

1950

\*May 15, 16

\*Oct. 3

LETHBRIDGE COLLIERIES LTD.  
(*Suppliant*) .....

}

APPELLANT;

AND

HIS MAJESTY THE KING  
(*Respondent*) .....

}

RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Contract—Crown—Coal Subsidy—Emergency Coal Production Board—  
Whether notice to producers an offer—acceptable by performance—  
Regulations having force of law—Whether powers conferred upon  
Board exercised.*

The Emergency Coal Production Board, in view of the national emergency existing in respect of the production of coal, was under the authority of the *War Measures Act*, created by Order-in-Council P.C. 10674, November 23, 1942. The Board, under the direction of the Minister, was authorized to take measures necessary to maintain and stimulate

\*PRESENT: Rinfret C.J., and Rand, Locke, Cartwright and Fauteux JJ.

the production of Canadian coal, among others, the rendering of financial assistance to such mines as it deemed proper to ensure their maximum or more efficient operation provided that in no case should it render such assistance where the net profits exceeded standard profits within the meaning of the *Excess Profits Tax Act*.

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Prior to April 1, 1944, the Board restricted payment of subsidies to mines being operated at a loss to an amount which in its opinion would permit a profit of 15 cents a ton. Then because of the increased wages and the cost of living bonus the operators had been called upon to pay, it by Circular Letter "C.C. 152" notified operators in the domestic fields of Alberta that it had approved payment of a flat production subsidy conditioned on an operator satisfying the Board that it was unable to absorb the increased costs and submitting specified data in support of its claim. The maximum subsidy for the Lethbridge area it fixed at 35 cents per ton and reserved to itself determination of the rate of subsidy to be advanced in each case.

The appellant claimed payment on the basis of 35 cents per ton instead of at the rate of 12 cents and 16 cents paid by the Board.

*Held:* the claim that the Board's Circular Letter C.C. 152 and the minutes of its meeting of April 18, 1944, constituted an offer to pay a subsidy of 35 cents per ton which appellant by extending its operations and increasing production accepted fails because the documents relied on do not constitute an offer in such terms.

*Held,* also that the evidence did not establish an intention on the part of the Board to make an offer which could be accepted by performance.

*Held,* that as to the plea the appellant had established its claim by reason of its compliance with regulations having the force of law—P.C. 10674 had the force of law, but there was nothing in it, standing by itself, upon which the appellant's claim could be founded. Assuming, without deciding, that it empowered the Board to pass a general order of the nature contended, nothing in the record indicated that the Board had attempted to exercise such power.

APPEAL from a judgment of the Exchequer Court (1), dismissing a claim for the payment of additional subsidies on coal produced by it.

*G. H. Steer K.C.* and *James McCaig K.C.* for the appellant.

*H. W. Riley K.C.* and *K. E. Eaton* for the respondent.

The judgment of the Court was delivered by:

CARTWRIGHT J.:—This is an appeal from the judgment of the late Mr. Justice O'Connor dismissing the claim of the appellant for additional subsidies on coal produced by it between April 1, 1944 and March 31, 1946.

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From April 1, 1944 to March 31, 1945 the appellant was paid a subsidy of 12 cents per net ton of marketable coal produced by it and from April 1, 1945 to March 31, 1946 a subsidy of 16 cents per ton. An additional 17½ cents per ton was claimed for the first of these periods and an additional 19 cents for the second.

The appellant's claim is put forward on two alternative grounds. The first is that by contract between the Suppliant and His Majesty, represented by the Emergency Coal Production Board, (hereinafter referred to as the Board) the Suppliant is entitled to the payments claimed. The alternative ground is that by virtue of the Order-in-Council creating the Board and certain actions of the Board taken thereunder the Suppliant has a statutory right to be paid the amounts claimed.

Under the authority of the *War Measures Act*, Order-in-Council P.C. 10674 dated November 23, 1942 was passed. This Order recites the existence of a national emergency in respect of the production of coal and the necessity of stimulating production. It creates the Board and provides *inter alia*:

3. (1) The Board shall be responsible, under the direction of the Minister, for taking all such measures as are necessary or expedient for maintaining and stimulating the production of Canadian Coal and for ensuring an adequate and continuous supply thereof for all essential purposes and without restricting the generality of the foregoing, the Board shall have the power and duty, under the direction of the Minister, of  
 \* \* \*

(e) rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine; provided that the Board shall not render or procure any financial assistance, except capital assistance, in any case where the net profits of operation exceed standard profits within the meaning of the Excise Profits Tax Act.

