COURT FILE NO.: 03-CV-259202CM1
DATE: 20031205

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ETHEL AHENAKEW, ALBERT BELLEWARE, C. HANSON DOWELL, MARIE GATLEY, JEAN GLOVER, HEWARD GRAFFTEY, AIRACA HAVER, LELANND HAVER, ROBERT HESS, ALBERT HORNER, OSCAR JOHVICAS, ARTHUR LANGFORD, NEALL LENARD, PATRICIA McCRAKEN, BLAIR MITCHELL, TOM MITCHELL, DAVID ORCHARD, ARLEIGH ROLIND, DONALD RYAN, LOUIS R. (BUD) SHERMAN, GERALD WALTERS, CADY WILLIAMS and JOHN PERRIN	)	*Sean Dewart* and *Steven Barrett*, for the applicants
Applicants	)	
- and -	)	
	)	
PETER MacKAY on his own behalf and on behalf of all members of the PROGRESSIVE CONSERVATIVE PARTY OF CANADA other than the applicants	)	*Paul Bates* and *Arthur Hamilton*, for the respondents
Respondents	)	
	)	**HEARD:** December 4, 2003

JURIANSZ J.

[1] This application seeks the Court's intervention following the agreement-in-principle reached on October 15, 2003 by Peter McKay, leader of the Progressive Conservative Party of Canada ("PC Party") and Steven Harper, leader of the Canadian Reform Conservative Alliance ("Alliance"). The agreement is titled "Agreement-in-principle on the establishment of the Conservative Party of Canada". Mr. Harper and Mr. McKay agreed with each other to place

certain recommendations before their respective caucuses and party membership for consideration. They agreed, in clause 11, to take "the required steps to achieve the support of their respective parties for the agreement as expeditiously as possible".

[2] On October 25, 2003, the Management Committee of the PC Party passed some 10 resolutions. The first called for a special meeting of members of the party to be held on December 6, 2003. The second resolution decided that a question would be put to the voting delegates at the December 6 meeting. The substantive portion of the resolution is as follows:

> Be it resolved: The Agreement-in-principle on the Establishment of the Conservative Party of Canada be approved and the Leader of the Progressive Conservative Party of Canada and its Management Committee are instructed and authorized to take all necessary steps to implement the Agreement.

[3] The third resolution required that the resolution to be put on December 6 would require the approval of at least two thirds of the delegates voting on the question. Other resolutions dealt with the organization of the special meeting and the procedures to be followed.

[4] The applicants are PC Party members who are opposed to the merger of the party with the Alliance. They request that the Court make a number of declarations, which are all premised on their view that the PC Party cannot be dissolved or merged with another political party, except with the unanimous consent of all of its members. They also seek a permanent injunction to prevent anyone from otherwise dealing with the party's assets.

[5] I note that several items of the relief set out in the Notice of Application are not pursued before me. Paragraph 1(j) requested a declaration that Mr. McKay is in breach of his written agreement, dated June 1, 2003, with Mr. Orchard and sought consequential relief. The request for this relief was withdrawn on the consent of counsel prior to the date set for the hearing. Paragraph 1(e) sought a declaration that the procedures set by the Management Committee of the PC Party for the special meeting scheduled for December 6, 2003 are contrary to the Party's Constitution and by-laws. Counsel for the applicants indicated they were not seeking such relief and informed the Court the applicants were making no attack on the specific procedures adopted by the Party respecting the special meeting. Counsel also informed the Court that the applicants were not requesting the Court to deal with the relief sought in paragraph 1(g) which sought a declaration that the Constitution of the PC Party prohibited its leader from agreeing with the leader of another political party that the PC Party will not nominate candidates in every federal constituency in Canada.

[6] Traditionally, the courts have been reluctant to get involved in supervising the internal affairs of voluntary associations. However, courts do recognize that membership in a voluntary association can give individuals important social rights that are worthy of some protection. Members may request the courts to require that the organization carry out its affairs honestly, in good faith, and in accordance with its governing rules.

[7] In this case we are dealing with a political party. The social interest of members in ensuring that the organization's affairs are conducted in accordance with its governing

Constitution is apparent. Citizens exercise important rights in participating in political activity through membership in political parties. However, the Court must be careful not to intrude into the political realm. There were submissions and evidence in this case that I considered to be political rhetoric. I have disregarded all such evidence and submissions.

The Court's Discretion To Not Adjudicate

[8] Counsel for the respondents submitted that I should not adjudicate the claims of the applicants for a number of reasons.

