

**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

(Case No. UNCT/20/3)

CONFIDENTIALITY ORDER

ARBITRAL TRIBUNAL

Mrs. Juliet Blanch (Presiding Arbitrator)

Mr. James Hosking

Professor Zachary Douglas

22 April 2020

Confidentiality Order

DEFINITIONS

1. For the purposes of this Confidentiality Order:

- a. "Disputing Party" means either Westmoreland Mining Holdings LLC or the Government of Canada;
- b. "Confidential Information" means information that is not publicly available and is designated by a Disputing Party as confidential on the grounds that it is:
 - i. Business Confidential Information of a Disputing Party or of a provincial, territorial or municipal government;
 - ii. Business Confidential Information relating to a third party;
 - iii. information otherwise protected from disclosure under the applicable domestic law of the disputing State party including, but not limited to, and as amended, Canada's *Access to Information Act*, the *Canada Evidence Act*, Canada's *Privacy Act*, and Alberta's *Freedom of Information and Protection of Privacy Act*; or
 - iv. information that is deemed to be financial, commercial, scientific or technical information supplied by third parties that has been treated in a confidential manner by those third parties;
- c. "Business Confidential Information" includes:
 - i. trade secrets;
 - ii. financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the Disputing Party, provincial, territorial or municipal government or third party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
 - iii. information the disclosure of which could result in material financial loss or gain to the Disputing Party, provincial, territorial or municipal government or third party to which it relates;
 - iv. information the disclosure of which could interfere with contractual or other negotiations of the Disputing Party, provincial, territorial or municipal government or third party to which it relates; or
 - v. other communications treated as confidential in furtherance of settlement between the Disputing Parties.
- d. "Restricted Access Information" means Confidential Information within the meaning of paragraph 1(b) that is designated by a Disputing Party as restricted access on the grounds that:
 - i. the disclosure of this information to the other Disputing Party could result in a serious material gain or loss which could potentially prejudice the competitive position of the Disputing Party, provincial, territorial or municipal government or third party to whom that information relates; or

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- ii. the information is highly sensitive Business Confidential Information that belongs or relates to a Disputing Party, provincial, territorial or municipal government or third party.
- e. "Written Submission" includes a brief, memorial, witness statement, exhibit or expert report.
- f. "Public Document" means a Written Submission, transcript, order or award that contains no Restricted Access Information or Confidential Information and no redactions of such information.
- g. "Public Version" means the version of a Written Submission, transcript, order or award that has been redacted to remove all Restricted Access Information and Confidential Information.
- h. "Restricted Access Version" means the version of a Written Submission, transcript, order or award that contains Restricted Access Information and Confidential Information that has not been redacted.
- i. "Confidential Version" means the version of a Written Submission, transcript, order or award that contains Confidential Information that has not been redacted and contains no Restricted Access Information or has been redacted to remove all Restricted Access Information.
- j. "Registry" means the International Centre for the Settlement of Investment Disputes (ICSID), the administering authority for the case as set out in section 4 of Procedural Order No. 1.

OBJECTIVE/PURPOSE

- 2. The Disputing Parties agree to respect and maintain the confidentiality of information exchanged in this arbitration in accordance with the terms of this Confidentiality Order.
- 3. A Disputing Party may designate Confidential or Restricted Access Information contained in any document that the Disputing Party produces to the other Disputing Party, and in any Written Submission, transcript, order or award. These designations shall be made in accordance with the procedures set out in this Confidentiality Order.
- 4. A Disputing Party shall not designate as Restricted Access Information any information belonging to the other Disputing Party which that Disputing Party has not also designated as Restricted Access Information.

DOCUMENTS EXCHANGED IN DOCUMENT PRODUCTION

- 5. A document produced by a Disputing Party to the other Disputing Party shall be protected from disclosure as though it contained Confidential Information in its entirety, except that (a) should the document be filed by one of the Disputing Parties as part of a Written Submission, the Disputing Parties must follow the process for designating Confidential Information as set out in this Confidentiality Order; and (b) any produced documents that are already publicly available need not be treated as Confidential Information protected from disclosure.