(m) doing such acts and things as are ancillary or incidental to exercise or discharge of any of the foregoing powers or duties.

4. (2) The Board may hold its meetings and conduct its business and proceedings in such manner as the Board may from time to time determine.

(4) The Board may exercise its powers and duties by order.

10. The Board shall report to the Minister as and when required to do so by the Minister, shall keep the Minister advised of the principles it is following in exercising the powers and duties conferred or imposed upon it by this order and shall refrain from doing all such things as the Minister may, in writing, from time to time direct.

Section 7 provides that any person who contravenes or fails to observe any order shall be guilty of an offence and liable to fine or imprisonment.

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Section 1(d) defines order as follows:

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"Order" means and includes any general or specific order, requirement, instruction, prescription, prohibition, restriction or limitation made or issued in writing by or on behalf of or under authority of the Board in pursuance of any power conferred by or under this order.

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By other clauses of section 3, very wide powers are given to the Board including power to cause mines to be opened and operated, to prohibit the operation of mines where production is insufficient to justify the employment of the labour and equipment involved, to direct methods of operation, to suspend laws as to conditions of employment and to take possession of coal, lands, buildings and other property.

Prior to the 1st of April, 1944, the Board pursued a policy as to the payment of subsidies, referred to in the argument before us as "The form F4 Policy" under which payment of subsidy was restricted to mines which were being operated at a loss and the subsidy consisted of such amount as, in the opinion of the Board, would permit such mines to make a profit of 15 cents per ton.

In the last quarter of 1943 an increase in the wages payable to coal miners had been authorized and the cost-of-living bonus, which had theretofore been paid by the Government, had been added to the wages payable by the operators. To compensate the operators for these increased labour costs an increase in the price of coal had been authorized, but it appears to have been the view of the Board that in some cases this increase in price would not amount to a sufficient compensation.

It appears that by March 1944, in the area in which the Suppliant operated, the coal fields were in surplus production and the Board decided upon a new policy which was set out in a Minute No. 2A made at a meeting of the Board on March 23, 1944 which reads as follows:

**Minute No. 2(a): Proposed New Form of Subsidy  
Western Domestic Fields.**

The Chairman advised that since the last meeting considerable work had been done to determine a fair basis of subsidy to cover the increased costs incurred by operators over which they had no control due to wage

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increases and absorption of the cost of living bonus in the basic wage rate. Independent calculations by different methods resulted in the following tentative basis of subsidy:

- (i) Approved coal mine operators in the fields indicated to be entitled to a maximum production subsidy as follows:

District	Subsidy per Net Ton of Marketable Coal Produced
Edmonton .....	65c
Drumheller .....	30c
Camrose (Shaft only) .....	30c
Lethbridge .....	35c
Coalspur (Shaft only) .....	35c
Saunders .....	35c
Saskatchewan Field (Shaft only) .....	15c

- (ii) Alternatively, subsidy may be computed based on the average subsidy approved for payment on Form F-4A for the months of October, November and December, 1943, plus the uncompensated proportion of Cost of Living Bonus.

Subsidy payable to be whichever is the less of (i) and (ii).

In discussion, it was agreed that this scheme should have the effect of keeping efficient mines in operation and should encourage less efficient operations to reduce costs sufficiently to enable them to maintain operations at the flat rates of subsidy set.

The members approved putting the scheme into force for the fiscal year April 1, 1944, to March 31, 1945, operators to be required to submit cost returns on a similar basis to form F-4A on a quarterly basis and rates of subsidy to be subject to review at the end of every three months.

Subsidy may be reduced if upon review the profit is greater than that allowed under the company's Standard Profits.

This Minute was not communicated to the Suppliant, and the Suppliant did not know of its existence until the examination for discovery of an officer of the Respondent in February 1947.

The appellant had not been in receipt of any subsidy under the Form F-4 policy and had not made any application for subsidy prior to April 1944. On April 8, 1944 the appellant addressed a letter to the Coal Controller, who was chairman of the Board, reading as follows:

Will you please give us all information on the payment of the recently announced coal subsidy to be paid to coal operators. It is our understanding that a subsidy of 35 cents per ton will be paid on Lethbridge coal but no doubt there will be some governing factors that we wish to acquaint ourselves with so that our monthly statements can be kept in line. An early reply will be much appreciated.

