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**BAIRD & CO. WHOLESALE AGENTS**  
ST. JOHN'S**Food Control Board  
Lose Sugar Case Appeal.****Judgment of the Chief Justice  
Upheld.**

Yesterday afternoon Justices Johnson and Kent filed their judgments in the appeal of Hon. H. J. Brownrigg, Minister of Finance and Customs, from the judgment of the Chief Justice, Sir William Horwood, in the Hickman sugar case. Both Justices upheld the finding of the Chief Justice and the appeal was dismissed with costs. The judgments as handed down yesterday are as follows:

**IN THE SUPREME COURT.**  
Between Henry J. Brownrigg, Minister of Finance and Customs, Appellant, and A. E. Hickman & Co., Ltd., Respondent.

Appeal from an order made by the Hon. the Chief Justice on the 13th of September, 1920, that peremptory mandamus issue to the appellant directing him to grant his warrant for the unloading of goods into the Colony.

Mr. L. E. Emerson (Mr. Carter with him) for the appellant.

Mr. Morine, K.C., (Mr. Bradley with him) for the respondent.

**Opinion of Mr. Justice Johnson.**

Before proceeding to the reasons why I think the order appealed from was right, I deal with the exception raised by counsel for the respondent that it was not open to appellant to introduce for the first time at this appeal the contention that C. C. Pratt was the applicant and not A. E. Hickman & Co., Ltd., in whom, if in anyone, lay right to the permit sought. I infer from Rule 9 of Order 54 and from the papers before me that the only facts dealt with by the Chief Justice were those appearing in C. C. Pratt's affidavit and those admitted at bar. Ex parte Firth 19 C D 419 was relied on by Mr. Morine who referred also to the White Book of 1915 p. 1118. But I cannot hold that those authorities sustain his objection, in the circumstances before me, to the appeal, which is by way of rehearing in a Court which includes the Judge of first instance. As I view this application, the Hickman Company, Ltd., is prosecutor and makes affidavit; by its secretary as to the essential facts respecting its rights as importer of the sugar in question. A limited company cannot make affidavit; it has neither back to be beaten nor soul to be damned for perjury. Its affidavits are made either by a director, its secretary, or chief officer, and Mr. Pratt is both its secretary and a director.

Dealing with the main question, Mr. Emerson contended that regulation No. 9 of the regulations as to sugar (made by the Food Control Board, approved by the Governor in Council under the provisions of the Food Control Act, 1917 and the War Measures Act, 1914-1916, dated 27th July, 1920, and published in the Royal Gazette), was effectual to prohibit importation of sugar unless permit to do so was first obtained from that Board. The caption of the regulations and all of them but No. 9 relate to sale of sugar, not to importation. I infer from that caption that the regulations were made by the Board under the power conferred by Sec. 3 of the Food Control Act.

Raising and expenditure of public revenue is essentially within the control of the people's branch of the Legislature, and the Customs Act sets the limits and conditions within which taxable merchandise may be imported. From this it follows that express authority of Parliament is necessary to delegation of powers vested by

those Acts in officers of Customs. Chapter 22 of the Consolidated Statutes (3rd Series), which is the code applicable to matters within its scope, provides that on compliance with its conditions, an importer shall be entitled to, and that the collector or other proper officer shall grant him, a warrant for the unloading of his goods inwards. Hickman & Co., Ltd., complied with those conditions as to the 200 barrels of sugar referred to in C. C. Pratt's affidavit but the Customs officer replied that as the importer had no permit from the Food Control Board regulation 9 stayed his hand.

Is regulation 9 ultra vires of the Food Control Board and if so was the approval by the Governor in Council (which the proclamation declares to have been under the provisions of the Food Control Act, 1914-1916) also ultra vires and of no effect?

As I read the Food Control Act, which is an Act respecting control of trading and makes no reference to importation, subsections (a) and (b) of section 2 are negligible here. Subsection (c) refers to control of distribution and to prevention of hoarding, interfering with supply or transportation of necessities, and cannot relate back to importation. Nor can section (3), which provides power in the Board to make regulations subject to approval by the Governor in Council for the purposes referred to in section (2) and for (a) governing prices, storage, distribution, sale and delivery, (b) prevention of waste, (c) and (d) (e) calls for copies of importers' invoices for the purpose of the Board's statements and statistics. Section (3) cannot be held to refer to importation. The Food Control Board was not in esse at the passing of the War Measures Act, and has neither powers nor duties under that Act.