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6. If a Disputing Party contends that a document that it produces to the other Disputing Party contains Restricted Access Information, the Disputing Party shall provide its proposed designations of Restricted Access Information by clearly labelling each page of the document as "Restricted Access" at the time that it produces the document. A document produced by a Disputing Party to the other Disputing Party containing such proposed designations shall be deemed to constitute Restricted Access Information in its entirety unless an objection is filed under paragraph 7 or the document is filed by one of the Disputing Parties as part of a Written Submission, in which case the Disputing Parties shall follow the process for designating Restricted Access Information as set out in this Confidentiality Order. A Disputing Party's designation of Restricted Access Information in a document shall be presumed valid until such time as a final designation is determined through the resolution of any objection or the completion of the process for designating Restricted Access Information in a Written Submission.
7. A Disputing Party may object to a proposed designation of Restricted Access Information in a document that it obtains through the other Disputing Party's document production. If such an objection is made, the Disputing Parties shall attempt to agree within fourteen (14) calendar days from the date of the objection on the final designations of Restricted Access Information in the document. If the Disputing Parties do not agree on the final designations of Restricted Access Information, a Disputing Party may submit the objection to the Tribunal for resolution. The Tribunal may invite further submissions on proposed designations of Restricted Access Information in documents exchanged during document production.

WRITTEN SUBMISSIONS

8. If a written submission does contain Confidential or Restricted Access Information, the submitting Party shall so notify the other Party and the Registry at the time of filing. The submitting Party shall specify whether the submission contains Confidential Information, Restricted Access Information, or both. If a written submission does not contain any Confidential or Restricted Access Information, it shall be filed as a Public Document. Information that Canada has designated as Confidential Information shall be highlighted in light blue and as Restricted Access Information shall be highlighted in light green. Information that the Claimant has designated as Confidential Information shall be highlighted in yellow and as Restricted Access Information shall be highlighted in light purple. Additionally, single brackets ([]) may be used to surround designated Confidential Information and double brackets { [[]] } may be used to surround designated Restricted Access Information.
9. Within seven (7) calendar days of the delivery of its submissions, exhibits and legal authorities under paragraph 9.3 of Procedural Order No. 1, the party filing the Written Submission (the "Filing Party") shall provide to the other Disputing Party (the "Receiving Party") its proposed designations, if any, of Confidential and Restricted Access Information in the Written Submission. Within seven (7) calendar days of receipt of these designations, the Receiving Party shall provide to the Filing Party its proposed designations, if any, of Confidential and Restricted Access Information in the Written Submission. The designations made by any Disputing Party under this paragraph are without prejudice to their ability to challenge those designations in accordance with paragraphs 10 and 11 of this Order.

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10. A Disputing Party shall have seven (7) calendar days from the date the Receiving Party provides its designations, or confirmation that it has no designations, under paragraph 9 to object to any proposed designations of Confidential or Restricted Access Information.
11. If such objections are provided, the Disputing Parties shall attempt to agree on the final designations of Confidential and Restricted Access Information in the Written Submission within seven (7) calendar days of the receipt of the objections. If the Disputing Parties do not agree on the final designations of Confidential or Restricted Access Information, a Disputing Party may submit any outstanding objections to the Tribunal for resolution within seven (7) calendar days. The Tribunal may invite further submissions on proposed designations of Confidential or Restricted Access Information.
12. If a Disputing Party does not object to the designation of Confidential or Restricted Access Information pursuant to paragraph 10, the Disputing Party is deemed to have accepted the designation.
13. Within ten (10) calendar days from the date on which the final designations of Confidential and Restricted Access Information have been confirmed by agreement of the Disputing Parties, by the failure of a Disputing Party to make or object to any designation, or by order of the Tribunal, the Disputing Party that originally filed the Written Submission shall file in accordance with paragraph 15.3 of Procedural Order No. 1:
 - a. a final Restricted Access Version of the Written Submission reflecting the final designations of Restricted Access and Confidential Information, but only insofar as any such designations have been made;
 - b. a final Confidential Version of the Written Submission reflecting the final designations of Confidential Information but with all Restricted Access Information redacted, but only insofar as any such designations have been made; and
 - c. a final Public Version of the Written Submission, with all Confidential and Restricted Access Information redacted.
14. Each page of a Restricted Access Version must be labeled "Restricted Access, Unauthorized Disclosure Prohibited". Each page of a Confidential Version must be labeled, "Confidential Information, Unauthorized Disclosure Prohibited." Each page of a Public Version must be labeled "Public Version." Public Documents shall be labeled "Public Document" on the first page of the document.
15. Where whole documents or multiple pages of Restricted Access Versions or Confidential Versions have been redacted entirely, such pages need not be reproduced in redacted form in the Public Version. Instead, a summary page stating the number of pages that have been redacted in their entirety will suffice.