In reply to this the appellant received a telegram dated April 12, 1944 saying "(Reference your letter April eighth) Re. Production subsidy, the following letter being air-

mailed to-day to Coal mine operators in the Domestic Fields of Alberta" \* \* \* the telegram then quoted in full the following letter C.C. 152 which was in due course received by the appellant.

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C.C. 152

When Replying  
Refer to File.....

CANADA  
EMERGENCY COAL PRODUCTION BOARD

Ottawa, Ontario,  
April 11, 1944.

Via Air Mail

To Coal Mine Operators in the Domestic Fields of Alberta  
Gentlemen,

Re: Production Subsidy

The Board has approved payment of a flat rate production subsidy as from April 1, 1944, on coal production of approved operators in the "domestic" fields of Alberta, such subsidy being based upon wage increases authorized by Government and not compensated by authorized price increases, plus the previously compensated portion of the cost of living bonus now incorporated in the wage scale. The subsidy is payable as an amount per net ton of coal production.

The conditions under which the subsidy will be provided are as follows:

1. An operator to be eligible for subsidy must show, to the satisfaction of the Board, that he is unable to absorb the wage increases and cost of living bonus referred to above. Operators who, on March 31, 1944, were in receipt of subsidy in accordance with Form F-4A need not make fresh submissions other than a direct application to be placed on the new basis of subsidy.

2. Operators applying for subsidy for the first time must submit such data as is available in support of the claim, including a recent audited financial statement, and statement of costs. (This will not be necessary if already filed with the Board or the Coal Controller.)

3. Operators approved for this subsidy will be required to submit, in duplicate, monthly, a sworn statement showing the net tons (of 2,000 lbs.) of marketable coal produced from their mining operation for the period. This may include coal used under colliery boilers and employee's coal. Coal purchased for resale must not be included in such claims, except as provided in (4). In addition, operators under subsidy will be required to submit, for information, a quarterly statement of costs and revenues on a form which will be supplied later.

Claims must be submitted not later than the 15th of the following month.

4. Operators may include tonnages of coal produced by others under contract from leases owned by the operator. Operators will be held responsible for notifying any such contractors that they (the operators) are claiming subsidy on such production. The Board will not entertain claims for subsidy from the contractors, who must look to the operator for any recompense.

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5. Subsidy will be discontinued if it is found that it is being employed to enable the operator to cut prices below those which have been established as fair and reasonable for the grade of coal produced.

6. No subsidy will be paid until the operator has supplied supporting data in a form satisfactory to the Board, and has been approved for subsidy.

7. In the case of those operators who were in receipt of subsidy in accordance with Form F-4A during the last three months of the calendar year 1943, the subsidy applicable as from April 1, 1944, will be the lesser of items (i) and (ii) hereunder:

(i) A maximum flat rate subsidy applicable to underground mines only, as follows:

Area	Subsidy Per Net Ton of Marketable Coal Produced
Edmonton .....	65 cents
Drumheller .....	30 "
Camrose .....	30 "
Lethbridge .....	35 "
Coalspur .....	35 "
Saunders .....	35 "

Operators in districts not mentioned above will take the rate of subsidy applicable to the area mentioned with which they are most closely related by reason of operating conditions, grade of coal and market areas served, or

(ii) The average of subsidy approved (after adjustments) for payment, per net ton of marketable coal produced, under Form F-4A for October, November and December, 1943, plus the previously compensated portion of the cost of living bonus now incorporated in the wage scale. The Board will determine the rate of subsidy to be advanced.

Approved operators not on F-4A subsidy during the last quarter of 1943 will receive subsidy at the rates indicated in subsection (i) or such lesser rate as the Board may determine.

8. The Board further directs that in no case will subsidy be provided which will result in net profits of operation exceeding Standard Profits within the meaning of the Excess Profits Tax Act, consequently all interim payments of subsidy will be considered as accountable advances subject to final adjustments after receipt and consideration of the operator's audited financial statement for his full financial year.

