

## Todd Weiler

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**From:** Todd Weiler [tweiler@naftalaw.org]  
**Sent:** 12 January 2005 14:52  
**To:** NAFTA News Recipients  
**Subject:** NAFTA News Flash - Mexico v. Feldman - Three Strikes and You're Out  
**Follow Up Flag:** Follow up  
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I have included the text of the Ontario Court of Appeal judgment in Mexico v. Feldman. The appeal was from a judgment of the Ontario Superior Court, dismissing Mexico's application to have a NAFTA/UNCITRAL Tribunal award set aside. I have only had time to read the reasons for decision once, but the result was not surprising: the award has been upheld.

The Court did seem to slightly misapprehend the difference between the grounds of review, under Ontario's Model Law statute, and the concept of standard of review, contained within Canadian statute and common law – in that it essentially conflated the two. It should have only stuck to the grounds of review, without any mention of the Canadian administrative law concept of standard of review (which itself is a dog's breakfast that has perennially crossed the line between review on grounds of jurisdiction and de facto, de novo appeals).

As such, the Court perhaps delved a little too deeply into the facts of the case – although one accepts that it must demonstrate sufficient knowledge of the issues to explain why it is refusing to stick its nose in a place where the applicable law says it does not belong. The basic, jurisdictional argument of Mexico was that the NAFTA Tribunal – through its drawing an adverse inference against Mexico re: its treatment of the investor and its competitors – effectively mandated the disclosure of tax information for which another provision of the NAFTA provides protection against disclosure. Because the issue was never fully argued before the Tribunal and didn't jibe with the facts in any event, the Superior Court dismissed it. The Court of Appeal did the same.

What is more interesting is the short analysis of the meaning of an award being contrary to public policy (another ground of review under the UNCITRAL Model Law). Whereas the Court of Appeal demonstrated a lack of familiarity with the NAFTA investment arbitration process earlier in its award (by wrongly assuming that the chairman of the NAFTA tribunal was chosen from a roster established under the NAFTA but which was, in truth, never populated), it demonstrated a relatively firm grip on the idea that an obligation to pay damages for unfair treatment is something qualitatively different than an obligation to take steps to change one's laws or regulations. Feldman and his competitors had been exploiting a tax loophole that was eventually closed by the Mexicans; the problem was that it was closed for Feldman a lot quicker than for his local competitors. The damages awarded to him by the NAFTA Tribunal effectively made up the difference. Mexico had argued that to be ordered to pay compensation to Feldman for an entitlement to which Mexico argued he was never entitled was contrary to public policy.

It was certainly an up hill argument, not only because it was clear that the Tribunal's damages award was meant to compensate for differences in treatment, rather than to establish an entitlement that may or may not exist in Mexican law. It was also a very tough argument because the "public policy" in question would be that of the jurisdiction of the reviewing court (i.e. Ontario; not Mexico). This point should stand as a reminder of why it is highly preferable never to hold an investor-state arbitration within the jurisdiction of the respondent state.

The Ontario Court of Appeal would have none of Mexico's public policy arguments, however, choosing instead to follow the more narrow, and well-trodden, path of merely confirming that the award and its reasoning were not otherwise contrary to fundamental principles of justice, in substance or in the process of their generation. As the award and the arbitration were more than fairly reasoned and executed, there was no ground for review and the appeal was dismissed.

As an aside, we can expect to see a more elaborated version of these kinds of "public policy" arguments in the application which will soon be made by an anti-trade Canadian NGO (the "Council of Canadians") and Canada's Postal Union before an Ontario court to strike down the entire NAFTA Chapter 11 process as unconstitutional in

Canada. One should never say never, but this application appears hopelessly and utterly doomed, not in the least because it clearly misapprehends the difference between an international tribunal's order to pay compensation and an order to change one's laws or regulations (the latter of which a NAFTA Chapter 11 tribunal can never do). This, of course, is above and beyond the fact that there is nothing wrong with governments binding themselves to the kinds of "good governance" obligations contained within the NAFTA, the WTO or a BIT.

In fact, one wonders why these groups have set their sites so low (on NAFTA Chapter 11). Their arguments would work better (albeit while still failing miserably) if targeted at the WTO. At least a WTO panel report, once adopted, imposes an absolute obligation on a WTO member to bring itself into compliance (which would naturally include changing it's laws).

The full text of the judgment is available at:

[www.naftaclaims.com](http://www.naftaclaims.com)

Kindest regards,

TJW

PS – Thanks to Paul Lalonde at Heenan Blaikie in Toronto for forwarding the text of the judgment to me.

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Todd Weiler

P 313-686-6969

F 309-210-2353

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