Bearing in mind that this case has to do with importation, I turn to the War Measures Act to find whether the Governor in Council's approval of Rule 9 made by the Food Control Board is authorized by any of its provisions.

Only one section needs scrutiny, section 6 of Cap. 1, of 1914, as amended by Sec. 2 of Cap. 4, of 1916. I preface my comments on this section by stating that no reference was made at the hearing as to whether regulation 9 was called for by anything which, "has resulted, shall result, or shall or may be expected to result from the continuance of war."

From the fact that a state of war has "existed," Proclamation has not yet been made under section 4 of the War Measures Act, 1914, that war no longer exists. State of war therefore still exists under section 5.

Section 6 of the War Measures Act, 1914, as amended by section 2 of the 1916 Act is a composite structure, comprehensive but involved. In a matter affecting the rights of the subject, generalities must be jealously scrutinized. The section therefore calls for careful analysis of its relevant parts.

It enables the Governor in Council to do and authorize to be done such things and to make such regulations as, within its scope and the limits therein prescribed, he deems necessary or advisable for the object there specified, namely:—

(a) Anything arising out of the war which began on the 4th of Aug. 1914 invasion or insurrection,

actual or apprehended;  
(b) Out of... shortage of stocks and increase of prices of articles of commerce "resulting or to be expected to result during the continuance of the war from the fact that war has existed."  
(c) Out of any other condition of facts attributable to war;  
(d) Trading, exportation, importation, production, manufacture, it may be questioned whether "actual war still continues."

(a) Does not call for comment;  
(b) Nor can shortage of stock or increase of price of sugar result from importation of sugar;  
(c) No such condition of facts was suggested at the hearing; and as to  
(d) I think it cannot, however, liberally construed, be held to empower the Governor in Council to enact, by mere approval of regulations made under another and inadequate statute, absolute prohibition of importation of sugar or other merchandise in default of permit issued by the Food Control Board; thus repealing the powers vested in, and suspending the duties imposed on the proper officer of Customs by section 23 of the Customs Act.

For the reasons above referred to, and because the War Measures Act, 1914-1916, cannot be supposed to have had in view the Food Control Act of 1917 or its Board with whom regulation 9 originated, I think that regulation 9 was ultra vires of the Board and that its approval by the Governor in Council was also ultra vires and of no effect.

The War Measures Act plus the Food Control Act and its regulations do not by application repeal or qualify the provisions of Chapter 22. The enactment of the Exports and Imports Act of 1915 corroborates these conclusions.

This appeal should be dismissed, with costs.

September 22, 1920.

**In the matter of an application of A. E. Hickman & Co., Ltd., for a writ of mandamus to issue directed to the Minister of Customs to grant a warrant for the unloading of goods belonging to the applicant.**

**Judgment of Mr. Justice Kent.**

This is an appeal from an order of the Chief Justice made in Chambers directing a peremptory writ of mandamus to issue commanding the Hon. Henry J. Brownrigg as Collector of Customs for the Colony to grant his warrant to A. E. Hickman & Co., Ltd., for the unloading further into this Colony of two hundred barrels of sugar imported by the s.s. Rosalind on the 2nd day of the present month of September and now in a customs warehouse at the port of St. John's. A preliminary objection was raised on behalf of the respondent that the affidavit of Mr. Pratt upon which the application is founded states that Mr. Pratt is the prosecutor and does not disclose a sufficient right or interest in him to support the application. Though this objection was not taken before the Chief Justice, it was in my opinion open to the respondent to raise it on the hearing of the appeal. All the material facts were before the Chief Justice and if the objection was valid it was apparent on the face of the affidavit. However, in my opinion the objection is not valid. Mr. Pratt is the Secretary and a Director of the applicant Company, and as such he had sufficient interest and right to make the application for and on behalf of his Company, provided the Company had a right to the performance by the respondent of the service demanded of him. It is not disputed that the Company had complied with all the conditions required by the Customs Act to entitle him, but for the questions which arise out of the regulations hereinafter referred to, to the warrant of the Collector of Customs to unload the goods in question. This being so, Mr. Pratt on behalf of the applicant requested the respondent to grant a warrant for that purpose but the respondent refused to do so "unless and until a permit for importing the said sugar was granted by the Food Control Board," but the Food Control Board refused to issue the permit. The question to be decided whether the respondent was justified in refusing to grant a warrant for unloading the applicant's goods unless a permit to import them was first issued by the Food Control Board. The Food Control Board is a statutory board appointed by the Governor in Council under and for the purpose of the Food Control Act, 1917. Its powers and duties are defined by that Act. They are to make inquiry into certain facts relating to the necessities of life used by the people of Newfoundland; to ascertain the requirements of the people of Newfoundland with regard to such necessities, to assist the production in or importation into

