

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 1976 UNCITRAL ARBITRATION RULES**

BETWEEN:

WESTMORELAND MINING HOLDINGS LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

(ICSID Case No. UNCT/20/3)

GOVERNMENT OF CANADA

SUBMISSION ON COSTS

August 19, 2021

Trade Law Bureau
Government of Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

1. Canada requests that the Tribunal order the Claimant to bear all of Canada's costs in this arbitration pursuant to Article 1135(1) of the North American Free Trade Agreement ("NAFTA"), Article 40 of the 1976 UNCITRAL Arbitration Rules (the "UNCITRAL Rules"), and Section 21.7 of Procedural Order No. 1.
2. Tribunals have broadly accepted the starting principle that "an unsuccessful litigant in international arbitration should bear the reasonable costs of its opponent."¹ The tribunal in *S.D. Myers* noted specifically that the "logical basis" for awarding costs to a successful respondent is that it "has in effect been forced to go through the process in order to achieve success, and should not be penalised by having to pay for the process itself."² NAFTA tribunals have routinely ordered a claimant to pay a respondent's costs upon finding no jurisdiction.³
3. While the Tribunal has discretion to apportion costs, the circumstances of this case justify a costs order in Canada's favour. Throughout the arbitration, the Claimant advanced unreasonable and shifting arguments to circumvent the well-established rule that a NAFTA tribunal's jurisdiction *ratione temporis* is limited to an alleged breach, and resulting loss or damage, that occurred after a claimant becomes an investor of a Party. Initially, the Claimant impermissibly tried to substitute itself for another investor, Westmoreland Coal Company ("WCC"), in WCC's NAFTA claim. It then alternatively filed a claim nearly identical to WCC's, using the generic term "Westmoreland" to refer to itself and WCC interchangeably. The Claimant argued that an examination of WCC's bankruptcy proceedings—which it claimed were "complicated" and would require a "deep inquiry" with expert witnesses—would be necessary to prove that the Claimant is "substantially the same" investor as WCC.⁴ Canada was thus compelled to retain Ms. Kathryn Coleman as an expert on U.S. bankruptcy law. When confronted with Ms. Coleman's evidence that the Claimant and WCC were not "substantially the same", the Claimant changed its theory, arguing there was no need for expert testimony,⁵ and that NAFTA allows the assignment of investment claims when two entities have a

¹ See e.g., **RLA-078**, *Generation Ukraine Inc. v. Ukraine*, Award, 16 September 2003, ¶ 24.1; **RLA-079**, *Canfor Corporation et al., v. United States*, Joint Order on Costs and Termination, 19 July 2007, ¶¶ 139 and 149 (finding that the principle of "costs follow the event" is "expressly contemplate[d]" by Article 40(1) of the UNCITRAL Rules and is the "guiding principle for the application of Article 40(2)"); and **RLA-080**, *Telenor Mobile v. Hungary*, Award, 13 September 2006, ¶ 107. See also **RLA-081**, John Y. Gotanda, "Consistently Inconsistent" (ICSID Review, Vol. 28, 2013), p. 428; **RLA-082**, Thomas Webster, "Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues" (Arbitration International, Vol. 25, 2009), p. 473.

² **RLA-083**, *S.D. Myers v. Government of Canada*, Final Award, 30 December 2002, ¶ 15.

³ See e.g., **RLA-084**, *Detroit International Bridge Company v. Canada*, Award on Costs, 17 August 2015, ¶¶ 49 and 61 (finding no jurisdiction and ordering the claimant to pay C\$ 1,777,706.30 and US\$ 150,336.00 for Canada's legal and arbitration costs, respectively); **RLA-051**, *Methanex Corporation v. United States*, Final Award of the Tribunal on Jurisdiction and the Merits, 3 August 2005, Part VI, ¶ 1 (finding no jurisdiction and ordering the claimant to pay US\$ 2,989,423.76 and US\$ 1,071,539.21 for the United States' legal and arbitration costs, respectively); **RLA-016**, *Ethyl Corporation v. Canada*, Award on Jurisdiction, 24 June 1998, ¶ 92 (finding that the claimant would pay Canada's costs with respect to certain jurisdictional issues as set forth in the Final Award); **RLA-020**, *Mesa Power Group, LLC v. Canada*, Award, 24 March 2016 ("*Mesa – Award*"), ¶ 706 (finding no jurisdiction over certain claims and ordering the claimant to pay C\$ 1,832,701 and C\$ 1,116,000 for Canada's legal and arbitration costs, respectively).

⁴ Bifurcation Hearing Transcript, pp. 110:17-111:6 ("To answer just the limited question of whether the Westmoreland of 2019 is the same as the Westmoreland of 2018 when the bankruptcy took place and the corporate reorganization took place, that would be a deep inquiry into what we think is a fairly complicated process which a lot of—and which we would be introducing probably Expert Witnesses on bankruptcies, on corporate reorganizations, on an explanation of why we think that the Claim survived the corporate reorganization, which at the time was, indeed, the advice of a small army of specialized lawyers." (emphasis added)).