9. The new flat rate subsidy will replace any subsidies paid prior to April 1, 1944.

Yours very truly,  
E. J. Brunning,  
Chairman

On April 13, 1944, a copy of C.C. 152 was sent by the Chairman of the Board to the Minister, together with a memorandum dated April 13, 1944. These were stated to be for the information of the Minister in anticipation of a meeting to be held on the following Monday, at which

the Alberta Coal Committee was to present a brief to members of the Cabinet. The last mentioned memorandum reads as follows:

DEPARTMENT OF MUNITIONS AND SUPPLY  
OTTAWA, CANADA

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Memorandum re Production Subsidies

The reasons for withdrawing the previous type of subsidy, reported on Form F-4, are as follows:

- (1) The Western domestic coal fields are now in surplus production. In other words, the coal emergency no longer exists in these areas.
- (2) To continue paying to operators all their losses, plus fifteen cents a ton profit, would result in keeping the high cost mines in operation, thus depriving the efficient low cost mines of sales, which in turn would result in bringing these mines down to a loss position, as there is insufficient demand for coal to keep all mines operating steadily throughout the year. In other words, to continue this form of subsidy would be subsidizing inefficiency.
- (3) An analysis of the profit or loss position of the individual mines in the domestic field show that they range from a profit of nearly one dollar per ton to a loss position requiring Government assistance amounting to \$2.50 per ton.
- (4) Great difficulty has been experienced in administering F-4 form of subsidy due to the continual controversy with operators on questions of fair and reasonable depreciation, depletion and the inclusion of excessive future development costs in current cost of production.
- (5) The payment of losses plus a profit to operators provides no incentive to either the owners or to labour to reduce costs.

The new flat rate subsidy plan obviates the above weaknesses by

- (i) Placing each operator in the same relatively competitive position as existed prior to the payment of production subsidies. This has been accomplished by basing the flat rate subsidy on the amount of assistance required per ton of coal produced to reimburse the operator for the increases in labour rates brought about by direction of the War Labour Board, also an item to offset the increase of cost due to the operator being required to absorb the cost-of-living bonus as of February 15, 1944. This bonus was previously paid by The Government.
- (ii) As the flat rate subsidy is calculated on the average tons per man day produced in the respective fields, it will be necessary for excessively high cost producers either to reduce their cost or close down.
- (iii) The new subsidy should provide the necessary incentive to operators to reduce costs as they can retain all profits that accrued from the operation including the subsidy up to an amount not exceeding standard profits within the meaning of the Excess Profits Tax Act.

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It appears that at the meeting with the members of the Cabinet a further meeting was arranged which was held in the office of the Coal Controller at Ottawa on the following day, April 18, 1944, between representatives of the Alberta Coal Committee and the Coal Controller. The Alberta Coal Committee represented the United Mine-workers of Alberta and the coal operators of Alberta, including the appellant.

The Minutes of this meeting, which are very lengthy, were filed as Exhibit 6 at the trial. A copy of the memorandum of April 13, 1944, quoted above, was read to the meeting and was copied in full into the minutes. A copy of these minutes was shortly thereafter sent to the appellant. In July 1944 the appellant made application for subsidy supported by statements of its operations during the last three months of 1943, and in the minutes of a meeting of the Board held on July 27, 1944 there is the following entry:

Applications supported by the necessary data as per terms and conditions set out in Circulars C.C. 151, 152 and 175 had been received from various operations and it was agreed that subsidy payments be made as accountable advances pending receipt of auditors' statements, covering the three-month basic periods used to determine rate of subsidy applicable to each operation.

Company	Rate Per Ton
1. Lethbridge Collieries Ltd. ....	12

By letter of August 7, 1944 the Board notified the appellant that its application to be placed on Flat Rate Subsidy as from 1st April 1944 was provisionally approved, that the rate so approved was determined to be 12 cents per ton, that payments would be made on that basis and would be treated as accountable advances until an auditors certified statement covering the last quarter of 1943 had been received and reviewed by the Board. The Appellant replied on September 1, 1944 pointing out that other operators in the Lethbridge Field were receiving amounts "varying up to 35 cents per ton". The letter continues:

It seems to us that wage increases not compensated for applies to all operations alike, and as 35 cents per ton had been decided upon as the rate applicable in the Lethbridge field, we set up our books in April, the beginning of our financial year, on this basis and on the advice of our chartered accountant, but have since made an adjustment to correct this mistake.