this colony of such necessities; to assist in or assume control of their equitable distribution and facilitate the transportation thereof and to prevent scarcity, monopolization, hoarding, injurious speculation and other causes interfering with such supply, distribution and transportation, and to make such regulations subject to the approval of the Governor in Council as it may find necessary or desirable for effecting these purposes. On the 27th of July, 1920, regulations were published in the Royal Gazette under the caption "Upon the recommendation of the Food Control Board and under the provisions of the Food Control Act, 1917, and the War Measures Act, 1914-1916. His Excellency the Governor in Council has been pleased to approve the following regulations regarding the sale of sugar." Then follow a number of regulations fixing minimum prices at which sugar may be sold by various classes of vendors, none of which is material to the question raised in this appeal, except the 9th regulation, which provides that, "No sugar shall be imported into Newfoundland unless a permit to do so shall have been obtained beforehand from the Food Control Board." It was in obedience to this regulation that the respondent refused, in the absence of the permit of the Food Control Board, to grant a warrant to the applicant for unloading the sugar in question. It was admitted that no permit was granted by the Food Control Board, but it was contended by the applicant that the regulation under which the permit was demanded is invalid and did not excuse the refusal by respondent to grant the warrant for unloading the sugar. This contention raises an issue between the parties as to the validity of the regulation in question. The regulations, of which that in question is one, were recommended by the Food Control Board and approved by the Governor in Council under the provisions of the Food Control Act, 1917 and the War Measures Act, 1914-1916. So far as the Food Control Act is concerned, nothing in its text authorizes the making by the Board of that regulation which takes away from the applicant his free right to import goods into the country or the approval of it by the Governor in Council who may approve only such regulations as are properly made by the Board. The powers and duties of the Board are strictly limited to the provisions of the Act and any attempt to exceed these limits is an exercise of authority on its part and has no legal effect. Regulations not falling within the scope of the Act are clearly ultra vires and void. In my opinion the 9th regulation is beyond the powers of the Board and so far as it depends upon the provisions of the Food Control Act is invalid. What then is the effect of the declaration in the caption of the regulations that they were approved by His Excellency the Governor in Council under the provisions of the Food Control Act, 1917 and the War Measures Act, 1914-1916? I eliminate the reference to the Food Control Act for the reasons I have just stated. The question remains whether the approval by the Governor in Council under the War Measures Act gives validity to regulations, recommended by the Food Control Board, which are otherwise ultra vires and invalid? The Food Control Board was specially created by Statute to carry out the provisions of the Food Control Act, and in the exercise of that power it has no care must be taken to keep within the terms of the Statute by which it was created. In like manner the special authority given to the Governor in Council by the War Measures Act applies only within the limits defined by that Act. Whether the War Measures Act gives the Governor in Council power to prohibit the importation of goods into this country or not, it can only be exercised for the purpose of carrying out the provisions of that Statute. It is not within its scope to give validity to any exercise of jurisdiction on the part of the Food Control Board. To attempt to do so adds nothing to the jurisdiction of the Board and neither derives any validity from an Act which itself is ultra vires and as, prima facie, the regulations were made and recommended by the Food Control Board in the exercise of its powers under the Food Control Act, it is therefore apparent at the hearing brings them within the War Measures Act, nor can it be said that the regulations themselves, in so far as they appear in this case, the conditions which induced the Board to adopt and recommend them, arose out of any of the matters specified in the War Measures Act. The regulations must therefore depend for their validity on the provisions of the Food Control Act alone. There is nothing in that Act which authorizes either the Food Control Board or the Governor in Council to prohibit the importation of goods into this Colony unless a permit for that purpose shall have been obtained beforehand from the Food Control Board. I am therefore of opinion that the applicant is entitled to a warrant from the respondent to unload the sugar in question without being required to first obtain such a permit. I agree with the decision of the Chief Justice and think this appeal should be dismissed with costs.

J. M. KENT, Judge.

St. John's, September 22nd, 1920.

Mr. L. E. Emerson and Mr. E. L. Carter for the appellant.

Mr. Morine, K.C., and Mr. Gordon Bradley for the respondent.

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