

CASES
 DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE
 AND
 IN THE EXERCISE OF ITS APPELLATE
 JURISDICTION

BETWEEN :

LETHBRIDGE COLLIERIES LIMITED SUPPLIANT;

AND

HIS MAJESTY THE KINGRESPONDENT.

1948
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 Oct. 20
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 1949
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 June 13
 Sept. 21
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Crown—Petition of Right—Emergency Coal Production Board—Subsidy—Contract—Offer of a grant or gift of a subsidy by the Board is not an offer acceptable by performance to create a contract—No recovery against the Crown.

The policy of the Emergency Coal Production Board established by Order in Council P.C. 10674 November 23, 1942, as set out in the Minutes of the Meeting of the Board on 23rd March, 1944, was that "approved coal mine operators in the fields indicated to be entitled to a maximum production subsidy as follows . . ." and that the members of the Board "approved putting the scheme into force for the fiscal year April 1, 1944 to March 31, 1945 . . ." In a letter addressed to the Coal Mine Operators in the Domestic Fields of Alberta it was stated "the Board has approved a payment of a flat rate production subsidy as from April 1, 1944, on coal production of approved operators."

Suppliant claims payment of the subsidy on the basis of 35 cents per ton instead of at the rate of 12 cents and 16 cents per ton approved by the Board.

Held: That the Board offered a grant or gift of a subsidy to the coal operators and such action did not constitute an offer which could be accepted by performance thereby creating a contract between the Board and the coal operators.

2. That no contract having been created there was no covenant on the part of the Board to pay a subsidy in consideration of the production of coal and therefore the suppliant was not entitled to recover the same.

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PETITION OF RIGHT by Suppliant to recover payment of a coal subsidy from the Crown.

The action was tried before the Honourable Mr. Justice O'Connor at Calgary and Ottawa.

George H. Steer, K.C. for suppliant.

Harold W. Riley, Jr. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

O'CONNOR J. now (September 21, 1949) delivered the following judgment:

By a Petition of Right the suppliant claims to be entitled to recover from the Crown a subsidy in respect of coal mined by it during the two-year period from 1st April, 1944 to the 31st March, 1946.

By Order in Council P.C. 10674, dated 23rd November, 1942, (Exhibit 1) the Emergency Coal Production Board was established under powers conferred by the War Measures Act and otherwise, to meet a threatened coal shortage.

Paragraph 3 of the Order in Council is in part as follows:

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.

On the 23rd March, 1944, the Board passed the following resolution:
 23rd March, 1944.

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

increases and absorption of the cost of living bonus in the basic wage rates. 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:

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

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(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.

The suppliant received a copy of the telegram (Exhibit 4) and a letter from the Controller, dated 11th April, 1944, (Exhibit 12) at the same time. The letter is referred to in the evidence as C.C. 152, and is as follows:

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.

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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.

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 cents
Camrose	30 cents
Lethbridge	35 cents
Coalspur	35 cents
Saunders	35 cents

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 adjustment 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.

Paragraph 10 of the Order in Council provided that:

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.

Pursuant to such provision, on the 13th April, 1944, the Chairman of the Board sent to the Minister a Memorandum (Exhibit 8) which he stated in the letter enclosing the same (Exhibit 7) set out the reason for withdrawal of the old plans and the advantages of the new type of subsidy. He also enclosed a copy of C.C. 152 (Exhibit 12) which he stated outlined in more detail the new production subsidy arrangements. The Memorandum to the Minister (Exhibit 8) is as follows:

Memorandum re Production Subsidies.

April 13, 1944.

The reasons for withdrawing the previous type of subsidy, reported on Form F-4A, 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 administrating 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.

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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.

Coal Controller.

There was no evidence that the Minister took any action on receipt of the said Memorandum (Exhibit 8).

On the 18th April, 1944, a Coal Committee representing the coal operators of Alberta, including the suppliant, interviewed the Cabinet and as a result of that interview a sub-committee of the Alberta Coal Committee met the Chairman, Mr. Brunning, and certain officials of the Board. Mr. Brunning put before the Committee the Memorandum (Exhibit 8) that he had furnished to the Minister as establishing the policy that was being followed by the Board in administering this question of subsidy. The Memorandum was contained in the Minutes of the Meeting between the sub-committee and Mr. Brunning, which Minutes were prepared and circulated by the office of the Board to those members of the sub-committee present (and others) and in turn by them to the operators, including the suppliant.

Parts of these Minutes (Exhibit 6) are:

The Controller again stated that the labour costs were not the only ones and that the true test of efficiency lay in the reduction of other costs. It was the feeling of the Board that since coal was in surplus supply subsidy should be paid to cover those costs that had increased through direct Government action and that this policy would place the field upon a normal competitive basis wherein the efficient operations would survive and the inefficient would have to choose between closing or improving their operational efficiency.