⁵ Jurisdiction Hearing Transcript, p. 271:10-12 ("There is no need for Expert testimony. Their Expert acknowledged that this was not about bankruptcy.")

“continuity of interest” under a self-judging U.S. tax standard, or are otherwise “affiliated”. The Claimant should bear all of Canada’s costs in the circumstances of these unreasonable and changing bases to establish jurisdiction.

4. Canada’s detailed costs are set out in Annexes I (Legal Representation) and II (Disbursements). These costs are reasonable. For example, Canada’s total billings for legal representation reflect hourly rates that are well below market rates. They also reflect the complexities of defending against a NAFTA claim in a federated State such as Canada, and include time for both lawyers and paralegals from the Trade Law Bureau of the Government of Canada, and lawyers from the Government of Alberta, who provided legal support.⁶ As Canada explained at the Hearing on Bifurcation, these costs do not represent the full cost to the Governments of Canada and Alberta associated with defending against this claim.⁷ In light of these circumstances, and the consistency of the total billings with what other tribunals have awarded respondents in a jurisdictional phase,⁸ Canada’s costs of legal representation are reasonable.

5. Canada’s disbursements are equally reasonable. For example, Canada was compelled to hire Ms. Coleman due to the Claimant’s groundless assertions about its relationship to WCC and the bankruptcy process. Ms. Coleman’s rates were discounted, and are commensurate with her extensive experience. Canada has also incurred reasonable expenses related to document management consultants, Noticia LLP, in preparation for a potential document production phase of the arbitration.⁹ Noticia LLP has facilitated the document collection process, which is challenging and time-consuming in a federated State where multiple government departments are engaged. The Claimant should be ordered to pay for these costs and the other reasonable disbursements listed in Annex II, which Canada would not have incurred but for the Claimant’s claim. Canada has also listed its share of the arbitration costs advanced to date in Annex II. Consistent with the presumption under Article 40(1) of the UNCITRAL Rules, the Claimant should bear Canada’s share of these fees.

6. Applying the relevant factors for the award of costs to the circumstances of this case, the Claimant should be ordered to pay all of Canada’s costs in the arbitration, which amount to C\$3,603,010.37. However, if the Tribunal decides that it has jurisdiction, it should, consistent with the approach of other NAFTA tribunals,¹⁰ reserve its decision on costs until a final award on the merits, so that it can consider the application of the relevant factors to the entire proceeding.

⁶ NAFTA tribunals have ordered claimants to pay Canada’s costs, including costs of provincial counsel. *See e.g.*, **RLA-039**, *Mercer International Inc. v. Canada*, Award, 6 March 2018, ¶ 9.11; **RLA-020**, *Mesa – Award*, ¶ 705.

⁷ Bifurcation Hearing Transcript, pp. 14:4-15:4. Costs that will not be captured by an award of costs in this arbitration include federal-provincial dialogues, review of materials, and extensive briefings of various levels of Government, all of which represent significant public resources that have been diverted and expended on the defence of this claim. Moreover, the Government of Alberta’s legal billings only represent provincial counsel’s hours performing functions in support of the litigation as part of the litigation team and in close collaboration with counsel and paralegals from the Trade Law Bureau. They do not include the significant number of additional hours spent performing internal coordination and advisory functions necessary for the defence of the claim.

⁸ *See e.g.*, fn. 3. *See also* **RLA-085**, *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, Award [Unofficial Translation], 29 October 2019, ¶ 455 (ordering the claimant to pay US\$ 2,518,886.59 for the respondent’s legal costs); **RLA-086**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, Award [Unofficial Translation], 20 May 2019, ¶ 848 (ordering the claimant to pay US\$ 4,661,965.00 for the respondent’s costs); **RLA-087**, *Orascom TMT Investments S.à r.l. v. Democratic Republic of Algeria*, Award, 31 May 2017, ¶ 587 (ordering the claimant to pay US\$ 2,842,811.01 for the respondent’s legal costs).

⁹ Document production would be the next step in the arbitration if the Tribunal decides that it has jurisdiction. *See* Email from Veronica Lavista to the Disputing Parties, dated July 31, 2020.

¹⁰ *See e.g.*, **RLA-033**, *Resolute Forest Products Inc. v. Canada*, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 331; **RLA-030**, *Grand River Enterprises Six Nations, Ltd. v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 105.

August 19, 2021

Respectfully submitted on behalf of the Government of
Canada,

A handwritten signature in black ink, appearing to read "K. Zeman", positioned above a horizontal line.

