

WESTERN DOMINION COAL MINES }  
 LIMITED (SUPPLIANT) . . . . . }

APPELLANT; \* <sup>1947</sup> Feb. 17, 18  
 \* May 13

AND

HIS MAJESTY THE KING (RESPOND- }  
 ENT) . . . . . }

RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Contract—Claim for subsidy from the Crown in respect of coal mining—  
 Order in Council establishing Emergency Coal Production Board—  
 Plan proposed by Board as to assistance to operators of coal mines—  
 Communications between claimant and the Board—Interpretation—  
 Question whether contract, or other ground for claiming subsidy,  
 established.*

By Order in Council P.C. 10674 of November 23, 1942, the Emergency Coal Production Board was established and made responsible, under direction of the Minister of Finance, for taking necessary or expedient measures for maintaining and stimulating the production of Canadian coal and for ensuring an adequate and continuous supply thereof, and included in its powers and duties was (under direction of the Minister) that of "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, however, that in no case shall the net profits of operation exceed standard profits within the meaning of the Excess Profits Tax Act."

Appellant, a coal mining company in Saskatchewan, claimed from the Crown a subsidy in respect to its coal mining from October 1, 1942, to March 31, 1943, basing its claim mainly on the ground that communications between appellant and the Board and appellant's operations had raised an obligation to pay such subsidy. The claim was dismissed in the Exchequer Court, [1946] Ex. C.R. 387, and appeal was now brought to this Court.

Appellant claimed that its "deep seam" operation was undertaken entirely as a war or national emergency measure and to assist the coal administrator in increasing production, that at all times material it was carried on at a loss. Appellant's "strip" operation made a profit exceeding said loss. Appellant's net profit on both operations for the period in question fell below its "standard profits" fixed under the *Excess Profits Tax Act*, by \$44,209.30, which sum it claimed.

Among the facts were the following: At the Board's first meeting (in December, 1942), it recommended "that in the first instance assistance be made available in the form of accountable advances based on estimated needs", as "in most cases it would be inadvisable if not dangerous to withhold assistance until" audited annual statements were available and studied or until an inspector's report could be made. Forms were prepared for the purpose of obtaining information

\* PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.  
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as to production, costs, revenue, etc., and on the back were instructions and the Board's plan or formula. On January 6, 1943, the Chairman of the Board, answering appellant's letter setting out increased costs due to an increased wage rate (authorized by the National War Labour Board), stated that the matter would be "looked after" as soon as the formula for making accountable advances had been decided. On January 29, 1943, the Executive Secretary of the Board wrote to appellant that the Board had "approved a plan whereby operators who are operating at a loss may be reimbursed" and enclosed forms "F-4" to be completed and forwarded, on which was the Board's plan or formula, stating, *inter alia*, that "the maximum amount of subsidy paid is regulated" by the lesser of (a) profits not to exceed "standard profits" as ascertained under the *Excess Profits Tax Act* or (b) such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold. Appellant completed and forwarded the forms, and on February 11, 1943, the Executive Secretary of the Board wrote to appellant that in the light of the statements therein and the seasonal nature of appellant's operations, "any question of subsidy should be deferred" until returns were received for the current financial year and until clarification of the situation in respect to standard profits, that in the meantime monthly submissions of forms should be continued, and that with respect to sales, "until a rate of subsidy, if any, is actually set no change need be made in your billing, and if a subsidy becomes payable", a back claim for additional amounts could be made. Appellant, besides forms covering certain months, sent, later, forms for the six months period now in question, covering, separately, the strip and deep seam operations. Appended to the minutes of a meeting of the Board on July 29, 1943, was a list of operators "receiving or authorized to receive F-4 assistance not authorized by individual minutes", which list included appellant, but with no amount set opposite its name. Though information on the forms was available to the Board before that date, it had not examined or "processed" the form statements. On December 9, 1943, in reply to a letter from appellant to the Executive Secretary of the Board, the Assistant Accountant, for the Accountant, of the Board, wrote that "we may assure you that the [Board] has authorized subsidy on your operations from the 1st of October, 1942", and, "to facilitate the computation of the correct amount of subsidy to which you are entitled", requiring a certified consolidated return. On March 3, 1944, the Chairman of the Board wrote to appellant that, "after making a careful review of the circumstances surrounding your claim for subsidy assistance, we have arrived at the conclusion that it would not be possible to justify a recommendation" for it.

*Held:* The appeal should be dismissed. On the documents and facts in evidence, no contract or other ground for allowance of the claim was established.

*Per* the Chief Justice and Taschereau and Estey JJ.:

The deep seam operation was, on the evidence, undertaken by appellant entirely of its own volition and it was not shown that it was at any time continued in consideration of a promise that a subsidy would be paid.

Though information as to the "stripping" and "deep seam" operations was asked for and supplied separately, yet (at least for the period in question) there was no suggestion that they would be treated separately in determining any question of subsidy. Appellant was not "operating at a loss" within the Board's said letter of January 29, 1943, and, on the basis of that letter, did not qualify for a subsidy.

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The statement in said letter of December 9, 1943, in the absence of evidence establishing either actual authority from the Board or that the writer was held out as one apparently having authority to make such communication, should not be accepted as an admission binding upon the Board.

