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BETWEEN:

WESTERN DOMINION COAL MINES LIMITED, ... } SUPPLIANT,

AND

HIS MAJESTY THE KING, ... RESPONDENT.

Crown—Petition of Right—Emergency Coal Production Board—Estoppel —Promise made without consideration not enforceable—Exercise of discretionary power.

Suppliant alleges that the Emergency Coal Production Board induced it to believe that it had been found entitled to the maximum subsidy permissible under Order in Council P.C. 10674, November 23, 1942, and that it was entitled to have and keep it as of right. Suppliant's claim is for $44,209 30. Respondent denies all liability to Suppliant. The Court found that the actual representation made to Suppliant was that it had been placed on Form 4A subsidy and that this was subject to certain qualifications. The Court also found that Suppliant had not altered its position as a result of anything done or said by the Emergency Coal Production Board.

Held: That since Suppliant did not change its position by reason of any statement or representation by the Respondent or its agent there is no basis for estoppel against the Respondent.

2. That any services rendered by Suppliant were not rendered at the request of the Board, and accordingly any promise made by the Board would not be enforceable for services rendered prior to the making of such promise.

3. That the Board cannot be compelled to exercise its discretion in favour of the Suppliant.

PETITION OF RIGHT by Suppliant to recover from the Crown the sum of $44,209.30 alleged due it by reason of certain arrangements entered into between Suppliant and the Emergency Coal Production Board.

The action was tried before His Honour Judge J. C. A. Cameron, Deputy Judge of the Court, at Winnipeg.

A. E. Hoskin, K.C. and *O. S. Alsaker* for suppliant.

J. B. Coyne, K.C. for respondent.

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

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CAMERON D.J., now (March 27, 1946) delivered the following judgment:

The Suppliant's Petition of Right as amended is for $44,209.30, said to be due it by reason of certain arrangements alleged to have been made between it and the Emergency Coal Production Board, (hereinafter referred to as the Board). The Respondent denies all liability.

By Order in Council P.C. 10674, dated November 23, 1942, the Board was established under powers conferred by the War Measures Act and otherwise. It consisted of the Coal Administrator and two other members to be appointed by the Governor in Council. Its powers and duties are set out in Section 3 of P.C. 10674 (Exhibit 3). In general terms it was responsible, under the direction of the Minister of Finance, for taking all necessary measures for maintaining and stimulating the production of Canadian coal and for ensuring an adequate and continuous supply thereof for all essential purposes. Certain of its specific powers and duties will be referred to later.

The Suppliant Company was reorganized in April, 1939, and about that time commenced the business of strip mining. This is a relatively simple operation and has proven successful and profitable. In 1941 the Suppliant being in need of water for its operations, decided to open up a deep seam mine with the dual purpose of securing a water supply which lay underneath and operating the seam itself. This new operation was entered into voluntarily by the Suppliant without any order or direction from any Governmental authority. It was producing coal by September, 1941. By the end of that year about $100,000.00 additional expenses had been incurred in the new operation, and a further $84,000.00 outlay was necessary to secure new equipment. In 1942, with the co-operation of the Coal Administrator's office, the War Contracts Depreciation Board permitted the Suppliant to write off $144,000.00 of this expense over a period of three years.

Towards the end of 1942 the Suppliant found itself in difficulties in regard to the new operations. New machinery had been installed and production increased somewhat, but not to the level anticipated. On December 29, 1942,

the Suppliant wrote to the Board, outlining its position, which it attributed to a shortage of competent workmen, and suggested the Government take over the whole operation. This was the first contact with the Board which had just been established.

On January 4, 1943, the Suppliant advised that the National War Labour Board had granted increases in wages, effective from October 1, 1942, and requested information as to how it would be compensated for the additional outlay. Later this additional expense was provided for.

On January 4, 1943, the Suppliant wrote the Board in regard to its stripping operations, requesting its assistance in securing further tax allowances in respect of expense of $50,000.00 to be incurred in moving the stripping operations to a new site, so as to greatly increase its production. The Chairman of the Board requested the President of the Suppliant Company to come to Ottawa to discuss the matter.