Krista Zeman
Adam Douglas
Megan Van den Hof
E. Alexandra Dosman
Mark Klaver

ANNEX I – COST OF LEGAL REPRESENTATION

TRADE LAW BUREAU - FISCAL YEAR 2019/2020¹ (Notice of Arbitration, Procedural Order No. 1, Confidentiality Order, Statement of Defence)			
Participant	Professional Fees		
	Rate (C\$)²	Hours	Total Fees (C\$)
<i>Federal Legal Representation</i>			
Scott Little, Senior Counsel	277.77	214	59,442.78
Adam Douglas, Counsel	241.19	250	60,297.50
Krista Zeman, Counsel	241.19	405	97,681.95
Alexandra Dosman, Counsel	241.19	344	82,969.36
Mark Klaver, Counsel	241.19	171	41,243.49
Megan Van den Hof, Counsel	202.24	446	90,199.04
<i>Provincial Legal Representation</i>			
Kyle Dickson-Smith, Counsel	185.00	333	61,605.00
Landy Zhao, Counsel	185.00	250	46,250.00
Paralegals			
Benjamin Tait	136.44	310	42,296.40
Nadine Robinson	136.44	202	27,560.88
Sub-Total 2019/2020		2,925	\$609,546.40

TRADE LAW BUREAU - FISCAL YEAR 2020-2021 (Statement of Defence, Request for Bifurcation, Hearing on Bifurcation, Memorial on Jurisdiction, Counter-Memorial on Jurisdiction, Reply Memorial on Jurisdiction)			
Participant	Professional Fees		
	Rate (C\$)	Hours	Total Fees (C\$)
<i>Federal Legal Representation</i>			
Adam Douglas, Senior Counsel	262.30	900	236,070.00
Krista Zeman, Counsel	244.35	900	219,915.00
Alexandra Dosman, Counsel	244.35	555	135,614.25
Mark Klaver, Counsel	244.35	516	126,084.60
Megan Van den Hof, Counsel ³	204.78	686	140,479.08

¹ The fiscal year of the Canadian federal government and Alberta’s provincial government are both April 1 to March 31. Canada’s claimed costs in this arbitration represent those incurred from May 13, 2019, the date of the filing of Westmoreland Mining Holding LLC’s Notice of Intent, to the date of this submission. This total includes time spent meeting with clients within the Governments of Canada and Alberta, assembling and reviewing documentary evidence, undertaking legal research and analysis, identifying and working with expert witnesses, drafting and reviewing written pleadings, addressing procedural matters and appearing before the Tribunal. Counsel for Canada was also assisted by paralegals.

² The cost of federal counsel’s time in this arbitration has been assessed by applying the “billable rate” used by Canada’s Department of Justice in its cost recovery process. Like its counterpart in private practice, the billable rate established by the Department of Justice is intended to capture all of the costs associated with providing legal services, including the cost of office space and equipment and administrative support. This rate varies according to the position in question, and ranges from C\$136.44/hr for paralegals to C\$277.77/hr for the most senior lawyers. The cost of provincial counsel’s time in this arbitration has similarly been assessed by applying a “billable rate” applied by Alberta’s Ministry of Justice and Solicitor General in its cost recovery processes. In all cases, the rate is below the market rate.

³ Where a participant displays two different rates, the participant’s classification level changed during the Fiscal Year, resulting in a change of applicable hourly rate.

	244.35	63	15,394.05
Provincial Legal Representation			
Kyle Dickson-Smith, Counsel	185.00	453	83,805.00
Landy Zhao, Counsel	185.00	475	87,875.00
Paralegals			
Benjamin Tait	143.38	748	107,248.24
Nadine Robinson	143.38	541	77,568.58
Sub-Total 2020/2021		5,837	\$1,230,053.80

TRADE LAW BUREAU - FISCAL YEAR 2021-2022			
(Reply Memorial on Jurisdiction, Comments on NAFTA Article 1128 Submission, Hearing on Jurisdiction)			
Participant	Professional Fees		
	Rate (C\$)	Hours	Total Fees (C\$)
Federal Legal Counsel			
Adam Douglas, Senior Counsel	264.51	342	90,462.42
Krista Zeman, Counsel	246.38	365	89,928.70
Alexandra Dosman, Counsel	246.38	329	81,059.02
Mark Klaver, Counsel	246.38	315	77,609.70
Megan Van den Hof, Counsel	246.38	254	62,580.52
Provincial Legal Counsel			
Kyle Dickson-Smith, Counsel	185.00	92	17,020.00
Peter Ciechanowski, Counsel	185.00	155	28,675.00
Paralegals			
Benjamin Tait	144.52	96	13,873.92
	154.44	197	30,424.68
Nadine Robinson ⁴	144.52	36	5,202.72
Natalie Benischek	144.52	54	7,804.08
Sub-Total 2021/2022		2,235	\$504,640.76
TOTAL COST OF LEGAL REPRESENTATION			C\$2,344,240.96

⁴ Ms. Benischek took over Ms. Robinson's responsibilities on this file following Ms. Robinson's departure from the Trade Law Bureau partway through this fiscal year.

ANNEX II - DISBURSEMENTS

Disbursement	Total (C\$)
Tribunal Advancements	\$208,396.50
Hughes Hubbard & Reed (Ms. Kathryn Coleman and Ms. Elizabeth Beitler)	\$513,593.51
Core Legal (Trial Technology & Graphic Consultants)	\$18,957.20
Noticia LLP (Document Management Consultant)	\$492,751.91
Travel Costs	\$22,307.44
Boardroom Rentals (Hearing)	\$2,762.85
TOTAL DISBURSEMENTS	C\$1,258,769.41