The Board's decisions would, as the evidence indicated, be recorded in the minutes of the Board, and could be adduced in evidence by production of the minutes or (under provision in said Order in Council) of a document signed by its Chairman. As to said list appended to the minutes of July 29, 1943, it was clear that no decision had been arrived at by the Board as to a subsidy to appellant; and no other minutes were produced mentioning appellant. The Board accepted appellant as an operator entitled to be considered for a subsidy. The Board's conduct was not that of a party contracting, but rather that of one endeavouring to determine whether appellant was, on the basis of the Order in Council and the plan, entitled to receive a subsidy. Appellant was throughout supplying information asked for with the intent and purpose of convincing the Board of its right to a subsidy under the Order in Council and plan. The essential elements of a contract were not present.

*Per* Kerwin J.: The facts afforded no basis for appellant's claim. Clearly, on the evidence, there was no contract; and there was nothing in said Order in Council, the minutes of the Board, or the actions of any of its responsible officers, upon which appellant might base a claim to a subsidy based upon a statute or anything similar thereto.

*Per* Rand J.: The opening of the deep seam was initiated by appellant and carried on until at least the early part of 1943 voluntarily and for its own purposes, with no inducing action by the Government or the then Fuel Administrator beyond the general exhortation for a country-wide increase in production. The statement in said letter of January 29, 1943, that the Board had approved a plan whereby "operators who are operating at a loss" might be reimbursed, meant, both in the plain and ordinary meaning of the language and when construed with the references in the context, a loss on total operations. There was nothing in the documents that could fairly be said to have misled appellant into believing that the general plan included the subsidizing of isolated operations. It did not appear that the operation of the deep seam during the period in question was ever involved in any bargain in which its continued operation was conditioned on payment of subsidy, or that the Board throughout was not restricting subsidy to the results of appellant's operations as a whole. As to a claim based (with contract, including any basis of estoppel, excluded) on compliance with conditions of an obligatory subsidy—the conditions, by their very terms, involved the Board's discretion, which could be exercised only after operating results became known and on an appreciation of all circumstances: a dis-

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cretion which became executed only when the subsidy was in fact paid; a contention that increased output in response to the Board's appeal would *ipso facto* guarantee to any company producing it a return of either standard profits or 15 cents per ton was wholly inconsistent with what the Board laid down. As to inclusion of appellant's name on said list of July 29, 1943—the correspondence makes it clear that there was a lack of co-ordination between the different departments of the Board; and the inference that appellant's operations had not been finally considered is confirmed by the absence of any amount for subsidy opposite its name; the entry was therefore, in fact, provisional; it is relevant to the period in question only as it might evidence recognition by the Board that the conditions on which it ordinarily acted were present; but it actually made its finding to the contrary, and the discretionary nature of its reserved power permitted it to do that.

APPEAL by the suppliant from the judgment of His Honour J. C. A. Cameron, Deputy Judge (now puisne Judge) of the Exchequer Court of Canada (1) dismissing its claim against the Crown for payment of a subsidy in respect to the suppliant's coal mining for the period from October 1, 1942, to March 31, 1943.

*A. E. Hoskin K.C.* and *E. F. Newcombe K.C.* for the appellant.

*R. D. Guy K.C.* and *R. D. Guy Jr.* for the respondent.

The judgment of the Chief Justice and Taschereau and Estey JJ. was delivered by—

ESTEY J.—This in an appeal from the judgment of Mr. Justice Cameron in the Exchequer Court dismissing the suppliant's claim for a subsidy, with respect to its coal mining, of \$44,209.30 for the period October 1, 1942, to March 31, 1943.

The appellant (suppliant) is engaged in coal mining in Saskatchewan, where in September, 1939, it began production through stripping operations and in 1941 through deep seam operations. Both were continued throughout the period material to this litigation.

By Order in Council P.C. 3117, dated October 18, 1939, approval was given to the appointment by the Wartime Prices and Trade Board of a coal administrator. Later when a national emergency in the production of coal developed, an Order in Council, P.C. 10674, dated Novem-

ber 23, 1942, and passed under the authority of the *War Measures Act*, established the Emergency Coal Production Board with the coal administrator as chairman. This Order in Council, among other things, provided:

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

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\* \* \* \*

- (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, however, that in no case shall the net profits of operation exceed standard profits within the meaning of the Excess Profits Tax Act;

The other clauses under para. 3(1) gave to the Board power of opening and operating new coal mines, prohibiting or limiting operation and directing production policies with respect to coal mines, but it is not contended that any of these powers were exercised with respect to the appellant's operations. It is by virtue of the power and duty of the Board under para. 3(1)(e) that the appellant bases its claim.

This Order in Council does not provide for a general subsidy payable to all who are engaged in coal mining operations. It goes no further than to provide that:

\* \* \* 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  
\* \* \*

This power is to be exercised as the Board deems proper, or in other words, in the exercise of its discretion toward the attainment of the ends therein specified. The Crown's position is that upon this basis the appellant's claim was duly considered and, as a consequence, the chairman of the Board advised the appellant under date of March 3, 1944, that financial assistance or a subsidy on its behalf could not be recommended.

