***Westmoreland Mining Holdings LLC v. Government of Canada***

**Overview:**

**Westmoreland Mining Holdings LLC v. Government of** **Canada** is a case filed under Chapter 11 of the North American Free Trade Agreement (NAFTA) by a US-based company which owned and operated coal mines in Alberta.

The Claimant alleged that the Province of Alberta’s **Climate Leadership Plan** (**CLP**), which sought to phase out all electricity generated from coal by 2030, reduced the lifespan of the Claimant’s mines, and treated it unfairly and in a discriminatory manner. [The Claimant sought damages of at least $470 million CAD](https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/westmoreland.aspx?lang=eng).[[1]](#footnote-1)

The Tribunal dismissed the claim in its entirety on January 31, 2022, finding that **it lacked jurisdiction** over the dispute. The Tribunal held that the Claimant did not own or control the investment at the time of the alleged breach, as required by Articles 1116 and 1117 of NAFTA.[[[2]](#footnote-2)](https://www.italaw.com/cases/7002),[[3]](#footnote-3)

**Background:**

[This case is connected to **Canada’s energy plan**, which aims to achieve **net-zero emissions by 2050** and transition to a low-carbon economy](https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan.html).[[4]](#footnote-4)

[One of the main components of Canada’s plan is the clean electricity investment tax credit, which applies to non-emitting electricity generation systems, such as wind, solar, hydro, tidal and nuclear](https://www.cbc.ca/news/politics/green-electricity-budget-2023-freeland-1.6793933).[[5]](#footnote-5) [Another component is the carbon pollution pricing system, which imposes a price on greenhouse gas emissions from various sources, including electricity generation](https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan.html).[[6]](#footnote-6)

In 2015, **Alberta announced its CLP**, which sought to phase out all electricity generated from coal **by 2030** and replace it with renewable energy sources and/or natural gas.

[The CLP also provided **transition payments** to three coal-fired generating unit owners impacted by the policy, but not to coal mine owners such as the Claimant](https://www.thecanadianencyclopedia.ca/en/article/national-energy-program).

 The Claimant argued that this policy reduced the value and lifespan of its mines and breached its rights under NAFTA.[[7]](#footnote-7)

**Claimant’s Submissions:**

According to the **Notice of Arbitration** and **Statement of Claim**, the Claimant’s main submissions were:[[8]](#footnote-8)

1. The CLP violated NAFTA Article 1102 by discriminating against the Claimant and its investment in favour of domestic coal producers and electricity generators.
2. The CLP violated NAFTA Article 1105 by failing to accord fair and equitable treatment and full protection and security to the Claimant and its investment.
3. The CLP violated NAFTA Article 1110 by expropriating the Claimant’s investment without compensation.

**Canada’s Submissions:**

According to the **Statement of Defence**, Canada’s main submissions were:[[9]](#footnote-9)

1. The Tribunal lacked jurisdiction over the dispute because the Claimant did not own or control the investment at the time of the alleged breach, as required by Articles 1116 and 1117 of NAFTA.
2. The Claimant’s allegations were unfounded and unsupported by evidence or legal authority.
3. The CLP was a legitimate and non-discriminatory measure taken by Alberta to address climate change and protect public health and the environment.

**The CLP / “Phase-Out” Strategy Components:**

Alberta’s CLP was announced in November 2015 and consisted of **four main policy pillars**:[[10]](#footnote-10)

1. Implementing a new price on greenhouse gas emissions;
2. Phasing out coal-generated electricity by 2030 and generating 30% of electricity from renewables by 2030;
3. Introducing a cap on oil sands emissions at 100 megatons per year
4. Reducing methane emissions from upstream oil and gas production by 45% by 2025 (from 2014 levels).