TRANSCRIPTS, ORDERS, AWARDS

16. The Disputing Parties shall have fourteen (14) calendar days from the receipt of a transcript, order, or award to designate information as Confidential or Restricted Access Information in the transcript or order and to exchange such designations. The Disputing Parties shall have an additional fourteen

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(14) calendar days from the receipt of such designations to raise any objections to the other Disputing Party's designations. At the conclusion of that period, if the Disputing Parties are unable within fourteen (14) calendar days to agree on any designations of Confidential or Restricted Access Information, a Disputing Party may submit the issues to the Tribunal for resolution.

17. Within ten (10) calendar days after any objections to proposed designations of Confidential or Restricted Access Information have been resolved by agreement of the Disputing Parties or by order of the Tribunal, the Disputing Parties shall consolidate their final designations and file in accordance with paragraph 15.3 of Procedural Order No. 1, as appropriate, a final Restricted Access Version, Confidential Version, and Public Version of the transcript, order or award.

TREATMENT OF RESTRICTED ACCESS AND CONFIDENTIAL INFORMATION

18. Until the elapse of any period for a Disputing Party to provide the other Disputing Party with its proposed designations of Restricted Access Information or Confidential Information, or such earlier time should the Disputing Parties communicate in writing that they have no proposed designations or requests for changes of bracketed information, a Written Submission (including exhibits), transcript, order or award, shall be deemed to be entirely designated as Restricted Access, unless it contains no Restricted Access Information, at which time it will be deemed entirely Confidential. Thereafter, until the final designations of Restricted Access Information and Confidential Information have been agreed by the Disputing Parties, or determined by the Tribunal, each Disputing Party's proposed designations of Restricted Access Information and Confidential Information shall be presumed valid. For greater certainty, the Disputing Parties and the Tribunal shall not disclose the Written Submission (including exhibits), transcript, order or award to any person not authorized to receive Restricted Access Information or Confidential Information under the terms of this Confidentiality Order until any Restricted Access Information or Confidential Information has been designated in accordance with the terms of this Confidentiality Order.
19. The time periods set out in this Confidentiality Order may be amended by agreement of the Disputing Parties, or by order of the Tribunal after hearing the Disputing Parties and taking into account all relevant circumstances.
20. Except with the prior written consent of the Disputing Party that claimed confidentiality with respect to the information, and, in the case of materials from provincial, territorial or municipal governments or third parties, the owner of such Confidential Information, Confidential Information may be used only in these proceedings and may be disclosed only for such purposes to and among:
 - a. Members of the Tribunal (and their assistants, if any) and officials of the International Centre for Settlement of Investment Disputes (the "Registry") to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;
 - b. counsel to a Disputing Party (and their support staff) or counsel to provincial, territorial or municipal governments whose involvement in the preparation or conduct of these proceedings is reasonably considered by a Disputing Party to be necessary in connection with preparation of the Disputing Party's case;
 - c. officials or employees of the Disputing Parties or of provincial, territorial, or municipal governments to whom disclosure is reasonably considered by the Disputing Party to be necessary in connection with preparation of the Disputing Party's case;