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The appellant's main contention is rather that by virtue of interviews and correspondence a contract was concluded between itself and the Board under which it was entitled to a subsidy. Its petition alleges that the deep seam operation was not necessary to the company's business "but was undertaken entirely as a war or national emergency measure and for the purpose of assisting the coal administrator in increasing the production of coal;" that such deep seam operation was, at all times material, carried on at a loss; that "at the request of the Board," it "did everything in its power to assist the Board in increasing the production of coal and in securing the maximum of production;" and again, that it "had performed the emergency services and maximum production desired and requested by the Government of Canada and the Board;" that for all this "the Board from time to time acknowledged the high efficiency of the company's operations and its great assistance in the national emergency."

The evidence supports many of the foregoing allegations but does not establish, nor is there an allegation to the effect, that at any time there was a promise on the part of the Emergency Coal Production Board to pay a subsidy. The Board under this Order in Council was charged with an important responsibility during the days of the war, a responsibility that involved the control of the output of coal throughout the entire Dominion. In the course of its duties it was constantly advising, directing and suggesting to the coal operators throughout Canada and determining in certain cases what, if any, financial assistance on the basis of need was necessary. Under the circumstances, the Board would from time to time make requests of operators quite apart from any question of subsidy.

Not only had the appellant's operations of the deep seam mine commenced but was actually in production in September, 1941, before the creation of the Emergency Coal Production Board by Order in Council P.C. 10674, dated November 23, 1942. In fact, the evidence of Mr. Brodie, president of the appellant company, makes it clear that the undertaking of the deep seam operations was a matter entirely of its own volition.

Q. You did mine the deep seam, and started operations in May, 1941?

A. Yes.

Q. And as you stated in your examination for discovery, "It was purely voluntary on our part in starting this thing?"

A. It was.

Moreover, the evidence does not establish that the deep seam operations were at any time continued in consideration of a promise that a subsidy would be paid.

The Board held its first meeting on December 7, 8, and 9, 1942, when it decided that because certain mines, in order that their production might be maintained, would require financial assistance, to recommend to the Minister of Finance that "assistance be made available in the form of accountable advances based on estimated needs \* \* \* ." The Board indicates in its minutes that accountable advances were necessary as "in most cases it would be inadvisable if not dangerous to withhold assistance until the audited annual statements of the companies" would be available, or until an Inspector might make a report. No evidence was adduced that the Minister acted upon this recommendation, but in that the Board proceeded upon this basis at all times material, it may be assumed that the Minister did so.

On the basis of these minutes, at first form F-4 and later F-4A were prepared for the purpose of obtaining information with respect to production, employment costs, revenue and disbursements and generally such information as the Board might require for the exercise of its power and duty under Order in Council P.C. 10674. On the back of these forms certain instructions were printed and contain the plan or formula of the Board.

The National War Labour Board had in November, 1942, made an order authorizing an increase in wages retroactive to October 1, 1942, in the coal mines. As a consequence of this the appellant, under date of January 4, 1943, made its first request (so far as material to this litigation) for financial assistance. The letter stated that this order had increased its disbursement for wages in both strip and deep seam operations in the sum of \$2,660.53, and concluded:

We, therefore, would like to know in just what manner this is going to be handled and in what way we are going to be compensated for this additional cost.

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So far as the record indicates, there had been no promise that they would be compensated for this increase in wages, but it is clear that it might be an item to be considered with respect to the rendering of financial assistance and was so accepted by the Board.

Estey J. The Chairman of the Board replied:

January 6, 1943.

Via Air Mail

Dear Mr. Brodie:

I have your letter of January 4, addressed to Mr. Neate, setting out the increased costs to your Company due to the new wage rate.

I discussed this matter at the Emergency Coal Production Board meeting this morning and have been asked to say that this matter will be looked after just as soon as the formula for making accountable advances to companies has been decided. This should not take many days.

Yours very truly,

J. McG. Stewart

Chairman.

Mr. Brodie, president of the appellant company, was in Ottawa immediately after this exchange of letters and interviewed Mr. Stewart and others associated with the Board. A number of matters were discussed but in the result the question of financial assistance was not advanced further than indicated in Mr. Stewart's letter of January 6, 1943. Mr. Brodie, relative to that interview, deposed:

Q. Do you remember this? At that time did the Board say we have got out a formula?

A. They said we would be taken care of and that the formula was not approved and prepared, but it would follow later.

Q. Then did you get the formula later?

A. Yes, we got the form F-4 with certain instructions.

The forms F-4 containing the formula were sent to the appellant for the first time with a letter dated January 29, 1943:

January 29, 1943.

Via Air Mail

Dear Mr. Brodie:

Our File 101-6-2

Referring to your letter of the 4th instant and our reply of the 6th instant in connection with accountable advances, I am instructed to advise you that the Board has approved a plan whereby operators who are operating at a loss may be reimbursed on the basis of standard profits as ascertained under the Excess Profits Act or alternatively to a maximum net profit of 15 cents per net ton before taxation.

For the purpose of establishing a basis on which these advances may be calculated, a new form F-4 has been prepared and I enclose



a supply for your use. I note that the increased wage scale was, in the case of Western Dominion, approved as of October 1, 1942, and in order to study the effect of such increased wages, I will require a form F-4 for each of the months of October, November and December, 1942, and monthly thereafter as soon after the close of business each month as possible.

I would request that the form be read carefully with particular attention paid to the instructions shown on the back. Inaccurate or incorrectly prepared forms will only cause unnecessary delay in making subsidy payments.

If you will forward the forms for the three months, October, November and December immediately, prompt consideration will be given thereto.