[The CLP was designed to diversify the province’s economy, create jobs, and reduce greenhouse gas emissions](https://open.alberta.ca/publications/alberta-s-climate-leadership-plan-progressive-climate-policy), while also providing Albertan businesses and citizens various incentives and programs to make the impending transition more manageable.[[11]](#footnote-11)

These include programs like the **Climate Leadership Adjustment Rebate**, which provides financial assistance to low- and middle-income households to help them adjust to the carbon levy, and the **Renewable Electricity Program**, which supports the development of renewable energy projects through a competitive bidding process.[[12]](#footnote-12)

Further, there are other grants and funds like the **Oil Sands Innovation Challenge**, which supports innovative technologies focused on the reduction of greenhouse gas emissions from oil sands operations or t[he **Methane Emission Reduction Program**, which provides grants to oil and gas producers to adopt emission-reducing technologies and practices](https://open.alberta.ca/publications/alberta-s-climate-leadership-plan-progressive-climate-policy).[[13]](#footnote-13)

**Tribunal’s Findings:**

The Tribunal decided that it **lacked jurisdiction** over the dispute because the **Claimant did not own or control** the investment at the time of the alleged breach, as required by Articles 1116 and 1117 of NAFTA.[[14]](#footnote-14),[[15]](#footnote-15)

The Tribunal found that the Claimant acquired its interest (the coal mines) on December 31, 2013, but that the alleged breach occurred earlier, on November 22, 2015, when Alberta announced its CLP.[[16]](#footnote-16)

The Tribunal rejected the Claimant's argument that the breach was a continuation that extended beyond the date of acquisition. The Tribunal also found that the Claimant did not control the investment at the time of the alleged breach, as it had delegated its management and operational authority to a wholly-owned subsidiary, Westmoreland Coal Company (WCC), which was also a US company.[[17]](#footnote-17)

The Tribunal noted that WCC had initially filed a NAFTA claim against Canada in 2018, but withdrew it in 2019 and assigned its rights to the Claimant.[[18]](#footnote-18)

The Tribunal held that this assignment was ineffective and did not confer jurisdiction on the Tribunal, concluding that the Claimant failed to meet the temporal and substantive requirements for bringing a claim under NAFTA – dismissing the claim in its entirety.[[19]](#footnote-19)

1. [*Westmoreland Mining Holdings LLC v. Government of Canada* (international.gc.ca)](https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/westmoreland.aspx?lang=eng) [↑](#footnote-ref-1)
2. <https://www.italaw.com/cases/7002> [↑](#footnote-ref-2)
3. <https://www.iisd.org/itn/en/2022/07/04/nafta-tribunal-in-westmoreland-v-canada-declines-jurisdiction-finding-that-the-claimant-did-not-own-or-control-the-investment-at-the-time-of-the-alleged-breach/> [↑](#footnote-ref-3)
4. Canada’s Energy Plan: <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan.html> [↑](#footnote-ref-4)
5. <https://www.cbc.ca/news/politics/green-electricity-budget-2023-freeland-1.6793933> [↑](#footnote-ref-5)
6. Canada’s Energy Plan: <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan.html> [↑](#footnote-ref-6)
7. *Westmoreland Mining Holdings LLC v. Government of Canada* [↑](#footnote-ref-7)
8. *Westmoreland Mining Holdings LLC v. Government of Canada*, Notice of Arbitration and Statement of Claim (2019) [↑](#footnote-ref-8)
9. *Westmoreland Mining Holdings LLC v. Government of Canada*, Canada’s Statement of Defense (2020) [↑](#footnote-ref-9)
10. <https://www.iea.org/policies/8583-alberta-climate-leadership-plan> [↑](#footnote-ref-10)
11. <https://open.alberta.ca/publications/alberta-s-climate-leadership-plan-progressive-climate-policy> [↑](#footnote-ref-11)
12. <https://open.alberta.ca/publications/climate-leadership-plan-program-and-policy-highlights> [↑](#footnote-ref-12)
13. <https://open.alberta.ca/dataset/da6433da-69b7-4d15-9123-01f76004f574/resource/b42b1f43-7b9d-483d-aa2a-6f9b4290d81e/download/clp_implementation_plan-jun07.pdf> [↑](#footnote-ref-13)
14. <https://academic.oup.com/icsidreview/article/38/1/140/6749027> [↑](#footnote-ref-14)
15. *Westmoreland Mining Holdings LLC v. Government of Canada* [↑](#footnote-ref-15)
16. <https://academic.oup.com/icsidreview/article/38/1/140/6749027> [↑](#footnote-ref-16)
17. <https://academic.oup.com/icsidreview/article/38/1/140/6749027> [↑](#footnote-ref-17)
18. *Westmoreland Mining Holdings LLC v. Government of Canada* [↑](#footnote-ref-18)
19. *Westmoreland Mining Holdings LLC v. Government of Canada* [↑](#footnote-ref-19)