



# **Impact of Sale or Insolvency of Investment Assets on Treaty Arbitration**

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J. C. Thomas, Q.C.  
Thomas & Partners



# The Claimants at the Date of the Submission of the Claim

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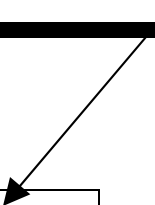
The Loewen Group Inc.  
(TLGI)  
(Canada)

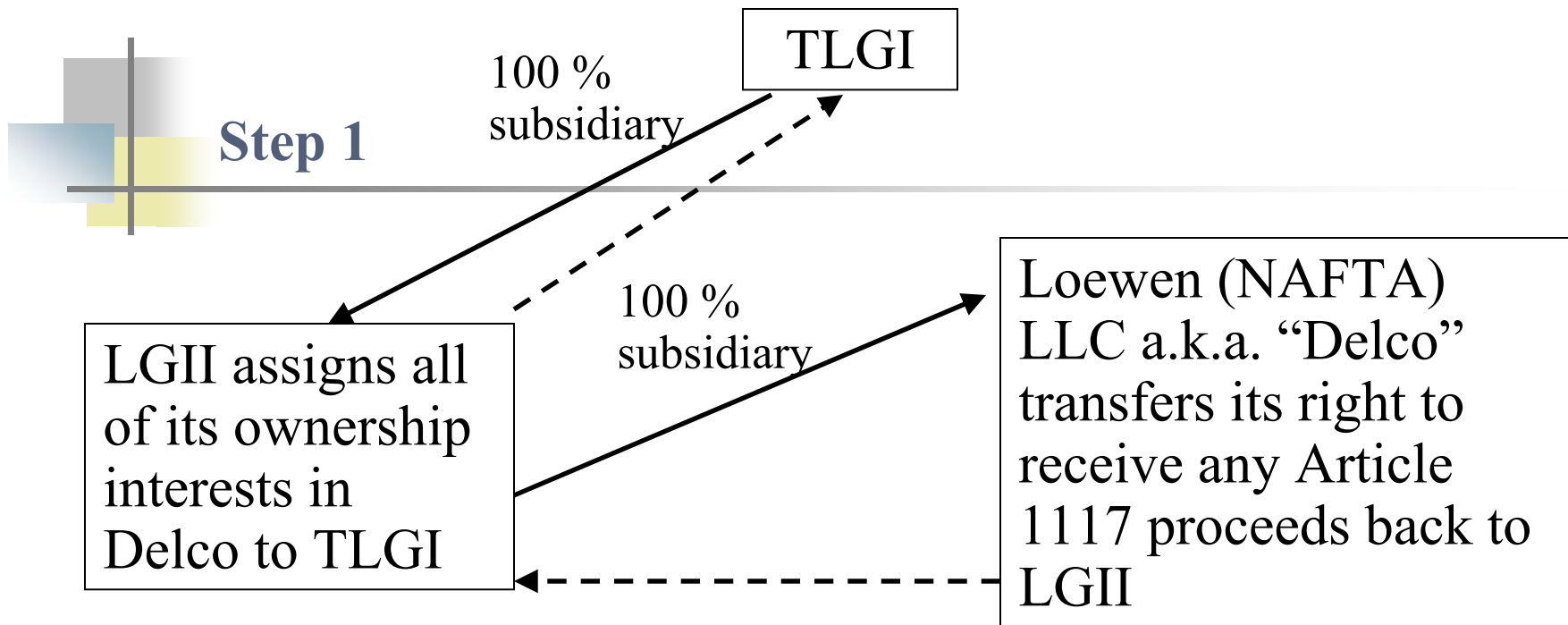
Raymond L.  
Loewen  
(Canada)