Yours very truly,

J. R. Cox,

Executive Secretary.

On the back or reverse side of form F-4 the printed instructions set out the formula or plan followed by the Board. These read in part as follows:

1. This production subsidy statement must be completed monthly,

\* \* \* \*

3. Subsidy may be paid as an accountable advance to the mine operator monthly or quarterly. If a change in wage scales should be authorized by The National War Labour Board, the operator should submit at once a statement showing the effect of such change on his payroll so that the amount of the accountable advance may be adjusted.

4. The maximum amount of subsidy paid is regulated by the lesser of the amounts indicated hereunder:

- (a) Profits not to exceed "Standard Profits" as ascertained under the provisions of the *Excess Profits Tax Act* or
- (b) Such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold.

The forms F-4, covering the months of October, November and December, 1942, were completed and forwarded to the Board by the appellant under date of February 5, 1943. These were acknowledged by the Board under date of February 11, 1943, in a letter reading as follows:

February 11, 1943.

Attention: Mr. A. E. Turner, Secretary-Treasurer

Dear Sir:

I have received your letter of February 5 enclosing returns on Form F-4 for your stripping and shaft operations separately for the months of October, November and December, 1942. In the light of these statements and the seasonal nature of your operations, I am of the opinion that any question of subsidy should be deferred until your audited returns are received for your current financial year and also until you have been able to clarify the situation in respect to Standard Profits.

In the meantime I think that these returns on Form F-4 should continue to be submitted each month and I attach a further twelve copies of the form.

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With respect to sales of coal as in Section 2 of the Instructions, until a rate of subsidy, if any, is actually set no change need be made in your billing, and if a subsidy becomes payable, it will be quite simple to make a back claim for the additional amounts.

Yours very truly,

J. R. Cox,  
Executive Secretary.

This letter makes it clear that in so far as the Board was concerned "any question of subsidy should be deferred" to the end of the appellant's current financial year. Moreover, in the concluding paragraph, "until a rate of subsidy, if any, is actually set" and "if a subsidy becomes payable" indicates in clear and unmistakable language that at that date there had been no agreement or promise that a subsidy would be paid. This letter was not replied to by the appellant nor was any exception ever taken to the foregoing statements.

Moreover, under date of April 15, 1943, with its operating statement for the eleven months ending February, 1943, showing a loss on deep seam operations, the appellant wrote to the deputy coal administrator and pointed out its loss and "one item that created a very substantial increase in cost was the award given by the National War Labour Board in November, retroactive to the 1st of October." This letter, although written after the close of the period in question, was in reference to it. There is no suggestion that any agreement had been made or was even under consideration at that time. On the basis of that loss caused in part by the increase in wages, the appellant asked an increase in price of certain coal, which was immediately granted and the appellant notified thereof by the deputy coal administrator under date of April 17, 1943.

While the appellant had from time to time sent in forms covering certain months, under date of June 7, 1943, it sent in forms F-4 duly completed for the six months period in question, October 1, 1942, to March 31, 1943, covering both the strip and deep seam operations. By letter dated June 14 the Board requested certain further information, which was forwarded under date of June 21. Separate forms covered the strip and deep seam operations and disclosed that during the six months in question the appellant realized a profit in the stripping operations of \$110,497.07,

and suffered a loss in the deep seam operations of \$82,546.37, or a profit on both operations of \$27,950.70. An adjustment made with the Income Tax Department increased this profit to \$30,790.70. The \$44,209.30 claimed is the difference between this profit of \$30,790.70 and the amount of \$75,000.00 fixed as the appellant's standard profit under the *Excess Profits Tax Act*. The evidence does not support this, nor was it contended that the Board had undertaken to pay that or any other specific amount.

On July 29, 1943, the Board held a meeting and appended to its minutes a list of operators entitled:

20th meeting on Thursday, July 29, 1943

Companies receiving or authorized to receive F-4 assistance not authorized by individual minutes.

The list included the appellant. The information requested on the forms F-4 was available to the Board before that date but it had not examined or "processed" (as stated in the record) these statements (Form F-4). In any event, it is clear that no decision had been arrived at on the part of the Board with respect to the subsidy.

The appellant relied particularly upon a letter of December 9, 1943, signed by Mr. A. O. Blouin for A. E. Bradfield, accountant. This letter it alleged constituted an acknowledgment on the part of the Board to pay a subsidy. It was a reply to a short letter from the appellant dated December 3, 1943, enclosing a copy of its letter on September 8, 1943, and asking a reply to the latter. The letter of September 8 read as follows:

September 8, 1943.

Mr. J. R. Cox,  
Executive Secretary,  
Emergency Coal Production Board,  
238 Sparks Street,  
Ottawa, Canada.

Dear Sir:

Re: Forms F-4—October, 1942, to March, 1943.

We forwarded forms covering the above period to you on June 7 and on July 17 wrote you further advising you of the amount of our standard profits as fixed by the Board of Referees. Since that time we have not heard further from you in this matter.

We believe that there is a very substantial amount due us in this connection in respect of the losses of the deep seam mine. We would like to point out that we have incurred very heavy expenses in endeavouring to increase the production of coal from our operations. The funds

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available from the above would be very useful to us at this time and we would appreciate hearing from you at an early date advising when we may expect this matter to be disposed of.

Yours very truly,

Secretary-Treasurer.