No record was kept by anyone as to what took place at the interview, and the evidence is conflicting and quite unsatisfactory. It was the only interview that the Suppliant had with anyone connected with the Board on matters in question; for while the evidence indicates another interview early in 1942, the Board had not then been constituted. Mr. Brodie, on his examination for discovery, said that his interview was with Mr. Stewart, the Board's Chairman, and that its whole purpose was how the Suppliant would be compensated for increase in wages. At the trial Mr. Brodie said it was with Mr. Stewart or Mr. Neate (the Deputy Coal Administrator and Technical Adviser to the Board)—or both; that he stated that as the deep seam operations were running at a loss, the Company would have to have some relief either by an increase in the price of coal or by a subsidy. He stated that they agreed that the matter would be taken care of, but that the formula had not yet been worked out and would come later. Mr. Neate in that part of his examination for discovery read into the record by Counsel for the

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Suppliant, says that undoubtedly there was discussion in regard to remuneration for operations that were not paying.

Even if I accept the evidence of Mr. Brodie at the trial as to what transpired at this interview, I am quite satisfied that there was then no contract entered into which would be binding upon the Respondent. It was not a meeting with the Board, and the Board's Minutes do not indicate that anything was done as a result of this interview. There is no evidence whatever that the Suppliant Company itself, undertook to do anything; Mr. Brodie merely asked for help in a losing operation. There was no consideration passing to the Board; no details of any proposed assistance were agreed upon and there was, therefore, no binding contract.

It seems to me that this interview, in the main, had to do with Mr. Brodie's request, contained in a letter, dated January 4, 1943, for the Board's assistance in securing further tax allowances regarding the expenses in moving the stripping operations to a new site. The Board Chairman wired an acknowledgment of that letter and requested the interview above mentioned.

The Board's Minutes of its meetings on December 7, 8 and 9, 1942, indicate the manner in which it proposed to function, and the basis on which it would grant financial assistance, and while these Minutes were not known to the Suppliant until they were produced by Mr. Neate on his examination for discovery in September, 1945, they are important as indicating the procedure of the Board and the meaning of certain expressions used at the trial.

The following are extracts of relevant portions of such minutes:—

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.

On January 29, 1943, the Executive Assistant of the Board wrote to Mr. Brodie as follows:—

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.

Exhibit 5 is Form F-4 therein enclosed. It is a comprehensive form and was intended to secure all necessary information as to the operations of the coal mining com-

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panies for individual operating months. Certain instructions were printed on the back of this form, and the following Sections thereof are relevant:—

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.

2. With every sixth consecutive statement the mine operator must attach the certificate of a recognized firm of Auditors or a recognized public auditor reconciling the accuracy of the six statements concerned.

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 15c. 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.

Under date of February 5, 1943, the Company returned individual F-4 forms for each operation—strip and deep seam—for the months of October, November and December, 1942. The letter accompanying these forms pointed out that separate statements were included for each operation—intimated that the standard profits had not yet been determined, and pointed out that the operations were to a certain extent seasonal, the low point being in the Summer. Information was also given as to the extra cost occasioned by wage increases for that year.

These items of correspondence are, in my view, of great importance. The Board's letter of January 29 was clear notice to the Suppliant that only operators operating at a loss would be reimbursed. (No exception is taken to that policy in the Company's reply.) Attention was called to the instructions on the back of Form F-4, and there it is clearly stated that subsidy may be paid as an accountable

advance to the mine operator, monthly or quarterly; and to the manner in which the maximum amounts of subsidy would be regulated.

It is suggested that the Board's letter of January 29, 1943, enclosing the blank forms, constituted an offer to the Suppliant, and that its reply, with the completed forms, was an acceptance of that offer, and that there was then a binding contract between the Board and the Suppliant. With that contention, I cannot agree. There was no offer and, therefore, there could be no acceptance; and there was also no consideration. In substance it amounted to nothing more than intimation to the Suppliant that if it desired to furnish proper information to the Board, then, subject to the express qualification that subsidy would be given only to operators operating at a loss, the Board would consider what should be done with the application under its powers and discretion contained in P.C. 10674. This Order in Council gives wide discretion to the Board as to how it would render assistance—Section 3(1) (e) being as follows:—

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

There is ample evidence to indicate that for the period in question, at least, the Board established a policy of giving assistance by way of subsidy only to operators, operating at a loss. Its letter of January 29, 1943, so states, as does also the letter of the Board's Chairman to the Suppliant, dated April 18, 1944, in which he says:—

> On January 29, 1943 you were advised of a subsidy plan whereby operators who were operating at a loss might be reimbursed. It has been the fixed policy of this Board that, until an operator can clearly establish that his operation is suffering losses, no subsidy will be advanced. (Exhibit 4 (51).)