CANADA

UNITED STATES

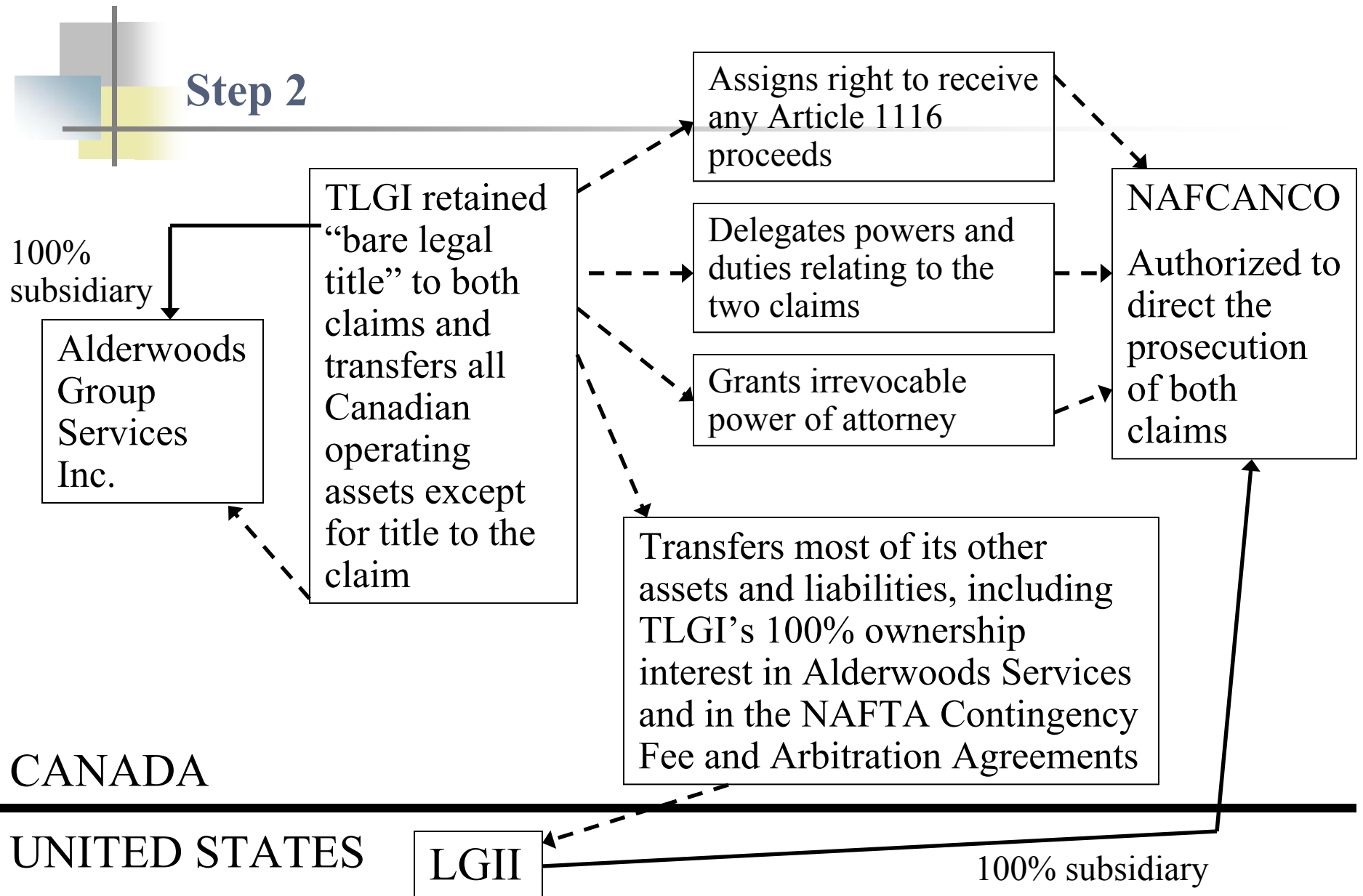
Loewen Group  
International, Inc.  
“LGII”  
(United States)