The reply signed by Mr. Blouin dated December 9, 1943, reads as follows:

December 9, 1943.

Air Mail

Dear Sirs:

In reply to your letter of December 3, we may assure you that the Emergency Coal Production Board has authorized subsidy on your operations from the 1st of October, 1942. In order to facilitate the computation of the correct amount of subsidy to which you are entitled, we will require a consolidated F-4A Return for the six months period, October 1 to March 31 (the end of your fiscal year), certified by your auditor. We would suggest that you also have prepared, at the same time, a consolidated F-4A statement to date from April 1, certified by your auditor. It will then be in order for you to submit monthly F-4A statements for subsidy for subsequent months. Your annual audited statement will then be the basis of final adjustment.

You will understand, of course, that separate statements are required for the different operations and that these must be prepared in accordance with the instructions to operators regarding costs.

Yours very truly,

A. O. Blouin

for A. E. Bradfield

Accountant.

Mr. Neate deposed, as one would expect, that whatever approval for subsidy made by the Board would appear in the minutes. No minutes were produced other than that of the meeting on July 29, 1943, when the appellant was included on the list of "Companies receiving or authorized to receive F-4 assistance \* \* \* ."

The Crown submitted that the admission of Mr. Blouin, as contained in this letter written in his capacity of assistant accountant to Mr. Bradfield, that "we may assure you that the Emergency Coal Production Board has authorized subsidy on your operations from the 1st of October, 1942," was made without authority and therefore not binding upon the Board. No evidence was tendered as to Mr. Blouin's duty or authority other than that he was assistant accountant to Mr. Bradfield. There is no suggestion that the Board represented or held him out as one authorized to communicate the decisions of the Board, nor that in the ordinary course of his duties he would be called upon

to communicate these decisions. The statement, in the absence of evidence establishing either actual authority from, or that he was held out as one apparently having authority to make such communication by the Board, cannot be accepted as an admission binding upon the Board. Bowstead on Agency, 9th Ed., 263; Phipson on Evidence, 8th Ed., 231; *Barnett v. South London Tramways Co.* (1); *George Whitechurch Ltd. v. Cavanagh* (2).

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The decisions of the Board, as the evidence indicated, would be recorded in the minutes of the Board and adduced in evidence either by the production of these minutes or by a document signed by the chairman, as provided for in the Order in Council P.C. 10674, para. 4(5) of which reads:

4. (5) In any Court or for any purpose, any document purporting to be signed by the Chairman of the Board shall be conclusive evidence that any statement, order or designation therein recorded was the act of the Board, without proof of the signature or official character of the Chairman.

Then the appellant pressed that Mr. Neate's answer constituted an admission that the Board was obligated to pay a subsidy. Mr. Neate deposed:

Q. Yes. That is what they are getting 25 cents a ton subsidy on, is that correct, during the last year? I think the amount owing, which is not in suit, is over \$40,000. When Mr. Blouin wrote his letter in December we were on the subsidy list and were entitled to a subsidy?

A. Very definitely.

The first part of this question relative to the 25 cents per ton and the \$40,000 refer to matters not here in issue. If one confines the answer "Very definitely" to the Blouin letter then if Mr. Neate meant the appellant was on the subsidy list the answer is not only consistent with the other parts of his evidence, but with the conduct of the Board as disclosed in the record. If the answer is construed as an admission that the appellant was entitled to a subsidy, it is clearly contrary to the other parts of Mr. Neate's evidence where he makes it clear that the policy of the Board was to pay a subsidy only if the company was operating at a loss. It is very difficult, therefore, to determine what is meant or what weight ought to be given to such an answer and, therefore, by itself it does not support any definite conclusion, much less one that is contrary to all the other evidence.

(1) (1887) 18 Q.B.D. 815.

(2) [1902] A.C. 117.

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Under date of March 3, 1944, Mr. Brunning, as chairman, expressed his views to the appellant:

Via Air Mail  
Dear Sirs:

March 3, 1944.

After making a careful review of the circumstances surrounding your claim for subsidy assistance, we have arrived at the conclusion that it would not be possible to justify a recommendation to the Board for subsidy assistance to your project. It will be unnecessary for you to submit F-4A Production Subsidy Statements.

Your profits for the fiscal years 1942 and 1943 have been substantially higher than for previous fiscal periods. These have been due in some measure to the generous assistance which has already been accorded to you by the Board.

May we take this opportunity of thanking you for your co-operation during the period of emergency in the production of coal. We are pleased to advise that this emergency is now past.

Yours very truly,

E. J. Brunning  
Chairman  
Emergency Coal Production Board.

It is true that in the deep seam operations the appellant had suffered a loss but had realized such a surplus upon the stripping operations that in the result it made a larger profit than in the previous year. The information relative to these operations was asked for and supplied separately, but throughout the record, at least for the period we are here concerned with, there is no suggestion that they would be treated separately in determining any question of subsidy. The Board's letter (quoted above) of January 29, 1943, stated:

\* \* \* the Board has approved a plan whereby operators who are operating at a loss may be reimbursed \* \* \*

It is clear that the appellant was not an operator operating at a loss, and therefore, on the basis of this letter, which basis obtained throughout the period in question, did not qualify for a subsidy.