Will you please define for us the items covered by the 12 cents per ton and advise if there is liable to be any change in this figure depending upon our entire year's operations.

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The Board replied on September 13, 1944 as follows:

This will acknowledge receipt of your letter dated September 1, 1944.

The rate of 35 cents per ton was established for the Lethbridge field as the maximum amount required to cover wage increases authorized by the National War Labour Board and not compensated by price increases, plus the previously compensated portion of the Cost of Living Bonus, now incorporated in the wage scale.

However, due to the fact that conditions under which different mines operate, vary considerably, operating costs therefore also vary and not necessarily as a result of inefficiency. Therefore it is necessary for this Board to examine each operator's position and determine what rate of flat rate subsidy is required to help him meet the above-mentioned costs, but in no case will such subsidy exceed the maximum rate set for the field.

Further, it is the policy of this Board that in no case will subsidy be provided which will result in net profits of operation exceeding Standard Profits within the meaning of the Excess Profits Tax Act, consequently, all interim payments of subsidy will be considered as accountable advances subject to final adjustment after receipt and consideration of the operator's audited financial statement for his full financial year.

In your case the rate of 12 cents per ton was established from the data you submitted covering the basic three-month period ending December 31, 1943.

The appellant telegraphed to the Board on September 18, 1944 as follows:

Re your letter thirteenth paragraph three does this mean if the rate of twelve cents established fails to bring our years operation to show standard profit will the rate be increased to provide for this or until the thirty-five cents is reached.

The Board replied on September 19, 1944 as follows:

Replying to your telegram of the 18th instant, I would refer you to my letter of September 13 and also Circular C.C. 152 dated April 11, 1944, both of which should clarify the basis on which the present flat rate subsidy assistance is payable.

The present rate of 12 cents payable to your operation which has been approved by this Board is not subject to revision. However, if at the end of your fiscal year, it is found that revenue has not been sufficient to meet the costs as outlined in C.C. 152, it will be in order for your Company to make a submission to this Board for its consideration.

There was further correspondence which does not materially affect the matters in dispute. In July 1945 the rate of subsidy was changed from 12 cents to 16 cents, the change to be effective from April 1, 1945.

In support of the appellant's claim in contract it is said that an offer made by the Board is to be found in Circular Letter C.C. 152 and in the statements made by the Chair-

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man of the Board at the meeting of April 18, 1944, that this offer was addressed to all, and capable of acceptance by any, of the Coal Mine Operators in the Domestic Fields of Alberta, that the offer was to pay a definitely ascertainable sum to any of such operators who performed specified conditions and that the appellant performed the conditions thereby accepting the offer.

The appellant seeks to interpret C.C. 152 and the statements made at the meeting of April 18th as an offer made to the appellant, in common with other coal mine operators in the same area, to pay a subsidy of 35 cents per ton subject only to the proviso that if as a result of such payment the profits of the operator receiving it would exceed its standard profits as determined for the purpose of Excess Profits Tax, the subsidy payment should be reduced to such figure as would permit the operator to make its standard profits but no more.

The appellant takes the position that the consideration which was required of it was that it should continue to mine coal and to endeavour to increase its production, that it did this, and that this was a performance of the condition prescribed in the offer and constituted an acceptance of the offer and that this performance coupled with the making of a claim for subsidy was a sufficient notification to the Board of the acceptance of its offer by the appellant. The appellant contends that not only did it continue to mine coal, but that it extended its operations and increased its production at considerable additional cost per ton to itself.

The appellant emphasizes the fact that it employed a number of inexperienced miners which necessitated the employment of a fire boss for every ten men instead of every sixty men, and that, instead of driving to the boundaries, it reversed this and took the coal in advance instead of in retreat. It is said that all this was done to increase production, but that it added substantially to the cost per ton. The learned trial Judge found it to be a fact that this was done and there is ample evidence to support his finding. It may be observed that this method of procedure on the part of the appellant appears to have brought about a result different from that which the Board

hoped to accomplish by its change in policy as to the payment of subsidy. The Board's intention as reported to the Minister was to increase the efficiency of operation in the various mines, whereas the course pursued by the appellant tended to decrease its efficiency of operation and to increase its production cost per ton.

