

## Todd Weiler

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**From:** Todd Weiler [tweiler@naftalaw.org]  
**Sent:** Friday, June 27, 2003 12:23 AM  
**To:** 'tweiler@naftalaw.org'  
**Subject:** NAFTA News Flash -- Loewen Award Finally Released

Dear NAFTA News Subscribers:

The much-anticipated and long-awaited award in Ray Loewen and Loewen Corp. v. USA was released to the parties on Thursday. It will most likely be available at [www.naftalaw.org](http://www.naftalaw.org) tomorrow (Friday).

While I have yet to see the award myself, I have been informed of the result and its ratio. Assuming I have been accurately informed, here are some very preliminary thoughts about the award. As always, please treat the following comments as utterly premature.

The Claimants in Loewen v. USA were apparently unsuccessful in their attempt to convince the Tribunal that the United States had breached Articles 1102, 1105 and 1110 because of a mammoth Mississippi jury award and the refusal of an Appellate Court to waive a 125% appeal bond (effectively requiring the company to post a bond greater than its net worth). The result was a settlement reached on onerous terms and eventual bankruptcy for Loewen.

Ultimately, the primary lesson to take from the Loewen Tribunal's dismissal of this claim could be that investors should be very, very wary of bringing any claim based upon the decision of a domestic court. The same conclusion could be drawn from the Final Awards in *Mondev v. USA* and *Azinian v. Mexico*. The *Mondev* Tribunal would not second-guess the decision of a US court to uphold the immunity of the City of Boston (from what would have been a costly jury finding in favour of the investor). In *Azinian*, the Tribunal was unwilling to allow the investors to use the NAFTA to revisit the merits of a domestic case that they deserved to lose in the courts of Mexico.

However, in the Loewen Award we may have something different.

The *Mondev* case turned on the fact that the City's original bad behaviour - which led to the court case - took place before the NAFTA came into force. The Tribunal could not look behind a valid court decision on the City's immunity under local law. Had the City committed the acts when the NAFTA was in force, the NAFTA route could have been chosen over recourse to a domestic court. However, time was not on *Mondev*'s side. For its part, the *Azinian* Tribunal easily dismissed the investors' claim because they failed to prove that there was anything improper about either the activity which led to the domestic court proceedings or the proceedings themselves.

By contrast to these two cases, the Loewen Tribunal was presented with the case of a 1/2 billion dollar jury award meted out within the context of a 2 to 4 million dollar commercial dispute (with effectively no chance for appeal). We know from the pleadings that the crux of Loewen's case rested on the theory that the outcome of the proceedings constituted a substantive denial of justice. In a nutshell, the question for the Loewen Tribunal should have been whether a jury award so out of proportion to the subject matter of the dispute could be justified on any grounds.

We know that the Tribunal dismissed Loewen's claim, but we do not yet know why. It would be unfortunate if the tribunal simply retreated to something akin to the subsidiarity principle (showing extreme deference to any decision emanating from a local court, no matter how bad it may have seemed). Instead, I would have liked to see the Tribunal provide pride of place in its analysis to the proportionality principle (weighing the jury's seemingly inexplicable damages award against the amounts actually in dispute to conclude whether - on a substantive basis - justice had been denied to Loewen).

Given that most of the available denial of justice jurisprudence is 80 to 120 years old and either focuses on procedural denials of justice or on substantive denials within the penal context, it is possible that the Tribunal simply concluded that "substantive denials of justice" do not exist in the modern commercial context. Such a conclusion would be

regrettable. On the other hand, maybe the Tribunal concluded that the jury's award was reasonable. Or perhaps the Tribunal simply concluded that the apparent perils of the Mississippi court system were a business risk that Loewen should be forced to bear.

Although its impact will likely be limited to claims involving court decisions, the award will surely make for good summer-time reading.

Other News:

A decision from the Tribunal in *Fireman's Fund v. Mexico* is rumoured to be expected soon. There is an outstanding preliminary challenge to the Tribunal's jurisdiction by Mexico, which would likely be resolved by this expected decision.

There are a number of recent documents from the *UPS v. Canada* case now available on [www.naftalaw.org](http://www.naftalaw.org). In addition, some of the arguments in the *Canada v. S.D. Myers* case (involving an attempt by Canada to set aside the award of a NAFTA Chapter 11 tribunal in the Federal Court of Canada) are now available on [www.naftalaw.org](http://www.naftalaw.org).

Also available on [www.naftalaw.org](http://www.naftalaw.org) is a copy of the investment chapter of the proposed US-Singapore Free Trade Agreement, as well as some additional documents from the *Methanex v. USA* case and the *Thunderbird v. Mexico* case. In both of these cases, the tribunals have provided orders outlining the timing and procedure for upcoming hearings.

Kindest regards,

TJW

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