The Board accepted the appellant as a coal operator entitled to be considered for a subsidy. The Board's conduct is not that of a party contracting but rather that of one who is endeavouring to determine whether the appellant was, on the basis of the Order in Council and the formula or plan, entitled to receive a subsidy. The appellant on its part was throughout obviously supplying all the information asked for with the intent and purpose of convincing

the Board that it was entitled to a subsidy under the Order in Council and the formula or plan. When all the information was obtained and the matter considered, the chairman pointed out that, inasmuch as the appellant had realized a profit and therefore it had not incurred a loss upon the whole of its operations, it was not entitled to a subsidy.

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The essential elements of a contract are not present in this case. *May and Butcher, Limited v. The King* (1). *Hillas & Co. Ltd. v. Arcos Ltd.* (2).

The appeal should be dismissed with costs.

KERWIN J.—The appellant's petition of right was rightly dismissed in the Exchequer Court. All the relevant facts are set forth in the judgment of Mr. Justice Cameron and on these facts I have been unable to discover any basis for the claim of the appellant to payment out of the public treasury. The evidence is quite clear that there was no contract between the Crown and the appellant, and I can see nothing in the Order in Council setting up the Emergency Coal Production Board, or in the minutes of that Board, or the actions of any of its responsible officers, upon which the appellant may base a claim to a subsidy based upon a statute or anything similar thereto. The appellant seems to have thought that because it incurred further expenses and increased the production of coal by its deep seam operations at a loss, it should be entitled to divorce those operations from its strip mining operations upon which it had a profit. As a matter of fact, the appellant secured various financial advantages in connection with both classes of operations, and has not made out a case in which it might be said that, even if strictly not entitled to succeed, there was some equity which should be considered in disposing of the case.

The appeal should be dismissed with costs.

RAND J.—The question in this proceeding is whether the appellant coal company is entitled to recover from the Crown a subsidy in respect of coal mined by it during the six months' period from October 1, 1942, to March 31, 1943. The right is put both on the ground of a contract entered

(1) [1934] 2 K.B. 17, at 21 (decided in 1929).

(2) (1932) 147 L.T. 503.

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into by the company with the Crown represented by the Emergency Coal Production Board and by compliance with the conditions of regulations having the force of law.

The company's operations during the period in question consisted of strip and deep seam mining. Much of the greater part of the production came from the former, which had been commenced in 1939, and was highly profitable. In the Spring of 1941, the company decided to sink a shaft primarily for the purpose of obtaining a supply of water then urgently needed, but at the same time to open new deposits to meet the growing war demands then foreseen. It was expected that this operation would meet its own depreciation and depletion charges and in time recoup the outlay; but a large deficit resulted instead. For the first year and a half labour shortage contributed to this, but other factors had evidently not been fully appreciated or weighed by the company.

Prior to November 23, 1942, a Coal Administrator appointed by the Wartime Prices and Trade Board administered generally coal production throughout the Dominion. On that day, by Order in Council P.C. 10674, the Emergency Board was set up to meet, as its name implies, a threatened coal shortage. The powers of the Board included:

- (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, however, that in no case shall the net profits of operation exceed standard profits within the meaning of the *Excess Profits Tax Act*;

On the 9th of December following, the Board passed minutes of which the following are material here:

With a view to maintaining production at certain mines the Chairman was of the opinion that financial aid would be necessary in several instances. After reviewing the financial position of certain mines, the members approved the Chairman's suggestion that a memorandum should be immediately submitted to the Honourable the Minister of Finance to the following effect:

The Board recommends that in the first instance assistance be made available in the form of accountable advances based on estimated needs; and that payments be made by Commodity Prices Stabilization Corporation Limited on the recommendation of the Board. In most cases it would be inadvisable if not dangerous to withhold assistance until the audited annual statements of the companies can be made available and studied or until the report of a Mines Inspector or other authority can be made.



The Board further recommends that the following principles be followed in making settlements with companies to which accountable advances may be made:

- (a) That the amounts and terms of payment of accountable advances be reviewed at least once every three months and be based wherever possible on audit and inspection reports satisfactory to the Board.
- (b) That (save in exceptional cases) settlements be made with companies on the basis of standard profits as ascertained under the provisions of the Excess Profits Tax Act or such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold, whichever amount may be the less.

\* \* \* \*

- (c) That in cases in which unprofitable operations have been carried on in 1942 at the request of the Coal Administrator, the Board, if satisfied that the Coal Administrator's request was reasonable and that the request for reimbursement of losses is bona fide, will join with the Coal Administrator in recommending such reimbursement.

It will conduce to clearness to deal first with certain aspects of the deep seam operation. On December 23, 1941, the company wrote to F. G. Neate, Technical Adviser of the Wartime Prices and Trade Board, foreshadowing a coal shortage at the beginning of the new year, and proceeded:

Our Company, last Spring, realized that the call from this field would require a very considerable increase in output. We, therefore, planned for additional production in the shape of sinking a new shaft to the Lower Seam to give us at least a 1,000 ton per day capacity. This program was rushed as fast as possible, but our schedule was badly disrupted through delays beyond our control. Steel was almost impossible to get—steel erectors equally so, and due largely to the fact that material supplies delayed us, in place of getting into production along about the 1st of September, we were unable to get going until the 1st of November. However, we had to meet the situation the best way possible and fully expected to have 1,000 tons a day by the 1st of November, but due to the above delays, we will not reach the 1,000 tons until January 1.

