at length.

14. One reason for the return to the question of punitive damages was said to be the discovery that the jury had assessed the punitive damages without having been instructed on the total worth of the defendant company. (Tr. at 5743) This reason was suggested in the absence of the jury by one of the counsel for the plaintiffs and was taken up by their leading counsel who said to the Judge: "We'll just tell the jury, you've given us your decision, but you didn't have certain information. We want you to have it and see if you're still [for] that same verdict or if you want to change it." (Tr. at 5744) Counsel for the defendant then tried to explain to the Judge that there is a different burden of proof for punitive damages (Tr. at 5744); but this was quickly smothered in talk by Judge and plaintiffs' counsel saying, "That was a jury instruction." The Judge immediately agreed: "The jury was instructed." (Tr. at 5745) But the jury instructions contained nothing regarding the burden of proof for punitive damages. The Judge then explained to the jury that "while the Court has accepted the 100 million dollars as

compensatory damages, we are now going to proceed with the punitive damage phase of the trial," (Tr. at 5753)

15. Much of the argument addressed to the jury in this phase was on this question of the value of the defendant company's total assets. According to counsel for the defendants that sum was 411 million dollars; and on that basis he asked the jury whether they might consider reducing the damages below the 160 million punitive damages they had returned at the end of the first phase. (Tr. at 5757) Counsel for the plaintiffs then called a witness, who said he was by profession an economist. (Tr. at 5758) There was a great deal of preparation in asking the witness about his qualifications and asking him to "look at the jury." (Tr. at 5758-59) Then he was asked his opinion on the net worth of "these defendants." He gave the astonishing reply that in his opinion they were worth "a minimum of 3 billion dollars, minimum." (Tr. at 5762) He was then asked to explain to the jury what was meant by "net worth." He replied that "Net worth, from an economists point of view, is the ability to generate income, how much money this company is worth in the open market." (Tr. at 5762) He then diverted into the net worth of the shares which he put at 1.8 billion dollars (Tr. at 5762); after which he again estimated the net worth of the defendants as, this time, 3.18 billion dollars. (Tr. at 5763) There was then an attempt by counsel for the defendants to get the witness to explain why his net valuation of the shares was grossly in excess of the actual quoted value at the close of the market the evening before. (Tr. at 5763) It appeared that he was going not on the market value but on his ideas about the potential of the defendant company. (Tr. at 5763) The witness was then made to read out the net worth on June 30, 1994 according to the defendants' filings with the Securities and Exchange Commission of the United States, which put the total value of the company at \$630,944,000. (Tr. at 5766) But under re-examination by plaintiffs' counsel, the witness. was happy to return to his estimate — as an economist — to 3 billion dollars as the future potential of the company. (Tr. at 5766)

16. Plaintiffs' counsel then called another witness to give evidence as an expert economist. Asked to tell the jury his estimate of "the net worth of these defendants" (Tr. at 5768), he remarkably came up with exactly the same estimate as the previous witness: "at least 3 billion dollars." (Tr. at 5769) He then went on to explain that the company accounts, being based on "historical costs, what was originally invested for stuff" was of little use in assessing the potential worth; and he explained that what one needed to look for was not the "book value" but the "market value." (Tr. at 5769-70) The fact that the previous witness, in arriving at the same answer, dismissed the current market value of shares as being of any practical use for the Courts purposes, passed without comment. Counsel for the defendants thereupon recalled one of their own previous expert witnesses, who had been making a further study of the documents in the public domain. His opinion was that the "accounting net worth of the company on June 30, 1995, was in excess of 600 million dollars, but less than 700 million." (Tr. at 5772)

17. After the reading of the Judge's instructions to the jury, pointing out that the purpose of the punitive damages was to punish and to deter (Tr. at 5791), the jury was subjected to another harangue from Mr. Gary for the plaintiffs. The case, he said, "was about greed. It was about powerful people wanting to make it all, they wanted to have it all." (Tr. at 5793-94) Punitive damages were "not designed just to benefit Jerry O'Keefe, it's designed to compel a wrongdoer to not do it again. This is to protect the public, you know, protect those families" (Tr. at 5795-96); a somewhat disingenuous statement considering that the punitive damages would go not at all to the public but to Jerry O'Keefe. He then returned to the plaintiffs' estimate of the worth of the defendant companies and rhetorically juggled with the various mentions of billions. 'One sample will suffice. After now suggesting to the jury that the punitive damages they might think should amount to one billion, he continued: "And, members of the jury, that number of 1 billion dollars still leaves them 2.1 billion dollars, but you can get

their attention. You can get it, and you've got to get it now, because if you don't, they take a little 160 thousand — 160 million, and they'll pay it and they'll just keep going. They'll just keep doing what they're doing." (Tr. at 5798) In the rebuttal stage he told the jury that "600 - 160 million dollars is peanuts to these people. They spend that a month. You ain't going to do nothing to them by just coming back with 160 million. That ain't what your job is. If you're going to do it, do it. Do the job, do it right." (Tr. at 5808) And so on, playing with great sums in millions and billions as if this was small change to defendants. Finally he worked up to his peroration: "1 billion dollars, 1 billion dollars, ladies and gentlemen of the jury." (Tr. at 5809)