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In my view, it nowhere appears in the evidence that the Board made to the appellant any such offer as that for which the appellant contends. It is first necessary to examine the circular letter C.C. 152. The letter opens with a statement that the subsidy is based upon wage increases authorized by the Government, and not compensated by authorized price increases, plus the previously compensated portion of the cost-of-living bonus now incorporated in the wage scale. It provides that an operator to be eligible for subsidy must show to the satisfaction of the Board that it is unable to absorb such wage increases and cost-of-living bonus. It provides that the *maximum* flat rate subsidy in the Lethbridge area shall be 35 cents per ton and that "the Board will determine the rate of subsidy to be advanced." The concluding words of paragraph 7 are:

Approved operators not on F-4A subsidy during the last quarter of 1943 will receive subsidy at the rates indicated in subsection (i) or such lesser rate as the Board may determine.

The appellant was one of the operators referred to.

I do not think that C.C. 152 is susceptible of the interpretation for which the appellant contends. Had it been the intention of the Board to say that it offered to pay to all operators in the Lethbridge area whichever should be the lesser of either (a) 35 cents per ton, or (b) such amount as would bring the profits of such operator up to the amount of its standard profits; it would have been easy to do so. The purpose of the subsidy is not indicated as being to raise the operator's profits to its standard profits, but to compensate it for the difference between the wage increases including the cost-of-living bonus and the permitted increase in the price of coal.

While C.C. 152 can not be said to be expressed in terms of perfect clarity its meaning appears to me to be as follows: In the case of each of the operators to whom the

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letter is addressed the Board will calculate, from the information supplied by such operator, the amount per ton of coal produced which, in the opinion of the Board, is necessary to compensate such operator for the difference between the increased costs of labour, including the cost of living bonus, and the authorized advance in the price of coal and will pay such amount by way of subsidy to the operator, always provided that such amount does not exceed the maximum per ton for the area in which the operator is located. The amount so paid is to be regarded as an accountable advance and if it appears from audited financial statements at the end of the operator's financial year that the operator has, as a result of the payment of subsidy, earned more than its standard profits the excess over such standard profits is to be repaid to the Board. The intention of the Board to reserve to itself the right to determine the rate of subsidy, if any, to be paid in each individual case is, I think, clearly expressed. In the case of the appellant the Board determined to pay and did pay subsidies at the rates of 12 cents and 16 cents respectively.

Even if the minutes of the meeting of April 18th could be regarded as setting out an offer by the Board I can not find in them any offer in the terms claimed by the appellant.

If I am right in my construction of C.C. 152 and of the minutes of April 18, 1944, the appellant's claim, in so far as it is based upon contract, would fail because the documents relied upon do not contain an offer in the terms for which the appellant contends. There is, I think, a further difficulty in the way of a claim based upon contract.

I agree with the learned trial Judge that the evidence does not establish an intention on the part of the Board to make an offer which could be accepted by performance. It is the factual basis which is lacking. No doubt, as was said by Pickford L.J. in *Davies v. Rhondda District Urban Council* (1), "If one person says to another 'If you will do so-and-so I will pay you so much money' and the man does it that constitutes a contract." But I do not think that on the record in this case it could be found that the Board was ever in the position of saying to the appellant

(1) [1918] 87 L.J. K.B. 166 at 168.

"If you will go on mining coal I will pay you so much money". Rather, I think, the Board went no further than to indicate that it proposed to follow a certain policy as to payment of subsidies but reserved to itself throughout the right to say what amount, if any, it would pay from time to time to any operator.

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I have not overlooked the appellant's argument based on estoppel but I can not find in the minutes of April 18, 1944 or in any of the other documents upon which reliance was placed any representation by the Respondent that the meaning of C.C. 152 was to make an offer in the terms for which the appellant contends. It therefore becomes unnecessary to examine the authorities to which Mr. Eaton referred us in support of his argument that the plea of estoppel could not succeed because the alleged representations did not relate to presently existing facts and were not sufficiently clear and unambiguous.

It is next necessary to examine the alternative basis on which the appellant's claim is put forward. It is said that, by orders having the force of law, the Board provided that the appellant, upon performing the condition of continuing to mine coal, should be entitled to the payments for which it makes claim.

There is no doubt that P.C. 10674 was in force throughout the relevant periods, and that it had the force of law, but there is nothing in this Order-in-Council, standing by itself, upon which the appellant's claim could be founded.