The letter then goes on to state that an expenditure of \$100,000 had already been made, but that a 1,000-ton production would not be sufficient to meet the developing situation, and that it would be necessary to instal additional units. It then adds, "We are, therefore, going to ask for a write-off on this additional expenditure in two years." The matter was taken up with the Department of Munitions and Supply and ultimately, of a total expenditure of \$189,000, depreciation of two-thirds was allowed over the company's fiscal years of 1943, 1944 and 1945.

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On December 29, 1942, the company wrote the Board, and after mentioning the allowance, recounted the difficulties that had been and were being met owing to a serious deficiency of manpower. It then proposed that the Government take over the deep seam development and operate it entirely as a wartime project. The plant would remain under the management of the company and the opinion was expressed that "under the circumstances the property would unquestionably recover the capital expenditure very rapidly." This letter was acknowledged by Neate, at that time the administrative officer of the Board, to the effect that the matter would be placed before the Board at its next meeting. Nothing further appears which deals directly with this request, but it is undisputed that the proposal was not entertained.

It is thus beyond question that the opening of the deep seam was initiated by the company and carried on until at least the early part of 1943 voluntarily and for its own purposes, with no inducing action on the part of the Government or the then Fuel Administrator beyond the general exhortation for a country-wide increase in production. Nor was any recommendation made by the Board under paragraph (e) of the minute quoted.

We come then to the operations of the company as a whole. On January 4, 1943, the president wrote Neate, as Deputy Coal Administrator, informing him of orders issued by the War Labour Board in November to advance wages retroactive to the 1st of October, 1942, giving details of the increased payroll for the deep seam and strip operations separately, and inquiring how the company would be compensated for the additional cost. This letter was answered on the 6th of January by the Chairman of the Board, stating that the matter had been discussed that day, and that he had been requested to say that it would "be *looked after* just as soon as the *formula* for making accountable advances to companies has been decided." This was followed on January 29 by a letter to the president which should be quoted in full:

Referring to your letter of the 4th instant and our reply of the 6th instant in connection with accountable advances, I am instructed to advise you that the Board has approved a plan whereby operators who are

operating at a loss may be reimbursed on the basis of standard profits as ascertained under the *Excess Profits Tax Act* or alternatively to a maximum net profit of 15 cents per net ton before taxation.

For the purpose of establishing a basis on which these advances may be calculated, a new form F-4 has been prepared and I enclose a supply for your use. I note that the increased wage scale was, in the case of Western Dominion, approved as of October 1, 1942, and in order to study the effect of such increased wages, I will require a form F-4 for each of the months of October, November and December, 1942, and monthly thereafter as soon after the close of business each month as possible.

I would request that the form be read carefully, with particular attention paid to the instructions shown on the back. Inaccurate or incorrectly prepared forms will only cause unnecessary delay in making subsidy payments.

If you will forward the forms for the three months, October, November and December immediately, prompt consideration will be given thereto.

The forms mentioned contained on the reverse side certain instructions, of which the following are material:

1. This production subsidy statement must be completed monthly, in duplicate, certified by the proprietor, partner or in the case of a corporation by a person authorized by by-law to sign, and the original promptly forwarded to the Office of The Emergency Coal Production Board, 238 Sparks Street, Ottawa. The duplicate must be retained for your files.

\* \* \* \*

3. Subsidy may be paid as an accountable advance to the mine operator monthly or quarterly. If a change in wage scales should be authorized by The National War Labour Board the operator should submit at once a statement showing the effect of such change on his payroll so that the amount of the accountable advance may be adjusted.

4. The maximum amount of subsidy paid is regulated by the lesser of the amounts indicated hereunder:

(a) Profits not to exceed "Standard Profits" as ascertained under the provisions of the *Excess Profits Tax Act* or

(b) Such amount of net taxable profits as shall be equal to 15 cents per net ton of coal produced or sold.

5. "Standard Profits." If the operator has not had his "Standard Profits" assessed under the *Excess Profits Tax Act* he should at once make application to the Inspector of Income Tax, Ottawa, for the establishment of a standard.

About the middle of January, the president, following his letter of December 29, 1942, had met the Board, and in his language at the trial:

I took it up with the Emergency Coal Production Board, and pointed out that our deep seam operations were running at a loss and therefore we had to have some relief, either by an increase in the price of coal or a subsidy. They agreed that the matter *would be taken care of* at that time.

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They said we would *be taken care of* and that the *formula* was not approved and prepared, but it would follow later.

And

We got the form F-4 with certain instructions.

On his examination for discovery these answers were given:

Q. Had this interview anything to do with anything except the question of how far you were going to be compensated for any increase in wages?

A. That was the whole purpose.

\* \* \* \*

Yes, both the deep seam and the strip were discussed. Perhaps I might say there that the decision was coming from the National War Labour Board authorizing an increase in the rates of pay and therefore—

\* \* \* \*

Q. Have you any statement anywhere from the board that any particular basis of subsidy was authorized in respect of the deep seam mine?

A. Yes, they forwarded me a letter.

Q. I mean there is nothing except what appears in the correspondence?

A. No.

The total loss on the deep seam operation is stated to have been \$434,000, and that for the six months' period, \$82,000; and the claim submitted, originally for \$30,847 on a total production basis for the six months with a net of 15 cents a ton maximum, was by amendment at the trial increased to \$44,209.30, the difference between the net surplus and the standard profits of \$75,000.