The Mississippi Decision And The Denial Of Justice

18. Loewen's strongest claim against the United States is for Denial of Justice. It will be convenient therefore at this point to consider how and to what extent the facts of the present case fit into this concept of international law, which is historically one of the oldest and most respected parts of the system. The NAFTA treaty aspect of this plea will be considered later in this Opinion.

19. There is a preliminary matter to be considered and that is the proper definition of denial of justice in international law. It is possible to find a variety of suggested meanings ranging from the very narrow to the very broad (a convenient summary is in chapter III of Amerasinghe's *Local Remedies in International Law* 1990). One of the narrowest is the traditional South American doctrine that denial of justice is limited to refusal of access to the courts. But the doctrine, certainly as expounded in the United States by both writers and by United States practice, is well expressed by the definition found in the Harvard Law School Research made under the late Professor Manley Hudson, which is as follows:

Article 9. A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to the courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a

manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

This is cited with approval in the latest edition of Brownlie's *Principles of Public International*

Law 5th ed. 1998 where the learned author (p. 533) states:

The most controversial issue is the extent to which erroneous decisions may constitute denial of justice. There is authority for the view that an error of law accompanied by a discriminatory intention is a breach of the international standard. (in a footnote he cites Whiteman, viii, 727-31 for this proposition)

It seems clear that the kind of denial of justice which Loewen suffered is, at minimum, that of "a manifestly unjust judgment;" coupled with "gross deficiency in the administration of judicial or remedial process;" and unwarranted "obstruction of access" to the appellate court in Mississippi.

20. It makes no difference that the manifest injustice in this case results from the verdict of a common law jury (a majority verdict of 11 votes out the twelve). (Tr. at 5732-33, 5811-12) it is clear that in the present case the origin of the manifest injustice was in effect created by a gross abuse of the system by plaintiffs' leading counsel, which if not quite aided and abetted by presiding Judge, was at least tolerated and totally uncontrolled by the Judge, even though he knew very well the game that was being played in his court. There were so many occasions when the Judge ought to have stopped plaintiffs' counsel; and occasions when he certainly ought to have warned the jury against counsel's methods. Whatever the reasons for the Judge's silences, and some of his curious utterances, the result was a remarkable travesty of justice. Moreover, the Judge's observation that counsel was playing the "race card," shows that the Judge was wholly aware of what was happening in his court. (Tr. at 359597) There are cases where bias, though wrongful, is relatively innocent because it is of the kind stemming from ignorance. This case was different. The jury might have been to some extent unaware of how they were being manipulated. But so far as the court was concerned, both the Judge and counsel knew perfectly well that counsel was intentionally stirring up racial and

nationalistic bias against Canada and Canadians; possibly one must suppose because he had decided that this was the way he might win the case and harvest absurdly and outrageously inflated damages. He also intentionally befuddled the members of the jury with large sums, changing sometimes in a sentence from millions into billions, and adding words to the effect that "these people" spend this sort of money in an afternoon. It was a remarkable but most unsavoury performance.

21. But the most telling aspect of this case is not the way the jury's verdicts were brought about but the verdicts themselves. The sums awarded were so bizarrely disproportionate as almost to defy belief. To begin with, the sum of 100 million dollars "compensatory" damages awarded in a relatively *straightforward* and routine breach of contract case, that on the face of it involved at the outside, and assuming a finding wholly for the plaintiff, certainly no more than a few million dollars, and probably significantly less, was in itself massively disproportionate. Having decided that sum, the jury then went on to assess punitive damages at 160 million dollars. The second phase allowed counsel to mesmerise the jury into changing their own already grossly exaggerated sum of \$160 million punitive damages into 5400 million. In terms of denial of justice these astonishing figures speak for themselves. These verdicts were brought about by carefully calculated, and wholly improper means. The gross denial of justice was the intended result.