Thus: Right to the proceeds of TLGI's Article 1117 claim remains in LGII (the U.S. investment)  
TLGI owned both Delco and LGII as well as the Article 1116 and 1117 claims

## Step 2





## Step 3

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- Since all of LGII's shares were worthless, in accordance with U.S. bankruptcy law, LGII cancels its old common stock, most of which had been owned by TLGI;
- LGII assigns to Alderwoods (Delaware), Inc. (a wholly-owned subsidiary) substantially all of its U.S. operating assets; and
- LGII retains the Contingency Fee and Arbitration Agreements as well as right to receive the Article 1117 proceeds.



## Results: The United States

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- LGII is renamed “Alderwoods Group, Inc.” and becomes a stand-alone U.S. company;
- Alderwoods owns all of TLGI’s Canadian operating assets (through its ownership of Alderwood Group Services, Inc., a Canadian company);
- Alderwoods owns all of the former LGII’s U.S. operating assets (through its ownership of Alderwoods (Delaware) Inc.);
- Alderwoods is a party to the Contingency Fee and Arbitration Agreements; and
- Alderwoods holds the right to receive 75% of any net proceeds from the Article 1117 claim (25% goes to U.S. creditors).

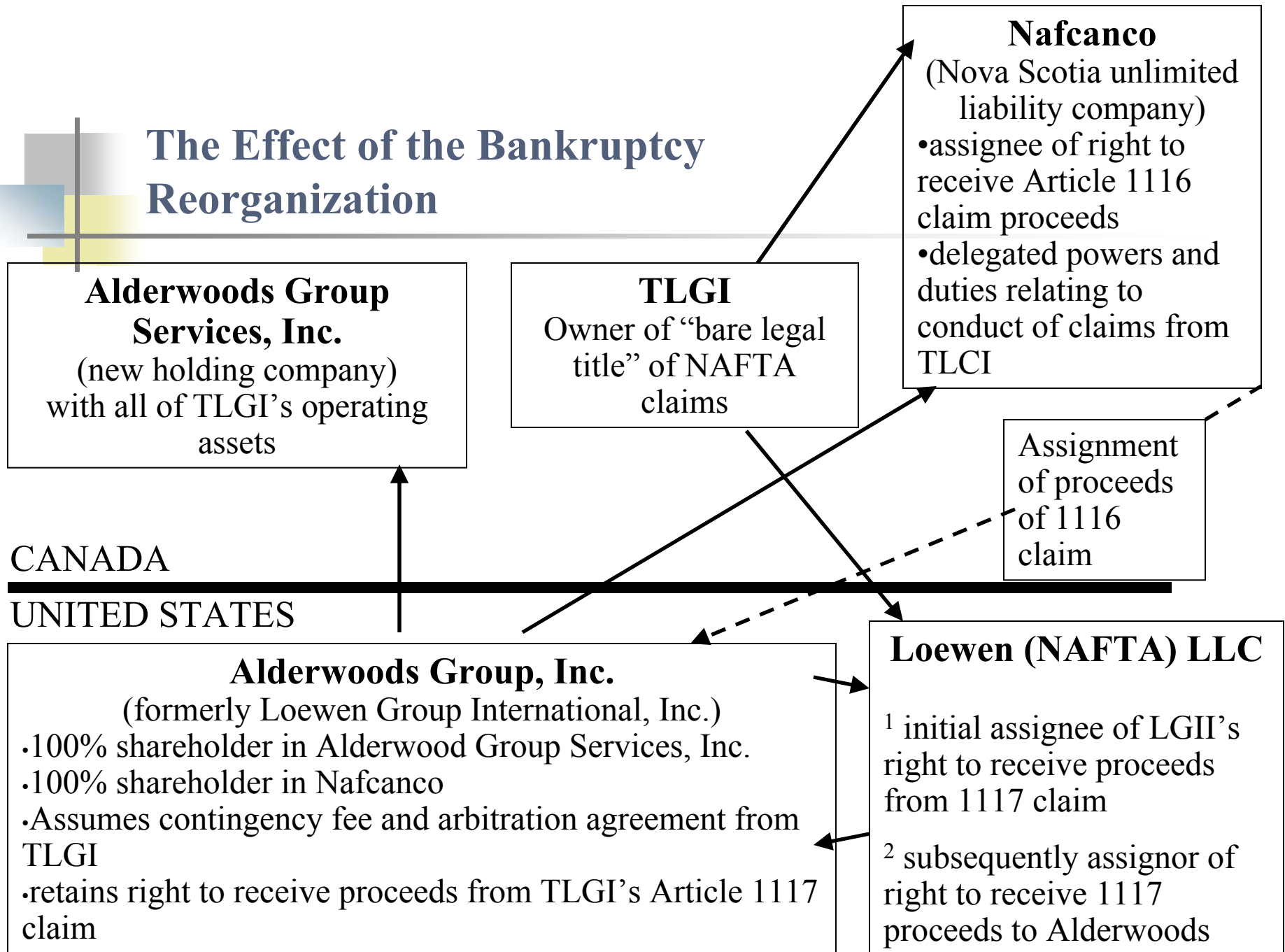


## Results: Canada

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- TLGI holds bare legal title to the Article 1116 and 1117 claims;
- Nafcanco holds the rights and responsibilities attendant to prosecuting both claims;
- Nafcanco holds the right to receive 75% of the 1116 claim proceeds (25% to Canadian creditors); and
- All Canadian operating assets owned by Alderwoods Group Services, Inc. (100% subsidiary of Alderwoods (U.S.)).

# The Effect of the Bankruptcy Reorganization







## Article 1131: Governing Law

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1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.



## **Section B– Settlement of Disputes between a Party and an Investor of Another Party**

### **Article 1115: Purpose**

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Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.



## **“Investor of a Party”**

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means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;



## Article 1116:

### Claim by an Investor of a Party on Its Own Behalf

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1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

- a) Section A or Article 1503(2) (State Enterprises), or
- b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

...



## Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

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An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

- (a) Section A or Article 1503(2) (State Enterprises), or
- (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

...



## Article 1136:

### Finality and Enforcement of an Award

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If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
- (b) a recommendation that the Party abide by or comply with the final award.



## **Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**

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4. An investment may not make a claim under this section.



## The Tribunal's Findings


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53. ... Judge Graves failed in his duty to take control of the trial by permitting the jury to be exposed to persistent and flagrant appeals to prejudice on the part of O'Keefe's counsel and witnesses. Respondent is responsible for any failure on the part of the trial judge in failing to take control of the trial so as to ensure that it was fairly conducted in this respect.

87. ... There was a gross failure on the part of the trial judge to afford the due process due to Loewen in protecting it from the tactics employed by O'Keefe and its counsel.


...





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.

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.



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.

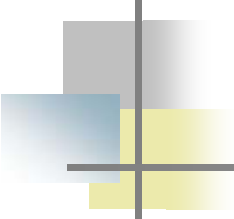
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## Tribunal's Reasoning on Diversity of Nationality

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1. The Treaty was silent on the issue of continuous nationality up to the date of the award.
2. The rules of customary international law continued to apply unless varied by the Treaty.
3. The United States had proved the existence of a customary law rule that the link of nationality must exist until the date of the award.

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4. The treatment of the *dies ad quem* rule in other treaties did not assist in proving how this Treaty should be interpreted; to the contrary, it highlighted the fact that NAFTA did not modify the customary law rule.
  5. The effect of the various assignments made to preserve the NAFTA claim had to be ascertained not by reference to private law rules but from the Treaty's rules.
  6. Equity could not save the claimant from the consequences of its having broken the chain of nationality that the Treaty requires.



End

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