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- d. independent experts or consultants retained or consulted by the Disputing Parties or by provincial, territorial, or municipal governments in connection with these proceedings;
 - e. witnesses, who in good faith are reasonably expected by a Disputing Party to offer evidence in these proceedings but only to the extent material to their expected testimony; or
 - f. court reporters and other hearing support staff.
21. Except with the prior written consent of the Disputing Party that claimed confidentiality with respect to the information, and, in the case of materials from provincial, territorial or municipal governments or third parties, the owner of such Restricted Access Information, Restricted Access Information may be used only in these proceedings and may be disclosed only to and among the following people, where their access to the information is necessary for the preparation of the conduct of the case:
- a. Members of the Tribunal (and their assistants, if any) and officials of the Registry to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;
 - b. Counsel to a Disputing Party (and their support staff) and counsel to provincial, territorial or municipal governments. Counsel to a Disputing Party that is also an employee or officer of a Disputing Party (*i.e.*, “in-house counsel”) and counsel to provincial, territorial, or municipal governments shall be entitled to Restricted Access Material provided they confirm that they are a member in good standing of a North American bar;
 - c. independent experts or consultants retained or consulted by the Disputing Parties; or
 - d. court reporters and other hearing support staff.
22. No Disputing Party shall file any confidential material covered by the terms of this Confidentiality Order in any Court without first bringing this Confidentiality Order to the attention of the Court and seeking directions concerning the filing of such material in a manner that protects its confidentiality. A Disputing Party shall notify the other Disputing Party and any affected parties prior to requesting such direction from the Court.
23. Inadvertent or improper disclosure of Confidential or Restricted Access Information, as set forth in the present Order, does not constitute a waiver of the designation of the information as Confidential or Restricted Access.
24. All persons receiving Confidential Information or Restricted Access Information shall be bound by this Confidentiality Order. Each Disputing Party shall have the obligation of notifying all persons receiving Confidential Information or Restricted Access Information of the obligations under this Confidentiality Order and to ensure that such persons receiving Confidential Information pursuant to paragraphs 20(d) or (e) or Restricted Access Information pursuant to paragraph 21(c); execute a Confidentiality Undertaking in the form attached as Appendix A, or a Restricted Access Information Confidentiality Undertaking in the form attached as Appendix B, as appropriate, before gaining access to any such information. Each Disputing Party shall maintain copies of Confidentiality Undertakings under Appendix A and shall make such copies available to the other Disputing Party upon order of the Tribunal or upon the termination of this arbitration. Each Disputing Party shall maintain copies of Restricted Access Information Confidentiality Undertakings.

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25. Where Confidential Information or Restricted Access Information is used or discussed at any hearing, the following rules shall apply:
 - a. the Tribunal shall restrict access to that portion of the hearing only to: (i) authorized persons in accordance with the terms of this Order; and (ii) originators of the Confidential or Restricted Access Information; and
 - b. transcripts of those portions of the hearing in which Confidential Information and Restricted Access Information is used or discussed shall not be made public.
26. Notwithstanding any other provision in this Confidentiality Order, any request for documents (other than those made in this arbitration), or for the production of documents under the applicable domestic law of the disputing State party, including documents produced to Canada in these proceedings, shall be wholly governed by the relevant federal or provincial legislation.
27. In light of the Note of Interpretation of the NAFTA Free Trade Commission issued July 31, 2001, a Disputing Party shall be free to disclose to the public Public Documents and the redacted, Public Versions of: (a) Written Submissions of the Disputing Parties; (b) decisions of the Tribunal; (c) correspondence to or from the Tribunal; (d) transcripts of hearings; and (e) procedural rulings and orders, and awards.
28. Notwithstanding any other provision in this Confidentiality Order, the Disputing Parties may make such disclosure of documents or information as is required by law.
29. In accordance with Articles 1127, 1128 and 1129 of the NAFTA, non-disputing NAFTA Parties may attend the oral hearings, and may have access to transcripts, orders, awards and Written Submissions.
30. Nothing in this Confidentiality Order shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information under or on the basis of: (a) national or provincial legislation; (b) a privilege; or (c) other grounds for exemption or non-disclosure.
31. One (1) unredacted copy of transcripts, orders, awards and Written Submissions, including those designated as Restricted Access and Confidential Information under this Order, may be retained by the Disputing Parties' legal counsel and legal counsel to provincial, territorial or municipal governments identified in paragraph 21(b). Counsel to the Claimant who are also officials or employees of the Claimant shall retain only a Public Version of the record. Any other documentation which has not been designated as a Public Document or Public Version must be returned to the respective Disputing Party or otherwise destroyed within thirty (30) calendar days following the later of: the conclusion of any set aside proceedings; the time to request set aside proceedings under Article 1136 of the NAFTA has expired; or the full compliance of a Disputing Party with the Tribunal's Final Award. When a Disputing Party destroys documentation, the Disputing Party shall provide a written certification of destruction of the documents to the other Disputing Party.
32. The obligations created by this Order shall survive the termination of these proceedings.
33. This Confidentiality Order shall be effective and binding upon a Disputing Party upon the signature of the Confidentiality Order by the Tribunal.