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This is confirmed by the evidence of Mr. Neate taken on his examination for discovery—questions 166 and 327—and read into the record at the trial by Counsel for the Suppliant.

Clearly there was nothing to prevent the Board deciding on such a policy, nor did it at any time misrepresent the matter to the Suppliant. In a letter from Mr. Neate to Mr. Brodie, dated April 17, 1943, he states:—"If and when subsidy should become payable on the basis of your rates in Form F-4 in accordance with our recent ruling . . . . ."

Moreover, it is evident that the Board's policy was that of granting financial assistance by way of accountable advances. This is indicated by the Minutes of December, 1942, and by the evidence at the hearing. It was considered inadvisable to withhold assistance until the annual audited statements were received, and, therefore, when subsidies were given they were actually advances made, subject to review when the annual statements were received; and I take it that if these indicated that the advances were not warranted under the Board's policy, the Company which had received the assistance would be required to return all or part of the amounts.

On June 7, 1943, the Company forwarded consolidated Forms F-4 for the period October 1, 1942, to March 31, 1943, for both strip and deep seam operations, together with letter from its auditors, verifying the forms. These consolidated returns were to replace ones previously forwarded for individual months, and certain necessary corrections were made to replace estimated amounts in the previous statements.

The annual statement of the Company was also forwarded to the Wartime Prices and Trade Board at the same time. On June 14, the Board requested certain additional information in regard to the forms just received, and this information was later forwarded to the Board. On July 17, 1943, the Board was advised that the standard profits of the Company had been fixed at $75,000.00; this, of course, was referable to the entire operations of the Company, and for a full twelve months' period.

The Suppliant continued its dual operations and I think I can assume that the deep seam operations were unprofitable and the strip operations profitable. The Board from time to time expressed its desire that the Suppliant should exert a maximum effort to obtain the production planned by the Suppliant, but gave no orders (such as it had power to do) and the Suppliant continued on a purely voluntary basis with relatively good results, considering the difficulties it encountered regarding manpower. Progress reports were sent in from time to time, and the Board expressed its appreciation of the Suppliant's efforts.

On September 8, 1943, the Suppliant wrote to remind the Board that all necessary information had been supplied, and requesting an early disposition of its claim. On December 3, 1943, the Suppliant again asked for information as to the status of its claim for the period October 1, 1942, to March 31, 1943, and received a reply from one Blouin, Assistant Accountant, as follows:—

> In reply to your letter of December 3rd, 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 1st to March 31st, (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 1st, 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 statements 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.
>
> A. O. BLOUIN
> for A. E. Bradfield
> Accountant.

This was the first intimation that the Suppliant had as to the result of its application. At the trial I authorized an amendment to Paragraph 5 of the statement of defence (which had originally admitted that this letter was written by or on behalf of the Board). Exhibit "A" is the said amendment and, in essence, it states that the letter was written on behalf of the Accountant of the Board, and that the Board did not authorize subsidy for the Suppliant's operations, except as to certain items of assistance which are not relevant to this claim.

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At the trial there was some evidence that Mr. Blouin's duties were to assist the Accountant and that he was not authorized to speak for the Board. But in view of a letter by the Chairman to the Suppliant on February 29, 1944, (Exhibit 4 (45)), stating that the Board at its 20th meeting held on July 29, 1943, approved the placing of the Suppliant on F-4A subsidy, I am satisfied that the question raised as to Mr. Blouin's authority to write the letter, is unimportant, except possibly as to the date when the subsidy was to begin, which is not mentioned in the Chairman's letter or the Board Minutes of that meeting. Section 4(5) of P.C. 10674 seems to establish conclusively that the statements in the Chairman's letter were in fact the act of the Board, itself.