[9] The Court has a wide discretion whether or not to make a declaration. The respondents submitted that:

i. the applicants delayed bringing the application until just before the December 6 meeting;

ii. the application was premature as the result of the vote was not yet known;

iii. Mr. Orchard had brought the application for political purposes; the true substance of the matter was political, not legal, and the Court should not interfere with political controversies;

iv. the dispute should be arbitrated by the internal process provided by the Party's Constitution and by-laws; and

v. the matter should be decided according to "federal common law" as opposed to Ontario law.

[10] It is true that the application could have been brought earlier. The evidence indicates that Mr. Orchard was well aware of the agreement-in-principle and was vocal in his opposition to it. However, he is but one of the applicants. I consider it understandable that some time would be required to retain legal counsel, consider the advice received, decide on a course of action and prepare the necessary materials. The delay has not been so inordinate as to disentitle the applicants to relief.

[11] I considered carefully the submission that the matter before the Court was hypothetical as the vote on December 6 had not yet taken place. In this regard I was puzzled by the submission of counsel for the applicants that the import of the agreement-in-principle was unclear, in that while it speaks to the establishment of the new Conservative Party of Canada, it does not refer to the merger or dissolution of the PC Party. If I accepted this submission, I would find that I ought to exercise my discretion not to issue declarations about future hypothetical events.

[12] However, I do not accept this submission. The resolution before the special meeting on December 6 approves the agreement-in-principle and instructs and authorizes the Leader and the Management Committee to take all necessary steps to implement the agreement. The agreement, when read in its entirety, clearly contemplates a merger of the PC Party with the Canadian

Alliance to form a new party, the Conservative Party of Canada, which "will assume all the rights, obligations, assets and liabilities of the PC Party and the Alliance". A Conservative Fund Trust is to be established to, among other things, retire the debt of either party. An Interim Joint Council is contemplated to establish riding associations, processes for the conduct of founding meetings, recognition of associations, and transfer of assets from the PC Party and Alliance riding associations to new Conservative Party riding associations, and to ensure fair and effective recruitment, selection, and training of Conservative Party candidates. Article 8(e) indicates the Interim Joint Council is to be responsible for the "filings with Elections Canada (as necessary to give effect of this agreement)". Article 15 indicates that the filing with Elections Canada "with respect to the founding of the Conservative Party of Canada" is to be completed by December 31, 2003. Mr. Orchard, the only applicant to give evidence in this proceeding, indicated on his cross-examination that the agreement-in-principle made clear to him that the PC Party and the Canadian Alliance would be succeeded by the Conservative Party. If that were not apparent to the applicants, it is difficult to understand why they would request the Court to make declarations that the PC Party cannot be merged with another political party except with the unanimous consent of all members.

[13] I am satisfied that the situation is sufficiently developed to give rise to an actual dispute between the parties. Both sides have important interests at stake. The leadership of the PC Party has embarked on a path to merge the party. The applicants are opposed to the course of action being taken. Counsel for both sides indicated to the Court that it would be of assistance to have a decision before the vote is taken tomorrow. Given their national significance, there is good reason to determine the questions raised by this actual dispute, and I am satisfied that the Court's decision will be of practical effect in resolving the dispute.

[14] I have concluded that this dispute does not fall within the ambit of the internal dispute resolution in Article 13 of the PC Party's Constitution. I regard the internal process as intended to deal with questions about whether the ongoing affairs of the party are being conducted in compliance with its Constitution and by-laws. This dispute arises in extraordinary circumstances not contemplated by its Constitution, concerns its continued existence, and as will be seen, is in large measure about the proper interpretation and effect of a public statute. In deciding not to defer to the internal arbitration process, I paid no heed to the applicants' arguments that that process was flawed by relationship and institutional bias. I regard the applicant's apprehension of bias to be without merit.

[15] I was not persuaded by the respondents' argument that Mr. Orchard might be motivated by political consideration. He is but one of the applicants. In any event, in this dispute, it would be hard to expect people not to be motivated by political consideration given the inherent nature of the dispute. My task is to focus narrowly on the real and important legal issues raised, and to remain strictly impervious to all political considerations.

[16] Finally, I was not persuaded that the Superior Court of Justice was not a proper court in which the applicants could bring their application. This is a constitutional superior court with plenary jurisdiction. I did not understand the respondents to press their submissions about the "federal common law" vigorously.