Then follows the Memorandum to the Minister (Exhibit 8) *supra*.

C.C. 152 (Exhibit 12) *supra* was not shown to the meeting.

The suppliant had never been on Form F-4A, and had never received a subsidy. So it came within the first category, that is, an operator not on F-4A subsidy.

The suppliant received a copy of the Minutes from the Alberta Coal Committee (Exhibit 6) which related the Memorandum to the Minister (Exhibit 8) and from the Chairman of the Board a copy of C.C. 152 (Exhibit 12).

Mr. Donaldson took the statement in C.C. 152—"Approved operators not on F-4A subsidy during the last quarter of 1943 will receive subsidy at the rates indicated in subsection (i)," as meaning just what it said and the following sentence—"or such lesser rate as the Board may determine," as meaning that if 35 cents put the company over its standard profits that the Board would determine such lesser rate so as to keep the company within such standard profits. On this interpretation that the subsidy was 35 cents per ton up to standard profits, the suppliant worked the mine in a manner quite different from that which it normally would have done. It employed green men with a fire boss for every ten men instead of every sixty men. This was described by Mr. Stubbs as more or less a training school for men which would result in the production per man day being very low. And instead of driving to the boundaries they reversed this and took the coal in advance instead of in retreat. All this was done to increase the production, but it greatly added to the cost. I accept Mr. Donaldson's evidence.

On the 7th August, 1944, the Board advised the suppliant by letter (Exhibit 20) that "your Company's application to be placed on Flat Rate Subsidy as from 1st April, 1944, was provisionally approved. The rate so approved was determined to be *12 cents per ton* and payments will be made on that basis and such payments will be treated as accountable advances until an auditor's certified statement . . . has been received and reviewed."

On the 1st September, 1944, the suppliant wrote the Board (Exhibit 13) pointing out that it had been allowed

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a flat subsidy of 12 cents per ton and other operators in the district had received up to 35 cents per ton and that it seemed to it that wage increases not compensated for applied to all operators alike, and as the 35 cents per ton had been decided upon as the rate applicable to Lethbridge, its books had been set up on that basis, but on the advice of its accountant an adjustment had been made to correct this mistake. The letter concludes with:

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

Mr. Brunning replied under date of 13th September, 1944, (Exhibit 14) that the rate of 35 cents per ton was established for the Lethbridge area as the maximum amount required to cover the authorized wage increases. He then adds:

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.

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

It will be observed that Mr. Brunning did not answer either of the two questions asked in Exhibit 13:

(1) Will you please define for us the items covered by the 12 cents per ton and, (2), advise if there is liable to be any change in this figure depending upon our entire year's operations.

But on Exhibit 13 written in lead pencil opposite these questions "No" is underlined.

On the 18th September, 1944, the suppliant wired the Board (Exhibit 15):

Re your let 13 paragraph 3. Does this mean if the rate of 12 cents established fails to bring our year's operations to show standard profit will the rate be increased to provide for this or until the 35 cents is reached.

Instead of giving a definite answer either one way or the other to this question, on the 19th September, 1944, Mr. Brunning wrote to the suppliant (Exhibit 16):

Replying to your telegram of the 18th instant, I would refer you to my letter of September 13th and also Circular C.C. 152 dated April 11th, 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.

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It would not be known at that date whether 12 cents per ton would or would not reimburse the suppliant for the authorized wage increases or whether or not the suppliant would show a profit over the fiscal period. The letter adds:

However, if at the end of the 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.

The suppliant interpreted this to mean that at the end of the year it could apply for an increase in the 12 cents per ton for that year. Eventually, however, the Board refused to reconsider this question, but it did increase the amount to 16 cents per ton for the following year.

On the 12th December, 1944, the Board wrote to the suppliant (Exhibit J) in part as follows:

In accordance with Mr. Brunning's letter of October 12, settlement of the subsidy assistance to your operations will have to be deferred until your financial statement has been received. We might point out that the Board has in the past tried to avoid paying subsidy to any operator who is paying dividends. The Board does not wish to be accused of supplying funds for distribution to stockholders.

In a letter to the suppliant under date of 21st December, 1944, (Exhibit 11) the Board stated in part:

As your production season has now begun it is felt that you will be operating on a profitable basis for the balance of your fiscal period. The Board must guard against placing the operators in the excess profits bracket and as operators who show a profit over the fiscal period must not be subsidized, we must await your returns of December 31st or possibly your financial statement at the close of your fiscal period before resuming subsidy payments . . .

We would appreciate your advice whether it is your intention to refrain from making any dividend payments during the fiscal period.