In reply to the Board's letter of December 9, 1943, the Suppliant on December 20, 1943, forwarded separate consolidated forms for the two operations for the period in question, together with auditor's certificates. No reply being received it wrote again on February 15, 1944, asking for early attention. On February 29, 1944, the Board Chairman wrote the Suppliant as follows:

> Under date of January 29, 1943, you were advised by Mr. J. R. Cox that the Board had approved a plan whereby operators who were operating at a loss would be reimbursed. This Board at the 20th meeting held on July 29, 1943, approved the placing of your company on F-4A subsidy.
>
> At a recent meeting of the Emergency Coal Production Board there was considerable discussion with respect to the production subsidy now being paid to domestic mines throughout Western Canada.
>
> In view of the surplus supply of domestic coal now available throughout the West, the emergency which existed during 1943 must now be considered over.
>
> As the Emergency Coal Production Board was set up solely to deal with coal supply during the emergency, it cannot justify further payments of production subsidy to mines producing domestic coal which are operating at a loss.
>
> The question of financial assistance to the coal mining industry generally is now under review and whether or not subsidies in some other form will be authorized is a matter for the Government to decide.

This was followed by a further letter of March 3, 1944, from the Chairman as follows:—(Exhibit 4 (46)).

> 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.

On March 6, 1944, the Assistant Accountant wrote the Suppliant requesting certain information. The evidence indicates that this was a circular letter to mine operators and this seems to be the case, as it refers to the fiscal year ending March 31, 1944, and to payment of subsidies already advanced. While assistance had been given, the Suppliant had not actually received any F-4 or F-4A subsidy.

On March 22, 1944, the Suppliant replied to the Chairman's letter of March 3, 1944, outlining its position and requesting payment of its claim of $30,487.44 for the six months' period in question. On April 18, 1944, the Chairman again wrote the Suppliant in these words—(Exhibit 4 (51)):—

On January 29, 1943, you were advised of a subsidy plan whereby operators who were operating at a loss might be reimbursed. It has been the fixed policy of this Board that until an operator can clearly establish that his operation is suffering losses no subsidy will be advanced.

We must point out that for your fiscal years ended March 31, 1942 and 1943, you showed profits of $24,643.11 and $25,639.15 respectively after providing for depreciation in the amounts of $100,150.82 in 1942 and $127,360.40 in 1943 and the depletion of $64,002.50 in 1942 and $64,727.50 in 1943.

In view of the foregoing we have no alternative but to confirm our letter of March 3.

Inasmuch, therefore, as the Suppliant had been placed on F-4A subsidy on July 29, 1943, the question arises as to the meaning and effect of such action by the Board. Exhibit 8 is an extract of the Board's Minutes of that date. All members and certain officials were present, but no representative of the Suppliant. Paragraph 2 of the Minutes reads:—

There was tabled a list of operators for whom production subsidy had been provided up to and including July 27, 1943, authorization for which had not been recorded in previous meetings. The meeting approved the names of the operators listed as being eligible for subsidy in accordance with Form F-4A. In future, certified lists of production subsidies will be submitted monthly for the Board's approval.

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Appended to the Minutes is a list of operators, headed "20th meeting on Thursday, July 29, 1943—Companies receiving or authorized to receive F-4 assistance". There are thirty-eight names on the list, and in respect of six of these (of which the Suppliant is one) no amount appears in the column headed "Amount of Assistance", but varying amounts are placed after the names of the other thirty-two.

The only evidence as to the procedure of the Board in matters of this sort is that of Mr. Neate, much of whose examination for discovery was introduced by Suppliant's counsel at the trial. He stated that the Board wanted to find out what was the best way to get the information "to find out whether an operator was operating at a loss", and Form 4 was established, drawn up and approved, and that was the plan or form sent to the Suppliant. Later the form was changed to F-4A. The subsidies were definitely to be accountable advances, as I have previously stated, and while granted to certain operators, they would later have to account for these sums, and only those later found to be operating at a loss would be permitted to retain such advances. Mr. Neate stated that the amounts inserted in the column headed "Amount of Assistance" were merely the amounts claimed by each operator and not the amounts approved by the Board. He also says that the reason for no amount being placed opposite the Suppliant's name was that its forms had not then been processed. The evidence is clear that at no time did the Board fix any amount as being payable by way of accountable advance to the Suppliant. Why this was the case, when they had been placed on the list and when all necessary material had been filed, does not appear from the evidence. It may have been because one of the operations was showing a profit and the other a loss, or because the Suppliant was receiving financial assistance in other forms.