The judgment of this Court in *Reference as to the Validity of the Regulations in relation to Chemicals* (1), and particularly at page 19 shows that the Governor General in Council has power to delegate the powers conferred upon him by the *War Measures Act*. At page 19, Rinfret J., as he then was, in whose judgment Taschereau J. concurred states:

That Act conferred on the Governor in Council subordinate legislative powers; and it is conceded that it was within the legislative jurisdiction of Parliament so to do. In fact, delegation to other agencies is, in itself, one of the things that the Governor in Council may, under the Act, deem "advisable for the security, defence, peace, order and welfare of Canada" in the conduct of the war. The advisability of the delegation is in the

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discretion of the Governor in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it, or as if it were part of the common law—subject always to the conditions already stated.

If it could be shown that by P.C. 10674 the Governor-in-Council had delegated to the Board the power to make, and the Board in turn had made, an order providing that during the period in question, the appellant was entitled to receive a subsidy of 35 cents per ton on the coal which it produced or such lesser subsidy as would bring its profits up to its standard profits but no more; then the appellant would appear to have a right to payment which would be enforceable by Petition of Right under Section 19(d) of the *Exchequer Court Act*.

It is necessary, therefore, first to examine Order-in-Council 10674 to ascertain what powers have been delegated to the Board. It will be observed that the word "Order" is defined as including any general or specific order made or issued in writing by or on behalf of or under authority of the Board in pursuance of any power conferred by or under P.C. 10674. The Board is given the power and duty under the direction of the Minister of:

3. (e) rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine; provided that the Board shall not render or procure any financial assistance, except capital assistance, in any case where the net profits of operation exceed standard profits within the meaning of the Excise Profits Tax Act.

(m) doing such acts and things as are ancillary or incidental to exercise or discharge of any of the foregoing powers or duties.

Subsection 4 of Section 4 provides that the Board may exercise its powers and duties by order. Section 7 makes it an offence to contravene or fail to observe any order.

I think it very doubtful whether on a proper construction P.C. 10674 empowers the Board to pass a general order having the force of law providing that a subsidy of so much per ton should be paid to all operators in a certain area. The wording of Section 3(e) seems rather to contemplate that the Board shall consider the situation of individual mines. The power and duty given to the Board is that of rendering "such financial assistance in

such manner to such coal mine as the Board deems proper for the purpose of ensuring the maximum or more efficient operation of such mine." The Board has, I think, rightly interpreted its duties as requiring it to pass upon the amount of subsidy to be paid to each individual mine, and while it announced the policy which it proposed to follow in various areas, it seems to me to have retained to itself the power and indeed the duty of passing upon each individual case.

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Assuming for the moment that P.C. 10674 does confer upon the Board a jurisdiction to pass a general order providing for the payment of subsidies as above suggested, I cannot find anything in the record to indicate that the Board attempted to exercise such power. The documents relied upon by the appellant on this branch of the argument appear to be the Minute of the 23rd of March, 1944, the memorandum to the Minister of April 13, 1944 and Circular letter C.C. 152.

I do not think that the Minute of 23rd March, 1944 can be properly regarded as being intended by the Board to be, or as being, an order having the force of law. It does not appear that a copy of it was sent to the Minister, or that it was published in the Gazette or elsewhere. It was not communicated to those upon whom the appellant argues it conferred rights. It does not purport to be in the form of an order. I cannot think that a document of this sort and in this form can be regarded as having the force of law and being effective, without more, to authorize and require payments to be made out of the public treasury.

The memorandum to the Minister of April 13, 1944 is simply a communication for the information of the Minister which does not purport to be in the form or to have the effect of an order.

Circular letter C.C. 152 does not appear to be intended to have the effect of an order, but even if it were otherwise, it is my opinion, for the reasons set out at length above, that properly construed it does not provide for payment of subsidies beyond those which the appellant has received.

In my view assuming, without deciding, that the Board had power under P.C. 10674 to enact an order of the



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sort for which the appellant contends, it has not attempted to do so. I think therefore that the appellant's alternative claim cannot succeed.

For the above reasons, in my opinion, the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Milner, Steer, Dyde, Poirier, Martland and Layton.*

Solicitor for the respondent: *F. P. Varcoe.*

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