In June 1945, Mr. Donaldson met Mr. Brunning and on June 28th, 1945, submitted a brief to the Board (Exhibit L). What the position was at the meeting is well described by the brief:

During our interview it early became apparent that we had a misunderstanding with respect to the Board's policy relating to subsidy assistance on the flat rate basis applicable to the various domestic coal fields. That policy as outlined to us by the Chairman was not a fixed

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one but discretionary by decision of the Board. This was so much at variance with the interpretation which we placed upon the pronouncement of the Board as set forth in C.C. 152 that the Chairman invited us to make a submission of the Company's case. This we are glad to do.

During the whole period the suppliant worked the mine in the manner indicated and continued to claim for a subsidy at 35 cents per ton up to an amount equal to standard profits.

The Board approved the suppliant for subsidy but paid only 12 cents and 16 cents per ton for 1944 and 1945.

Mr. Frank G. Neate in his examination for discovery as an officer of the Crown, stated:

That the amount of flat rate subsidy was arrived in this manner. The operators were divided into certain areas and F-4 returns were requested for October, November and December, 1943, and from that F-4 the flat rate was determined for a certain operating area and Drumheller had one field and Lethbridge another and Edmonton another, and in each case the flat rate varied according to the returns of losses sent in by the various operators. I can say this, that I know in calculating it was found the Drumheller losses amounted to 28 cents and, to be generous, they added 2 cents and made it 30 cents, and in the case of Lethbridge the figure was slightly over 30 cents and they made it 35 cents to bring each into the flat rate pattern . . . but the flat rate was not determined on an arithmetical average. You have two smaller mines and they could not swing it. It would be the tonnage of the Lethbridge field based on their losses and it would be 30 cents or 35 cents as the case might be.

The Minutes of the Meeting of the Board held on the 31st May, 1944, set out C.C. 152 in full but no action was taken in respect to it in any way. That is, C.C. 152 is merely copied into the Minutes without either being approved or disapproved.

On the 27th July, 1944, the Minutes of the Board show that the subsidy for the suppliant was then fixed at 12 cents per ton and the Minutes of the Board on the 18th October, 1945, show that the subsidy to the suppliant was then fixed at 16 cents per ton.

The first question that arises is what policy did the Board lay down at the meeting held on the 23rd March, 1944? To understand that it is necessary to examine the policy that had been in force before that date and the results. Prior to the introduction of this maximum production subsidy, as it is termed in the Minutes of the Meeting of the Board, dated the 23rd March, 1944, there

had been in force a subsidy, which the Memorandum to the Minister (Exhibit 8) referred to as F-4A-form of subsidy.

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Under the F-4A form of subsidy, only those operators who were operating at a loss received a subsidy. The subsidy consisted of a payment to operators of all their losses plus 15 cent a ton profit. Each operator submitted the Form F-4A and the Board considered each application separately and fixed the amount of the subsidy. The losses depended in part upon the amount charged for depreciation, depletion and development costs, so that mines operating at a loss, even when they were in the same area, received subsidy in varying amounts, and those mines which were not operating at a loss did not receive anything.

As each mine in the same area received a different amount, the subsidy was the direct opposite of a flat rate subsidy applicable to all mines in one area. The result, so long as coal was in short supply, did not affect the competitive position between any two mines, because the efficient mine could still sell all the coal that it could produce.

When, however, the coal fields in question were in surplus production and all mines in the same area were competing and there was an insufficient demand for coal to keep them all operating steadily, difficulties arose. As the report to the Minister points out, to pay to an inefficient mine all its losses plus 15 cents a ton profit, would keep the high-cost mines in operation and thus deprive the efficient low-cost mines of sales, which in turn would put them in a loss position. As the paragraph in the report puts it: "in other words, to continue this form of subsidy would be subsidizing inefficiency."

The new flat rate subsidy plan for each area "obviated these weaknesses" (in the language of the report to the Minister) by:—

1. Placing each operator in the same relatively competitive position as existed prior to the payment of production subsidies.
2. Made it necessary for excessively high cost producers, either to reduce their cost or close down.
3. Provided the necessary incentive to operators to reduce costs, as they can retain all profits that accrued from the operating, including the subsidy, up to an amount not exceeding standard profits, within the meaning of the Excess Profits Tax Act.

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In other words, the subsidy was changed from one in which the Board allotted varying amounts to the different mines in the same area, to one in which each mine (approved by the Board) in the same area, received the same flat rate subsidy, based on the net ton of coal production.

It is quite clear that if the Board paid each mine in the same area at a different rate of subsidy, then the operators would not be in the same relative competitive position as existed prior to the payment of production subsidies. The essence of the new policy was that the *same flat rate* would be paid to *all mines in the same area*.

Mr. Neate stated that C.C. 152 merely embodied the policy of the Board, as set out in the Minutes of the Meeting of the Board. If the sentence in the letter C.C. 152 (Exhibit 12) "or such lesser rate as the Board may determine" is given the meaning that the Board would pay mines in the same area at varying rates, then that provision is wholly inconsistent with the policy laid down by the Board, and was in fact directly opposed to such policy and was unauthorized.