It was suggested that the letters signed by the Board Chairman, denying liability to the Suppliant, were written in a personal capacity, and not on behalf of the Board, and Mr. Neate seemed to be of that opinion. But it must be remembered that Mr. Neate was not a Board member and was not present at all the meetings, and in view of

Section 4(5) of P.C. 10674, to which I have previously referred, it is conclusive that the statements therein contained were the acts of the Board itself.

In the Suppliant's reply filed by reason of the amendment of Clause 5 of the statement of defence, Counsel raises the question of estoppel. But Respondent's Counsel argues that there is no estoppel as against the Crown; and alternatively that there is here no basis for an estoppel.

The decisions as to estoppel against the Crown are somewhat conflicting. In the Supreme Court of Canada in *Bank of Montreal* v. *The King,* (1), three of the Judges held that estoppel could not be invoked against the Crown. Reference also may be made to *The King* v. *Capital Brewing Co., Ltd.,* (2); Everest & Strode Law of Estoppel, 3rd Ed. 8; Robertson on Civil Proceedings by and against the Crown p. 576. On the other hand there are many leading cases which would seem to indicate that while the doctrine of estoppel by deed does not apply as against the Crown, yet estoppel in pais does so operate. In *Attorney-General to the Prince of Wales* v. *Collom* (3), Atkin J., said, after referring to *Attorney-General for Trinidad and Tobago* v. *Bourne* (4), and *Plimmer* v. *The Mayor of Wellington* (5):—

> A further point was raised that no estoppel binds the Crown, and that this equity is based upon estoppel. There is authority for the general proposition so far as estoppel by deed is concerned. I know of no authority for the proposition as applied to estoppel in pais.

Reference also may be made to *Queen Victoria Niagara Falls Park Commissioners* v. *International Railway Company* (6),

But is there, in fact, any basis for raising the question of estoppel? The principle is stated in *Square* v. *Square* (7), where Langton J., at p. 49, quotes the statement of Lord Denman, C.J., in Pickard *v.* Sears:—

> But the rule of law is clear that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

(1) 27 C.L.T., 227.
(2) (1932) Ex. C.R. 182.
(3) (1916) 2 K.B., at 204.
(4) (1895) A.C. 83.
(5) (1884) 9 A.C. 699.
(6) (1927) 63 O.L.R. 49 at 68
(7) (1935) L.J., N.S., 104 at 46.

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Further Langton J., said:—

It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or someone on his behalf; (*b*) with the intention that the plaintiff should act upon the faith of the statement; and (*c*) the plaintiff does act upon the statement.

See also *Greenwood* v. *Martins Bank Limited,* (1).

In essence, what the Suppliant now alleges is that the Board induced it to believe that it had been found entitled to the maximum subsidy permissible under the Order in Council, and that it was entitled to have and keep it as of right. But clearly the Board did not do so. The actual representation made to the Suppliant in December, 1943, was that it had been placed on Form 4A subsidy. But this was qualified by the prior statement by the Board that such subsidy was to be by way of accountable advances, and the whole matter was subject to the further qualification that subsidies could be paid by the Board and kept by the recipient only if the operator were operating at a loss. The Suppliant was fully aware of these qualifications, but assumed that because one of its operations was conducted at a loss, that therefore it was entitled to subsidy in respect of that operation. There never was, for the period in question, any decision by the Board that the deep seam operation would be treated entirely as a separate matter, although it did request that separate forms be supplied for each operation. Financial assistance in ways other than by way of subsidies had been granted in respect of the two operations, and as Mr. Neate said,—"The Board had to find out how each was progressing". The total operations could not be disregarded by the Board, for, by the terms of the Order in Council, it had to consider the standard profits, which are the profits of a taxpayer, and not those of each operation of a taxpayer. And I can find no evidence that the Suppliant altered its position as a result of anything done or said by the Board. As stated by Counsel, it "went on" when it could perhaps have shut down. The deep seam operation had been planned and put into execution in 1941 long before the Board came into existence. The correspondence filed at the hearing indicates that the Suppliant planned

(1) (1932) L.J., 101 K.B.D. 623 at 626.

to continue this operation for several years, if not for the full duration of the war. In February, 1942, the Suppliant wrote the War Contracts Depreciation Board, outlining the plan and stated:—

> This proposed additional production of 250,000 tons will not be required the minute our war effort ceases, and all the capital expended will become idle. We, therefore, apply to your Board to grant a depreciation allowance sufficient to write this off in two years. With such a provision to write this off in two years, our bankers will provide us the finances required.