22. There is one other aspect of the Mississippi proceedings to mention: the question of what the punitive damages were supposed to be for. The reason given by counsel and the court was to punish and prevent any further such activities by the defendants. (Tr. at 5755, 5791) Basically it can only have been to punish and deter for the future any like breaches of contract. There was no evidence at all of any conduct by the defendants which might as it were aggravate the breach of contract, even assuming there was a breach of contract. In terms of NAFTA's policy of encouraging investment, it is difficult to think of anything

more likely to be against the letter and spirit of the treaty than unexplained immense punitive damages for a breach of contract involving relatively small sums of money.

Thp Local Remedies Rule (“LRR”)

23. The concept of denial of justice is very closely related to the rule of international law requiring exhaustion of local remedies before intervention to protect a national allegedly harmed in another country may validly be instituted, whether diplomatically or by legal process. In relation to denial of justice it may be expressed by saying that in international law there can be no denial of justice *until* the local remedies have been exhausted. The rationale of the rule is variously explained but essentially it is that an adequate municipal court remedy is the norm and one should therefore try this first before transferring to the international sphere on a different though related international law case against the government for an international delinquency. This rule, in the present case, raises the question of resort to the Mississippi Supreme Court; and there is also to be considered the closely related matter of the settlement entered into by Loewen. There are several observations to be made on this rather technical but important question, which is notoriously full of possible pitfalls. (For a rather splendid commentary of a few pp. see the UK pleading in the *Finnish Ships* case arbitrated in 1932, conveniently to be found in BYIL XVII, 1936, at p. 22 of an article by Fachiri). The present case is an unusual one in that the municipal proceedings in question were brought with the present complainant as defendant; far the greater part of the precedents were cases initiated in the local courts in which the person complaining of a breach of international law was the plaintiff.

24. Perhaps the first thing to say is that the local remedies in the present case have in fact been exhausted. Resort to the local court of appeal was made unreasonable by the refusal to modify the bond requirement which in this case amounted to economic duress; and be it noted in a change of mind of the Mississippi Supreme Court which was at first minded to

modify the required bond, so there can have been no legal obstacle to modifying it to make an appeal possible.

25. Second, the NAFTA Treaty has dispensed with the local remedies rule for cases brought under the treaty. This is indeed the plain policy of the treaty; a policy becoming **more** and more common when international law remedies are themselves becoming more common and better known.

26. A third reason why the local remedies rule is not applicable here — quite apart from what must be the main one that the local remedies were in fact exhausted — is to be found in the terms of the NAFTA Enabling Act, which in sec. 102(c), precludes, in the local law, any private law suit or right of action “against a federal, state or local government . . . based on the provisions of the NAFTA.” This of course refers not to the Mississippi contract case but to the new case based upon NAFTA and international law, to which the Mississippi case is simply the background facts. But it is that original contract case to which the LRR applies. When the new case against the United States for denial of justice is instituted by notice under the terms of the treaty, the notice will presumably contain the undertaking required by the Enabling Act as it were to abandon any and all local or indeed other remedies. This, together with the fact that local remedies were in effect denied, finally by the Mississippi Supreme Court, seems to dispose of any possible difficulties with the local remedies rule.

The Settlement

27. The Settlement entered into by Loewen and no doubt registered with the court can in no wise be regarded as a settlement or waiver of Loewen’s claim against the United States. That will be in form and in substance a wholly different claim from the one which was settled in the Mississippi court. That settled claim was about a contractual relationship governed by the law of Mississippi and the other involved party was the plaintiffs in the Circuit Court of Hinds County; the claim now under discussion will be a claim against the United States

for denial of justice and it will be governed by the NAFTA treaty and by the relevant rules of general international law.

28 . The main question about the settlement therefore is whether it might be regarded as having disposed of the possibility of a complaint of denial of justice in the Mississippi proceedings; that is to say the factual basis of the allegation of a denial of justice for which the United States is claimed to be responsible. But the settlement was clearly made under economic duress by reason of the Mississippi Supreme Court refusing to reduce to a reasonable sum the bond requirement for appeal. Loewen was put into the position of having to choose between accepting the terms of the settlement or going into liquidation. In short the position is that the settlement, having to be made under duress, has itself become a basis for the Loewen claim. It is part and parcel of the denial of justice for which the United States is responsible in international law. The settlement is also relevant to the question of the measure of damages; but that will be looked at below.

Some Aspects Of The NAFTA Treaty Provisions

29. It is important obviously to bring the Loewen case well within the provisions of the NAFTA treaty as this is the only source for being able to assert a right to have the matter submitted to an international arbitration.