In my opinion, the policy which the Board laid down in the Minutes and as explained in the report to the Minister, was that all operators in the Lethbridge area approved for subsidy by the Board, would be paid 35 cents per ton.

The suppliant having been approved for subsidy by the Board and having produced coal, should, in my opinion, have received a subsidy of 35 cents per ton up to standard profits.

Mr. S. T. D. Morrow, an auditor with the Treasury Department, made an audit of the books of the suppliant and a report of the audit bears date 15th April, 1947.

Mr. Morrow questioned, and I think that is as far as he went, the prices obtained on the sale of coal, the depreciation charged by the suppliant, the stores and supplies and general work, i.e. switching and loading, outside general and underground general. Using the sale price of coal as an example, what Mr. Morrow said in effect, that if the suppliant had sold coal at the maximum price permitted by the Order of the Wartime Prices:

and Trade Board, that the company would have received a greater revenue and therefore would have had a much higher profit.

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The evidence of Mr. R. H. Roberts, the Sales Manager of the suppliant company, showed that the company had continued to sell after the Order of the Board became effective, at the price that coal was sold during the basic period, 15th September to 11th October, 1941, plus additional increases authorized from time to time and that the suppliant had strictly adhered to the orders of the Board at all times. In addition, the suppliant had applied from time to time to obtain increases in price, and some increases had been granted and the coal had been sold at the increased price.

Mr. Patterson, the auditor of the company, dealt with the question of depreciation and the other questions raised. There is no need of my dealing with each item raised. I am satisfied on the evidence before me, that the suppliant obtained the highest prices for its coal that it could obtain and that the items that it has charged for depreciation, stores and supplies and general work and the other items questioned by Mr. Morrow, were reasonable and proper, and I so find.

Assuming that I am right in holding that the suppliant was entitled to such subsidy, the next question is whether there is a liability on the part of the respondent to pay the difference and a right in the suppliant to recover the same enforceable by petition of right?

On the facts here, the claim cannot be put on the basis of a contract reached by mutual agreement.

Nor in my opinion, can the claim be put on the basis of compliance with conditions of regulations having the force of law. P.C. 10674 (Exhibit 1) which established the Board and the powers of the Board, does not set out conditions which could be complied with so as to create a statutory contract. Moreover, its language is permissive and not imperative, and in addition, the payment of subsidies is in the discretion of the Board.

And for the same reasons a statutory contract cannot be created in my opinion, by combining the regulations under P.C. 10674 with what the Board did.

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With statutory contract excluded, there remains the question of whether the claim can be put on this basis: that what the Board did, was an offer capable of acceptance by performance, that is, the production of coal by an approved operator, thus constituting a contract, which created a liability on the part of the respondent to pay the subsidy, and gave the suppliants a right to recover it, enforceable by petition of right. As this in turn depends on whether what the Board did constituted such an offer, it is necessary to examine just what was done.

Under P.C. 10674, the Board was responsible under the direction of the Minister of Munitions & Supply, for taking all such measures as were necessary or expedient for maintaining and stimulating the production of coal and for ensuring an adequate and continuous supply for all essential purposes, and without restricting the generality of the foregoing, the Order provided that the Board had the power and duty under the direction of the Minister of *inter alia* rendering or procuring such financial assistance in such manner to such coal mines as the Board deemed proper for the purpose of ensuring a maximum or more efficient operation of such mine.

The policy of the Board was as set out in the Minutes of the Meeting of the 23rd March, 1944. After setting out that independent calculations by different methods resulted in the following tentative basis of subsidy, the Minutes state that: "approved coal mine operators in the fields indicated to be entitled to a maximum production subsidy as follows: . . ." The Minutes also show that "the members approved putting the scheme into force for the fiscal year April 1, 1944 to March 31, 1945 . . ."

Next, in C.C. 152 (Exhibit 12) addressed to the Coal Mine Operators in the Domestic Fields of Alberta, it was stated: "the Board has approved payment of a flat rate production subsidy as from April 1, 1944, on coal production of approved operators."

The question then is, did the Board make an offer which could be accepted by performance and thus create a contract, or did the Board merely offer a grant or gift of subsidy? Based on what I have set out above, I reach the conclusion that what the Board did was to offer a grant

or a gift of subsidy, and what the Board did, did not constitute an offer which could be accepted by performance.

No contract was therefore in my opinion created, and hence there was no covenant to pay a subsidy in consideration of the production of coal. And there was no right in the suppliant to recover the subsidy enforceable by petition of right.

For these reasons, the suppliant is not entitled to the relief claimed. The respondent is entitled to costs.

Judgment accordingly.

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