

2009 01H 0010

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

VICTOR TODD SPARKES

INTENDED APPELLANT

AND:

IMPERIAL TOBACCO CANADA LIMITED

INTENDED FIRST RESPONDENT

AND:

IMPERIAL TOBACCO COMPANY LIMITED

INTENDED SECOND RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA

INTENDED THIRD RESPONDENT

**MEMORANDUM OF ARGUMENT OF INTENDED APPELLANT
ON INTERLOCUTORY APPLICATION**

Chesley Crosbie, Q.C.
Ches Crosbie Barristers
169 Water Street, 4th Floor
St. John's, NL A1C 1B1
Counsel for Intended Appellant

James L. Thistle, Q.C.
McInnes Cooper
10 Fort William Place, P.O. Box 5939
St. John's NL A1C 5X4
Counsel for Intended First and Second
Respondents

William Everett, Q.C.
Lawson Lundell
925 West Georgia Street
Suite 1600 Cathedral Place
Vancouver, BC V6C 3L2
Counsel for Intended Third Respondent

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Procedure

1. Rule 57 is silent as to the filing of Reply.

Rule 57, *Rules of the Supreme Court, 1986* [Appendix B, Tab 1]

2. Rule 1.02 provides:

1.02. These rules govern every proceeding in the Supreme Court of Newfoundland and Labrador, including the conduct of appeals, except where a statute otherwise provides.

Rule 1, *Rules of the Supreme Court, 1986* [Appendix B, Tab 2]

3. A Court of Appeal Practice Note was issued effective January 1, 2007 entitled “Conforming to Rules Respecting Filing an Appeal Book and a Factum”, but the directive is silent on the issue of reply.

CAPN No. 2006-01 [Appendix B, Tab 3]

4. Rule 29 concerning Applications, makes provision for the filing of memoranda of law, but is silent as to the filing of memoranda in reply:

29.08.(b) a memorandum listing any authority and the applicable provisions of any statute, regulation or rule that are to be relied upon by the applicant on the application;

Rule 29, *Rules of the Supreme Court, 1986* [Appendix B, Tab 4]

5. In the proceedings below, the Intended Appellant (Plaintiff) filed a Reply, without any specific authorization in the Rules and without seeking leave specifically to do so. The filing of written materials took place in accordance with a schedule agreed with the Case Management Judge.
6. The experience of counsel for the Intended Appellant is that the practice of the Trial Division in complex applications is to accommodate written Reply and that

this has not been an issue either with counsel or the Court. Certification applications in which present counsel has filed Reply in the Trial Division include the following:

- (a) 2003 01T 4242 CP, *Brenda Rideout v. Health Labrador Corporation*;
- (b) 2006 01T 2966 CP, *Verna Doucette v. Eastern Regional Integrated Health Authority*;
- (c) 2004 01T 2716 CP, *Victor Todd Sparkes v. Imperial Tobacco Canada Limited et al.*

7. The *Judicature Act*, RSNL 1990, c. J-4, makes provision for cases in which procedure is not provided for by the Rules:

56. (1) In cases not provided for in this Act, the rules or by the provisions of another Act that are not inconsistent with this Act, the pleading, practice and procedure of the High Court of Justice in England are, where applicable, the pleading, practice and procedure of the Supreme Court.

(2) Where the practice and procedure in a particular proceeding cannot be ascertained, the court may adopt the practice and procedure that is necessary to permit the proceeding to continue.

Judicature Act, RSNL 1990, c. J-4, s. 56 [Appendix B, Tab 5]

8. The rules of other Canadian appellate courts make specific provision for filing of Reply, for example:

- (a) Rules 28.(1) and 35.(4), *Rules of the Supreme Court of Canada*, SOR/2002-156 [Appendix B, Tab 6]
- (b) Rule 24, *Court of Appeal Rules*, B.C. Reg. 297/2001 [Appendix B, Tab 7]
- (c) Rules 61.03.1(11), (12) and (13), *Courts of Justice Act – R.R.O. 1990*, Reg. 194 [Appendix B, Tab 8]

9. As to the procedure of the High Court of Justice in England, provision is made for what is referred to as supplementary skeleton argument:

15.11A(1) A supplementary skeleton argument on which the appellant wishes to rely must be filed at least 14 days before the hearing.

Civil Procedures Rules, Appeals, Practice Direction Part 52, p. 29
[Appendix B, Tab 9]

10. The adverse parties did not oppose filing of Reply in proceedings below, and they have not made the Intended Appellant aware that they oppose the filing of Reply in proceedings in this Court, as of time of filing of this application for leave.

Substantive Content of Reply

11. The Memorandum of Argument of the Intended Appellant – Merits is 32 pages in length. The Reply is 6 pages.
12. Paragraphs 1 to 7 and 12 of the Reply take a position on an issue on which the Intended Appellant had not previously taken a position, namely, whether the provisions of the TPA are clear and unambiguous and whether the learned judge below made a ruling on this issue.
13. Paragraphs 8 to 11 of the Reply take a position on an issue raised by Imperial Tobacco in their Supplemental Material, namely recent legislative initiatives. Courts are statutorily mandated to take notice of all acts of the legislatures of Canada. The admissibility of Hansard may be debatable, but the Intended Appellant takes no position on this.

Evidence Act, RSNL 1990, c. E-16, s. 26.(1) [Appendix B, Tab 10]

U.F.C.W, Local 617P v. Royal Dressed Meats Inc. (Trustee of), 1989 CarswellOnt 180 [Appendix A, Tab 1]

14. Paragraphs 13 to 15 take a position on the order sought, in reply to Canada's submission that there is no reason to believe that Justice Adams would come to any different consideration on the same record, were the matter to be remitted to him for further case management.

ALL OF WHICH is respectfully submitted this day of September, 2009.

Chesley F. Crosbie, Q.C.
Ches Crosbie Barristers
Solicitors for the Plaintiff/Intended
Appellant

APPENDIX A – AUTHORITIES CITED**Tab**

- 1 *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)*, 1989 CarswellOnt 180 (S.C.)

APPENDIX B – STATUTES CITED**Tab**

- 1 Rule 57, *Rules of the Supreme Court, 1986*
- 2 Rule 1, *Rules of the Supreme Court, 1986*
- 3 CAPN No. 2006-01
- 4 Rule 29, *Rules of the Supreme Court, 1986*
- 5 *Judicature Act*, RSNL 1990, c. J-4, s. 56
- 6 Rules 28.(1) and 35.(4), *Rules of the Supreme Court of Canada*, SOR/2002-156
- 7 Rule 24, *Court of Appeal Rules*, B.C. Reg. 297/2001
- 8 Rules 61.03.1(11), (12) and (13), *Courts of Justice Act – R.R.O. 1990*, Reg. 194
- 9 Civil Procedures Rules, Appeals, Practice Direction Part 52, p. 29
- 10 *Evidence Act*, RSNL 1990, c. E-16, s. 26.(1)