30. First, there is the broadly drafted Article 1105 to consider. This article provides for the treatment of investments **in** accordance with the Minimum *Standard*; and to establish what is meant by the minimum standard it has to refer to general international law which has long traditionally defined the requirements of a minimum standard for the treatment of aliens — the treatment of aliens generally and not only in terms of investment. The article in paragraph 1 provides:

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.

This is an important provision of the NAFTA Treaty, for it refers without qualification to the general international law governing the treatment of aliens, and to its minimum standards to be found in the large jurisprudence on that subject. To be sure, there is indeed a minimum standard and the cases show that generally speaking it has been applied when the treatment of an alien has been outrageous and so without any doubt a breach of a minimum standard. But the present case is such a one. No reader of the transcript of the Mississippi trial could fail to understand that this whole episode was outrageous from beginning to end; and must be without doubt a breach of the minimum standard required both by international law and by the NAFTA Treaty.

Expropriation

31. It is necessary also to consider specifically Article 1110 which deals with "Expropriation and Compensation." The facts of the present case do not show an expropriation in the usual sense of a general enactment or decree which appropriates to the State a certain category, or categories, of alien property or investment. Nevertheless there has been in effect an expropriation of Loewen's property by the vehicle of the bizarre trial falling far below any possible standard when judged by international law, or indeed by the NAFTA treaty. This expropriation is another aspect of the denial of justice.

The NAFTA Treaty Standards Of Treatment Of Alien Investors

32. Article 1102 of the NAFTA treaty is also a basis for the Loewen claim. It has three paragraphs, each of which calls for separate consideration. Paragraph 1 provides:

Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

This reference to the national standard recalls the classical controversy between North and South America, and indeed Europe over this standard and whether it was acceptable as part of

international law. The *Calvo* clause was an attempt to write the standard into investment agreements. It is therefore not surprising to see that it survives in this treaty as one of the standards laid down. The interesting feature of the Loewen case is that it is a straight and undeniable breach of even the national standard. The endeavour of Mr. Gary, plaintiffs' leading counsel was, throughout the trial, to draw a clear distinction between the treatment to be accorded to "our boys" and the treatment suitable for those "Canadians" coming from the remote north to exploit the people of that district of Mississippi.

Paragraph 2 of the same Article is a like provision but in respect this time not of the investors but of the investors' investments.

Paragraph 3 is pertinent to the present case because it makes it wholly clear that the like standard of treatment must be accorded also "with respect to a state or province."

The treaty provides three standards of treatment — all well-established in the practice and the jurisprudence of international law, the antidiscrimination standard (Article 1102), the most-favoured nation treatment (Article 1103); and the minimum standard (Article 1705). The latter has already been looked at above. But the way the imposition of the standard is expressed in the text of this article is important. It refers to "treatment in accordance with international law, including fair and equitable treatment and full protection and security." It thus imports without qualification the entire general international law concerning this standard. In the second paragraph the word "measures" appears again in "measures it [a Party] adopts and maintains;" but the important first paragraph is not qualified in this way, and clearly is not confined to "measures," whatever that might mean.

The Question Of Damages

33. The basic principle governing the measure of damages in international law is the one expressed famously in the *Chorzow Factory* case, 1928 P.C.I.J. (Ser. A) No. 13, that the applicant should, so far as possible be put into the position *quo ante*; and where this is not in

fact possible the sum of damages should, so far as is possible by payment of money, put the applicant in a position corresponding to that he would have enjoyed if the wrong had not been committed. In short, the governing principle of damages in international law is the *restitutio in integrum*, using money damages wherever the actual restitution is no longer possible.

34. The other damage question that springs to mind is the legal position of the jury's verdicts in the international law claim. Of course the whole Mississippi proceeding is tainted with illegality in international law and in particular in the context of the obligations of the United States under the NAFTA treaty. The United States is under an obligation in international law to restore Loewen into the position it would be in were it not for the Mississippi miscarriage of justice.

35. Was the verdict finding a breach of contract a reasonably possible verdict, or was it manifestly a perverse verdict? There is some authority for treating the Mississippi verdict as itself improper. Thus O'Connell (p 11 16) says that "Where the wrong consists of an act of legislation or a judgment of a court reparation may take the form of declaration that the act or judgment be annulled." And in the footnote he cites the Martini claim (*Italy v. Venezuela*) 1930 UN Rep. II, 975; and Eagleton, *The Responsibility of States in International Law* (1928) Chap.8. That approach seems appropriate here, for the prejudicial anti-Canadian evidence admitted at trial infected the jury's liability determination as well as its assessment of damages.