On March 7, 1942, the Department of Munitions and Supply wrote the Suppliant (as requested by the latter) referring to the Company's proposition to acquire equipment and expand its facilities to increase production to 250,000 tons per annum, and requesting the Company at its own expense to make these expenditures, and stating that no liability of any sort was thereby incurred. This letter was requested by the Suppliant to further its application to the War Contracts Depreciation Board.

I find, therefore, that the Suppliant did not change his position by reason of any statement or representation by the Respondent or its agent, and that there is, therefore, no basis for raising the question of estoppel.

It is to be kept in mind that the claim here is for payment of subsidy for the period October 1, 1942, to March 31, 1943, and that nothing was done by the Board to place the Suppliant on subsidy until July 29, 1943, and no statement to that effect was given to the Suppliant until December 9, 1943.

Assuming that the Board did on July 29, 1943 place the Suppliant on subsidy for the period in question, can the Respondent be now compelled to pay any subsidy for services said to have been rendered in a previous period and without any contract, expressed or implied? The "services so rendered" (the production of coal) were not rendered at the request of the Board, and therefore in my view, even if the action of the Board on July 29, 1943 was taken to be a promise, it would not be enforceable. See *Pollock on Contracts,* 10th Ed., 177, and cases therein referred to. And even if there were an existing moral obligation not enforceable at law, such would not furnish good consideration for a subsequent express promise. See

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Privy Council decision in *Jayawickreme* v. *Amarasuriya* (1), and cases therein referred to; also *Roscorla* v. *Thomas* (2).

A so-called past consideration—that is something done by the promisee before the promise was made—may constitute a motive for the promise but is not a real consideration (save perhaps in exceptional cases of which this is not one). It would be otherwise if the services had been rendered at the request of the promisor. There being no legal consideration, there was no enforceable contract.

And it seems apparent that there is no statutory right to receive the financial assistance. This is not a case where moneys are appropriated for division among named parties, or those in a special class. The financial assistance is to be "in such manner to such coal mine *as the Board deems proper*". The discretion is entirely that of the Board, under the direction of the Minister. No direct grant was made by the Order in Council to the Suppliant.

While the Board had the power and duty of rendering financial assistance, it was to be in such manner and to such coal mine *"as the Board deems proper"*. Here the Board has not seen fit to exercise its discretion in favour of the Suppliant in this particular matter. And where there is a discretionary power, there appears to be no legal remedy to compel the Board to exercise that discretion in favour of the Suppliant.

In *Quebec, Montreal and Southern Railway Company* v. *The King* (3), Audette J., said:—

> Therefore, using the words of the Chief Justice in re Hereford Railway Company *v.* The Queen neither on the ground of contract nor on that of statutory obligation are the suppliants entitled to succeed. It was further held in that case that when money is granted by the Legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. The statute granting the subsidy did not create a liability on the part of the Crown to pay the same. Where there is a discretionary power, there is no legal remedy.
>
> The authority to grant a subsidy under the statute, is not mandatory but purely discretionary, and essentially a matter of bounty and grace on behalf of the Crown, creating no liability to pay the same enforceable by petition of right. Moreover, under the facts of the case the suppliants are not entitled to the relief sought herein.

(1) (1918) A.C. 869 at 875.
(2) (1842) 3 Q.B. 234. 114 E.R. 496.
(3) (1914) 15 Ex. C.R. 237.

Reference may also be made to *The King* v. *Noxzema Chemical Company of Canada, Ltd.*, (1), where Kerwin J., stated at page 186:—

> The Legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the Court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal. In such a case the language of the Earl of Selborne in Spackman *v.* Plumstead District Board of Works appears to be particularly appropriate:—And if the Legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

See also *Literary Recreations Ltd.*, v. *Sauve* (2); *Lake Champlain & St. Lawrence Ship Canal Company* v. *The King* (3).