The Merits of the Applicants' Claim

[17] The applicants' position is that the PC Party has no independent legal existence apart from the individuals comprising its membership. They rely on the common law that the members of a voluntary association are bound together by a complex of contracts between each member and every other member of the association, the terms of which are those expressed in its Constitution and by-laws. While the members of an unincorporated association are free to transform the objects of the association, merge with other associations, or even terminate their association, they may make such fundamental changes only in accordance with the terms of the association's Constitution and by-laws. Where the Constitution and by-laws are silent, they may do so only with the unanimous consent of all members. The Ontario Court of Appeal decision in *Astgen v. Smith*, [1970] 1 O.R. 519 is a clear articulation of this common law principle.

[18] *Astgen* and other common law cases recognize the social interest that members have in their association, but they also indicate the courts' concern that a majority of members may seek to divert an association's property. In *Organization of Veterans of the Polish Second Corps of the Eighth Army v. Army Navy and Air Force Veterans and Canada* (1978), 20 O.R. (2d) 321 (C.A.), the Court of Appeal explained that it was because of the peculiar nature of the interest of the members of an unincorporated association in its property that Courts have been zealous to protect that interest when factions develop and the fellowship of the association is broken. The Court said that there is particular concern to do this where the fragmented association has split into a disloyal faction that has gone its separate way and attempted to take the association's property with it, and an ongoing loyal group of adherents who seek to preserve the property and the fellowship of the original association. After making these comments, the Court of Appeal restated the principle from *Astgen* that "unless authorized by the organization's Constitution, a mere majority of members cannot cause property to be diverted to another association having different objects".

[19] The applicants did not persuade me that these common law cases applied to the PC Party. The PC Party is indeed a voluntary association. However, unlike the associations that were the subject of the common law cases, it is not a voluntary association devoid of any legal recognition and without any legal capacity. Rather, as a political party registered under the *Canada Elections Act*, S.C. 2000, c. 9 as amended, it enjoys the significant benefits of registration and is subject to regulation under that *Act*.

[20] The starting point of the analysis is that the *Canada Elections Act* bestows some legal personality and legal capacity on a registered political party.

[21] Section 504 of the *Act* provides:

> 504. In the case of judicial proceedings or a compliance agreement involving an eligible party, a registered party or a suspended party,
>
> (*a*) the eligible party, registered party or suspended party is deemed to be a person; and

> (*b*) any act or thing done or omitted to be done by an officer, a chief agent or other registered agent of the eligible party, registered party or suspended party, within the scope of their authority to act, is deemed to be an act or thing done or omitted to be done by the eligible party, registered party or suspended party, as the case may be.

[22] This provision deems a registered party to be a "person" for the purpose of judicial proceedings. Section 402, which I will consider in more detail later, provides an indication of how broadly "judicial proceedings" should be interpreted. Paragraph 402(1)(f) indicates that a registered party has the legal capacity to engage in civil, penal, and administrative proceedings both as an initiating and responding party. Paragraph 402(1)(g) indicates that a judicial or quasi-judicial decision may be enforced by or against a registered party itself.

[23] Without embarking on a comprehensive review of the statute (which was not undertaken before me), I observe that there are a number of other sections that consider a registered political party to be a "person". Subsection 495(1) and s. 507 make clear that a registered party is a "person" who may be prosecuted under the *Act* for a number of offences. Subsection 323(3) and s. 438(1) seem to consider a registered party to be a "person or entity".

[24] Subsection 504(b) provides that a registered party is responsible for acts or things done or omitted to be done by specified persons. Section 504 also makes clear that a registered party is capable of contracting, at least by entering compliance agreements with the Commissioner under s. 517 of the *Act*.

[25] On the basis of s. 504 I refuse the relief requested in paragraph 1(k) of the application. Despite the consent of the respondents, I find it unnecessary to make an order appointing the respondent Peter McKay as the representative of all members of the PC Party other than the applicants for the purposes of this proceeding. I am satisfied that the PC Party can be named as the respondent to this application itself.

[26] Applicants' counsel submit that the fact the registered party has some legal personality is a matter of form only, and that it is immaterial whether the applicants' contractual relationships are with all other members of the PC Party or with the PC Party itself. They submit that the recognition that the PC Party has a legal personality does not change the underlying substantive principles and legal requirements that unincorporated associations must comply with their constitutions and the common-law. They submit it simply changes who may be made liable for a breach.

[27] In assessing this submission it is necessary to examine the scope and nature of the regulation of registered political parties under the *Canada Elections Act*.

[28] Certainly, a political party does not have to register under the *Act*. However, registration enables a political party to derive significant benefits. A registered political party is able to gain access to public funding in the form of income tax credits, reimbursement of up to 22.5 percent of its election expenses directly from the Treasury of Canada, and allocation of broadcasting

time as specified by the *Act*. If a political party chooses to register, it is acknowledged in law and becomes subject to regulation under the *Act*.