The precise language of the letter of January 29, 1943, is of the utmost importance: "The Board has approved a plan whereby *operators who are operating at a loss* may be reimbursed." Here is a statement of the Board's intention toward coal mining generally throughout Canada. What is it that is to be operated at a loss? Conceivably, any part of a business, the accounts of which could be segregated. But that the plain and ordinary meaning of the language is total operations, I think unquestionable. This is confirmed when it is construed with the reference to "standard profits", and to the instructions on Form F-4A. The purpose, obviously, was the instigation of production by means of financial assistance where without it the production would not have been carried on; commercial profit would meet the ordinary case; but where a company was operating either at a loss or so near a loss as to have no incentive to produce, the Board would furnish the needed

stimulus. At the same time, notwithstanding price control, increased production would in general absorb increases of cost, such as wages. If, then, with the knowledge of the Board, operations were commenced or continued by reason only of the proposals for subsidy, the condition of assistance would be present. The minute of December 9 would seem to put the actual intention of the Board beyond doubt; and there is nothing in the documents that can fairly be said to have misled the company into believing that the general plan included the subsidizing of isolated operations; at the least, it should have raised the question in the mind of the president whether his case was covered and have been followed by inquiry. In other words, it is unreasonable on the part of the company to claim the wider interpretation on the written communications.

The same limitation is implied also in a letter to the appellant from the Executive Secretary of the Board dated February 11, 1943:

I have received your letter of February 5, enclosing returns on Form F-4 for your stripping and shaft operations separately for the months of October, November and December, 1942. In the light of these statements and the seasonal nature of your operations, I am of the opinion *that any question of subsidy should be deferred until your audited returns are received for your current financial year and also until you have been able to clarify the situation in respect to Standard Profits.*

and in the letter from the Deputy Coal Controller of April 17, 1943:

*If and when subsidy should become payable on the basis of your rates on Form F-4, in accordance with our recent ruling, of which a copy is attached, there would be no deduction of tonnage on your subsidy statements.*

It may be that the president left Ottawa in January, 1943, with an impression that in some way by a "formula" the deficit in the deep mining operations would be "looked after". But the Board was then making up its mind and there is nothing to indicate that he gave any more information than that the seam was being operated at a loss. Whether the precise extent of the loss or its relation to the rest of the operations was presented or considered we do not know. But the discussion was necessarily preliminary and the Board, as it is made clear in the subsequent docu-

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ments, was not in a position to give a categorical assurance of assistance, particularly so in the unusual operating situation.

The general plan would require a special application to a minor segment of a company's undertaking; but nothing looking to that took place. Moreover, the large capital expenditure had been completed only a few months before, and it would have been extraordinary that it should be abandoned so soon afterwards. No doubt the president's concern was chiefly with that seam; but when the letter of January 29 with the forms was received, the "formula", at the time of the meeting in Ottawa in course of preparation, was then before him, couched in terms of overall operations, and making no provision for exceptional cases. Even the preliminary assurances said to have been given were linked with the basis then being formulated, and whatever general impression he had carried from the meeting, he was not at liberty from that moment to disregard the considered and precise statement so communicated. In the view most favourable to him, he continued on an understanding that some as yet undefined special treatment would be accorded his deep workings, an understanding quite unwarranted in the face of the declaration of the Board, and it appears neither that the Board held such an understanding nor was aware that he did.

Giving to the company the benefit of every reasonable inference, and interpreting the facts in the background of the emergency and war conditions then prevailing, I am unable to find that the operation of the deep seam during the six months in question was ever involved in any bargain in which its continued operation was conditioned on the payment of the subsidy. Nor can I detect any indication that the attitude of the Board was not consistent throughout, that it was not at all times restricting subsidy to the results of the operations of the company as a whole. Not until the year 1944 was there a suggestion that the deep seam be dealt with separately, but the record does not disclose its fate. The company has not yet alleged an agreement by which the deficit itself would be recouped nor that a profit, however based, would be guaranteed; and the

amendment at trial related to the output of the seam claims simply the difference between the net surplus of the company and the standard profits.

With contract, including any basis of estoppel, excluded, compliance with the conditions of an obligatory subsidy is urged. But these conditions, by their very terms, involved the discretion of the Board which could be exercised only after operating results became known and on an appreciation of all circumstances: a discretion which became executed only when the subsidy was in fact paid. This contention is really that an increased output in response to the appeal of the Board would *ipso facto* guarantee to any company producing it a net return of either the standard profit or of 15 cents for every ton produced, whichever was lower: but that is wholly inconsistent with what the Board laid down.

The inclusion of the appellant's name on a list of companies to which subsidy was approved was relied on; but the correspondence makes it clear that there was a lack of co-ordination between the different departments of the Board; time after time requests were made for statements that had long before been sent to the Board; and the inference that the company's operations had not been finally considered is confirmed by the absence of any amount for subsidy opposite its name. The entry was therefore, in fact, provisional: it is the converse aspect of "accountable advances". It was made only in July, 1943, and it is relevant to the six months' period ending March 31, 1943, only as it might evidence recognition by the Board that the conditions on which the Board ordinarily acted were present; but the Board actually made its finding to the contrary, and the discretionary nature of its reserved power permitted it to do that.

I would, therefore, dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Pitblado, Hoskin & Co.*

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

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