In the case of *Hereford Railway Company* v. *The Queen* (4), Sir Henry Strong, C.J., said at page 15:—

> Therefore, neither on the ground of contract nor on that of statutory obligation are the suppliants entitled to succeed There remains the ground of trust. Can it be said that the Crown is by the statute made a trustee or *quasi* trustee of this money to hold it until the railway should be completed and then pay it over to the Company? Several cases have been before the English courts where moneys have come into the hands of the Crown for the purpose of being distributed amongst a certain class of persons. Such were the cases of Kinloch *v.* The Queen, and Rustomjee *v.* The Queen, in both of which it was determined that money so held by the Crown could not be considered as subject to a trust enforceable by means of a petition of right. I see no reason why the principle of these cases should not apply here. If no enforceable trust is to be considered as imposed when money to be applied to a particular designated purpose is placed in the hands of the Crown under treaty or otherwise than by act of parliament, why should the conclusion be different where the money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown? No reason can be suggested for such a difference.

I find, therefore, for the reasons stated that the Suppliant has no contractual, statutory or other right to the sum claimed or any part thereof.

Some reference, however, should be made to the amount claimed, should the matter go further.

The claim as filed was for $30,847.44 and was according to the computation made in paragraph 25 of the Petition

(1) (1942) S.C.R. 178.
(2) (1932) 3 W.W.R. 123 at 125.
(3) (1916) 54 S.C.R. 461 at 475.
(4) (1894) 24 S.C.R. 1.

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WESTERN DOMINION COAL MINES LTD. v. THE KING

Cameron D.J.

of Right. At the trial, by consent, a new paragraph 25A was added and paragraph 26 was amended (Exhibit 1). The claim now is for $44,209.30. The figures given in the computation in paragraph 25A are not in dispute. The computations are based on (1) the limitation that financial assistance cannot exceed an amount which would result in the net profits of operation exceeding standard profits within the meaning of the Excess Profits Tax Act, and (2) Section 4 of the Instructions on the reverse side of Form F-4, which states that the maximum amount of subsidy paid is regulated by the lesser of,—

(*a*) Profits not to exceed standard profits;

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

The first computation in Section 25A shows that the maximum subsidy for the six months' operations of the deep seam mine and based on 15 cents per ton of coal produced would be $90,020.22, a sum much greater than that indicated by the alternative method limiting the profits to standard profits.

But the second computation is in my view quite wrong. The figures used are for the Company as a whole for the full year, and are based on standard profits for the full year ending March 31, 1943.

In view of the fact that the maximum subsidy is the lesser of two amounts, one of which is based on standard profits, and inasmuch as standard profits under the Excess Profits Tax Act are for a taxpayer and not for single operations of a taxpayer (and have been so fixed for the Suppliant) I cannot see how a subsidy could be computed, except for the whole operation.

Section 2(1) of the Excess Profits Tax Act defines standard profits, and contains a proviso that such profits shall be deemed to have accrued on an equal daily basis throughout any fiscal period or portion thereof which is in question. At no time was there any suggestion that the financial assistance should be for the full year ending March 31, 1943, although that is the claim now made in paragraph 26. And as the standard profits are deemed

to have accrued on an equal daily basis, the proportion of the standard profits for the six months in question would be $37,500.00.

The following, therefore, would be the only basis on which maximum subsidy could have been awarded by the Board:—

Net gain for six months on strip mine operations	$ 110,497 07
Net loss for six months on deep seam mine operations	77,131 32
Net gain for six months	$ 33,365 75
Maximum amount of subsidy	4,134 25
	$ 37,500 00

The amount shown for profit on the strip mine is taken from the Company's return of December 14, 1943. The amount shown for loss on the deep seam operation is from paragraph 25A of the Petition of Right. It is apparently arrived at by deducting certain additional labour costs, later recovered from the Board, from its loss in this operation as shown on the other return of December 14, 1943.

Two things only remain to be said. The Suppliant on a purely voluntary basis exerted considerable effort to increase the production of coal, and, under the conditions, achieved some success. The Board on the other hand has not, I think, failed in any duty it may have had to the Suppliant as will be seen from various forms of assistance itemized in paragraph 7 of the defence.

For the reasons mentioned above, I find that the Suppliant is not entitled to any of the relief claimed in the Petition of Right, and it will be dismissed with costs.

Judgment accordingly.