36. But there is an additional complication: the proper procedure for redressing what one considers to be a mistaken verdict, is the appeal to the Court of Appeal. This was in realistic terms refused by the rejection of the motion to reduce the necessary bond; a particularly ironic situation when the main, and obvious ground of appeal would have been, quite apart presumably from the question of breach of contract or no, the manifestly absurdly inflated damages awarded. This is therefore the head under which I would have thought it

would be possible and reasonable to include a sum of damages for the losses stemming from what was in effect a deprivation of the right of appeal.

The **Question Of The Claim For The Shareholders' Losses**

37. I know of no reason in principle why there could not be a claim on behalf of the shareholders of Loewen. Suffice to say that there is of course quite a lot about the rights and losses of shareholders in the Barcelona *Traction* case (ICJ Rep. P.3). This was a claim by Belgium for the losses suffered by Belgian shareholders in a Canadian company which was made bankrupt in suspicious circumstances by a remote, small town court in Spain; as a result of which a Spanish gentleman acquired the company at what seemed a bargain price. The claim failed owing to questions about the locus standi of Belgium to exercise its rights of diplomatic protection in respect of a Canadian company. The Court took a very conservative approach in refusing to go behind the corporate veil. Nevertheless the position of a claim founded upon the provisions of the NAFTA treaty, and brought by the investors, as they are entitled to do under the provisions of that treaty, is a quite different legal situation. Under the wording and structure of NAFTA, the Barcelona Traction impediment is effectively removed, allowing the shareholders to make a fair and equitable claim.

Conclusions

38. The proceedings and decisions in the Hinds County Court amount, in my opinion, to a clear instance of Denial of Justice in the form of, to use the Harvard Research definition of denial of justice in international law, a manifestly unjust judgment; gross deficiency in the administration of the judicial process; and failure to provide those guarantees which are generally considered indispensable to the proper administration of justice. The sums of damages awarded of \$100 million compensation damages and \$400 million punitive damages are so ludicrously disproportionate to the actual modest value of the invested interests involved as to speak for themselves in terms of an extreme example of denial of justice.

39. These facts also constitute a breach of the NAFTA Treaty provisions on the protection of the investments and the investors of one Party in the territory of another. In particular, it constitutes in express terms several times repeated, a breach of the requirement of national treatment (Article 1102), for the jury in the case were repeatedly told to be mindful of a distinction between local people and such people as “Canadians;” second it constitutes a breach of even the minimum standard for the treatment of aliens required by international law and by Article 1105 of the NAFTA Treaty, for the treatment accorded in this case was truly outrageous even by the minimum standard. Furthermore, Article 1105 of the Treaty elaborates the minimum standard by reference to international law and “including fair and equitable treatment and full protection and security,” and also “non-discriminatory treatment.”

40. Loewen nevertheless rightly attempted to seek local redress and to exhaust local remedies by appeals to the Mississippi Supreme Court. But the local law requires an appellant to deposit a bond of 125% of the damages. This, in view of the absurd damages awarded would have amounted to \$625 million: about the total amount the company was worth; so in effect it was being required to go in liquidation. The Supreme Court of Mississippi had the power to reduce the bond requirement but ultimately refused to do so. It is clear therefore that, in international law Loewen has exhausted the local remedies available to it.

41. In the event of resort to international arbitration under the NAFTA Treaty, Loewen would be required to waive resort to any tribunal other than the one set up under the treaty. (Article 1121)

42. The Loewen claim will presumably be submitted to the United States Government. The treaty requires that “the disputing parties should first attempt to settle a Claim through Consultation and Negotiation.” (Article 1118)

43. If the United States disputes the claim, then there is an “investment dispute” which can be made the subject of the treaty arbitration procedures. (Article 1115)

44. Loewen has then a right to arbitration.

45. This investment dispute to be submitted to arbitration is not of course in any way an appeal from the Mississippi court decisions. It is not a dispute in the local law of contract with the local plaintiffs in the Mississippi case, but an investment dispute between Loewen and the United States, governed by international law and the terms of the NAFTA Treaty. The Mississippi proceedings are merely the facts on which the new case is based.

46. The settlement accepted by Loewen in the Mississippi court was not, and cannot be viewed as a settlement of the different matter of the claim against the United States. It was made under economic duress, for Loewen had no alternative but to accept it, having been forcibly deprived of any realistic possibility of appeal. In fact, the circumstances of the settlement are an integral part of the complained denial of justice.

47. The measure of damages to be claimed from the United States is in international law, *restitutio in integrum* and, insofar as that may not be possible, restitution as far as money can do it to the position the party would have been in but for the international law and treaty wrong.



R.Y. Jennings
26 Oct. 1998