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34. A Disputing Party may apply for an amendment to, or a derogation from, this order if compelling circumstances so require.

Date: 22 April 2020

For the Tribunal

Mrs. Juliet Blanch
Presiding Arbitrator

Signed by both Disputing Parties in acknowledgement of the obligation to abide by this Confidentiality Order:

For the Government of Canada

Mr. Adam Douglas, Counsel
Ms. Krista Zeman, Counsel
Mr. Mark Klaver, Counsel
Ms. Alexandra Dosman, Counsel
Ms. Megan Van den Hof, Counsel
Mr. Benjamin Tait, Paralegal
Ms. Nadine Robinson, Paralegal
Trade Law Bureau (JLT)
Global Affairs Canada
125 Sussex Drive
Ottawa, Ontario KIA OG2
Canada

For Westmoreland Mining Holdings, LLC

Mr. Elliot J. Feldman
Mr. Michael S. Snarr
Baker Hostetler LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
United States of America

APPENDIX A

CONFIDENTIALITY UNDERTAKING

TO: The Government of Canada (and its legal counsel) and Westmoreland Mining Holdings, LLC (and its legal counsel).

FROM: _____

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Westmoreland Mining Holdings LLC. and the Government of Canada, over which claims for confidentiality have been advanced ("Confidential Information"), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person who has not signed a Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the Confidentiality Order that has been agreed to by the Disputing Parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
3. I will promptly return or otherwise destroy any Confidential Information received by me to the Disputing Party that provided me with such materials or the information recorded in those materials, at the conclusion of my involvement in these proceedings.
4. I acknowledge and agree that either of the Disputing Parties to this arbitration is entitled to relief to restrain breaches of this Confidentiality Order, to enforce the terms and provisions hereof in addition to any other remedy to which any Disputing Party to this arbitration may be entitled at law or in equity.
5. I agree to submit to the jurisdiction of the courts:
 - a. For residents of Canada in the Province of Ontario; or
 - b. For residents of the United States of America in the District of Columbia; or
 - c. For residents of another jurisdiction, at their choice [check one box]:
 - In the Province of Ontario
 - In the District of Columbia

SIGNED, SEALED AND DELIVERED before a witness this __ day of _____, 20__.

(Print Name)

(Print Witness Name)

(Signature)

(Witness Signature)

APPENDIX B

RESTRICTED ACCESS INFORMATION CONFIDENTIALITY UNDERTAKING

TO: The Government of Canada (and its legal counsel) and Westmoreland Mining Holdings, LLC (and its legal counsel).

FROM: _____

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Westmoreland Mining Holdings LLC. and the Government of Canada, over which claims for confidentiality have been advanced ("Confidential Information") and for which access has been restricted ("Restricted Access Information"), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person who has not signed a Restricted Access Information Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the Confidentiality Order that has been agreed to by the Disputing Parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
3. I will promptly return or otherwise destroy any Restricted Access Information and Confidential Information received by me to the Disputing Party that provided me with such materials or the information recorded in those materials, at the conclusion of my involvement in these proceedings.
4. I acknowledge and agree that either of the Disputing Parties to this arbitration is entitled to relief to restrain breaches of this Confidentiality Order, to enforce the terms and provisions hereof in addition to any other remedy to which any Disputing Party to this arbitration may be entitled at law or in equity.
5. I agree to submit to the jurisdiction of the courts:
 - a. For residents of Canada in the Province of Ontario; or
 - b. For residents of the United States of America in the District of Columbia; or
 - c. For residents of another jurisdiction, at their choice [check one box]:
 - In the Province of Ontario
 - In the District of Columbia

SIGNED, SEALED AND DELIVERED before a witness this __ day of _____, 20__.

(Print Name)

(Print Witness Name)

(Signature)

(Witness Signature)