[29] In order to register, s. 366 requires the political party to provide detailed information about itself, and s. 382 requires that the party report any changes within 30 days. Reports must be certified. Regulation of registered parties goes beyond requiring information to be reported and financial reports to be filed. For example, s. 373 requires a political party upon becoming registered to vary its fiscal year to a calendar year. Section 377 dictates who is eligible to act as an auditor for a registered political party. These matters interfere with a party's internal governance.

[30] The Chief Electoral Officer may suspend a political party's registration for a number of reasons. Section 388 requires a registered political party to apply to be deregistered, and upon such application, the Chief Electoral Officer "may suspend the registered party". Subsection 397(1), when it applies, provides that the chief agent of a suspended party must remit an amount equal to the net balance of assets over liabilities to the Chief Electoral Officer to be forwarded to the Receiver General.

[31] Thus, it can be seen that one consequence of registration is that the assets of the party may be said to acquire a public dimension. The assets are augmented by indirect and direct public funding. On the other hand, the assets may in some circumstances be paid over to the Receiver General.

[32] I conclude that regulation of political parties under the *Canada Elections Act* is not confined to mere registration but extends to matters of essential substance.

[33] Sections 400 to 403 of the *Canada Elections Act* deal with the merger of registered political parties. The fundamental question is whether the merger of two political parties is accomplished pursuant to their governing constitutions under the common law, and the *Act* merely regulates the registration of the new merged party; or whether the *Act* authorizes and regulates the merger of two registered political parties to create a single merged registered party.

[34] I set out the provisions in full, underlining the particular phrases that I find helpful in interpreting the provisions. I discuss some of the particular phrases below.

> 400. (1) Two or more registered parties may, at any time other than during the period beginning 30 days before the issue of a writ for an election and ending on polling day, apply to the Chief Electoral Officer to become a single registered party resulting from their merger.
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> (2) An application to merge two or more registered parties must
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> (a) be certified by the leaders of the merging parties;
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> (b) be accompanied by a resolution from each of the merging parties approving the proposed merger; and

(c) contain the information required from a party to be registered, except for the information referred to in paragraph 366(2)(i).

401. (1) The Chief Electoral Officer shall amend the registry of parties by replacing the names of the merging parties with the name of the merged party if

(a) the application for the merger was not made in the period referred to in subsection 400(1); and

(b) the Chief Electoral Officer is satisfied that

(i) the merged party is eligible for registration as a political party under this Act, and

(ii) the merging parties have discharged their obligations under this Act, including their obligations to report on their financial transactions and their election expenses and to maintain valid and up-to-date information concerning their registration.

(2) The Chief Electoral Officer shall notify the officers of the merging parties in writing whether the registry of parties is to be amended under subsection (1).

(3) If the Chief Electoral Officer amends the registry of parties, he or she shall cause to be published in the Canada Gazette a notice that the names of the merging parties have been replaced in the registry with the name of the merged party.

402. (1) A merger of registered parties takes effect on the day on which the Chief Electoral Officer amends the registry of parties under subsection 401(1).

(2) On the merger of two or more registered parties,

(a) the merged party is the successor of each merging party;

(b) the merged party becomes a registered party;

(c) the assets of each merging party belong to the merged party;

(d) the merged party is responsible for the liabilities of each merging party;

(e) the merged party is responsible for the obligations of each merging party to report on its financial transactions and election expenses for any period before the merger took effect;

(f) the merged party replaces a merging party in any proceedings, whether civil, penal or administrative, by or against the merging party; and

(g) any decision of a judicial or quasi-judicial nature involving a merging party may be enforced by or against the merged party.

403. Within six months after a merger

(a) each of the merging parties shall provide the Chief Electoral Officer with the documents referred to in subsection 424(1) for

(i) the portion of its current fiscal period that ends on the day before the day on which the merger takes effect, and

(ii) any earlier fiscal period for which those documents have not been provided; and

(b) the merged party shall provide the Chief Electoral Officer with

(i) a statement, prepared in accordance with generally accepted accounting principles, of its assets and liabilities, including any surplus or deficit, at the date of the merger,

(ii) an auditor's report, submitted to the chief agent of the merged party, as to whether the statement presents fairly and in accordance with generally accepted accounting principles the information on which it was based, and

(iii) a declaration in the prescribed form by the chief agent of the merged party concerning the statement.

[35] The phrase "resulting from their merger" is compatible with the interpretation that the merger is a matter already accomplished at common law before registration of the merged party. However, the remaining language of these provisions indicates that the *Canada Elections Act* regulates the merger itself. Subsection 400(1) says the parties may apply to the Chief Electoral Officer to become a single registered party. Subsection 400(2) and paragraph 401(1)(a) refers to an "application to merge" registered parties. Paragraph 400(2)(b) says that the application must be accompanied by a resolution approving the "proposed merger". I take this to indicate that the resolutions of the merging parties do not accomplish the merger themselves, as it remains a "proposed merger" until it is recognized as a merged party under the *Act*. Subsection 402(1) builds on this by stating a merger "takes effect" when the Chief Electoral Officer amends the registry of parties. Sections 400 and 401 indicate that there are certain requirements before the merger will be permitted. Paragraph 401(1)(e) indicates that the Chief Electoral Officer must be satisfied that the merged party is itself eligible for registration, and the merging parties have fulfilled all their obligations under the *Act*. Subsection 402(2) stipulates the legal consequences of merger and provides for the transfer of assets and liabilities from the merging parties to the merged party. Paragraphs 402(2)(f) and (g) go so far as to provide that the merged party replaces the merging parties in legal proceedings, and that any decision involving a merging party may be enforced by or against the merged party.

[36] In submitting that these provisions dealt with registration only, counsel for the applicants recognized that the interpretation he advanced could result in the political party registered under the *Act* not being congruent with the structure of the voluntary association at common law. He suggested that two registered political parties could merge during the prohibited period, and the consequence would be that they could not register the merged party until the expiration of the period. The suggestion seems to me to be wholly inconsistent with the obvious goal of the *Act* to maintain and make available to the public accurate and up-to-date information about political parties.

[37] The fact that these provisions deal with substance rather than registration is apparent from the consequences of merger stipulated by s. 402(2). Suppose two registered parties purported to merge with each other at common law, and in doing so provided that their assets did not go to the merged party. This would be in direct conflict with para. 402(2)(c) that provides their assets are transferred to the merged party. There is no reason to interpret s. 402(2)(c) other than according to its ordinary grammatical meaning. That paragraph is part of a statute that requires in some circumstances that the assets of a party registered under the *Act* be remitted to the Receiver General, as we have already seen.

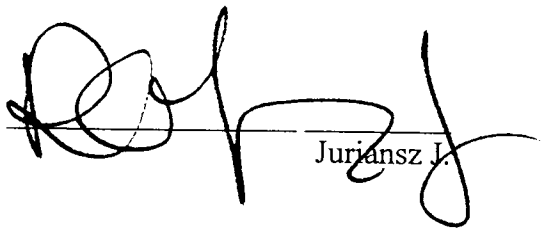
[38] I am satisfied that on the merger of two or more registered parties, s. 402(2)(c) affects the transfer of their assets and liabilities to the merged party. Paragraphs 1(c), (d), (f) and (i) of the application all seek declarations and an injunction to confirm the applicants' position that the PC Party cannot transfer its assets to another political party. I decline to grant such relief because it is my view that the transfer of assets of a registered political party may be effected pursuant to the *Canada Elections Act* in some circumstances. Given this, it would be inappropriate to make declarations that the transfer of the PC Party's assets cannot be effected without the unanimous consent of its members.

[39] It is my view that ss. 400 to 403 of the *Act* regulate the merger of registered political parties. Registered political parties may apply to merge into a single registered party. Upon the regulatory requirements being satisfied, the statute makes the merger effective. In these cases, the common law principles regarding unregulated voluntary associations upon which the applicants rely would not apply.

[40] In expressing this view, I should not be taken to be declaring the law. In this proceeding I was asked to make declarations that the PC Party cannot merge, transfer its assets, or dissolve without the unanimous consent of every one of its individual members. I have decided, based on the view I take of the law, that it is not appropriate to make such declarations.

[41] A further comment must be made about paragraph 1(h) of the application. Paragraph 1(h) seeks "a declaration that the resolution [before the December 6 special meeting] does not constitute the resolution required pursuant to s. 400(2)(b) of the *Canada Elections Act* in order for the PC Party to merge with another registered party under the Act". Whether the resolution being acted upon tomorrow, or any other resolution, satisfies the requirements of the *Act* must, in the first instance, be decided by the Chief Electoral Officer. I refuse the relief requested in paragraph 1(h) on that basis.

[42] The application is dismissed in its entirety. Counsel may make an appointment through my secretary to address costs.



Released: December 5, 2003