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COURT OF APPEAL FOR ONTARIO

DOHERTY, GOUDGE and SIMMONS JJ.A.

B E T W E E N:	)	
	)	
ETHEL AHENAKEW, ALBERT BELLEMARE, C. HANSON DOWELL, MARIE GATLEY, JEAN GLOVER, HEWARD GRAFFTEY, AIRACA HAVER, LELANND HAVER, ROBERT HESS, ALBERT HORNER, OSCAR JOHVICAS, ARTHUR LANGFORD, NEALL LENARD, PATRICIA McCRACKEN, BLAIR MITCHELL, TOM MITCHELL, DAVID ORCHARD, ARLEIGH ROLIND, DONALD RYAN, LOUIS R. (BUD) SHERMAN, GERALD WALTERS, CADY WILLIAMS and JOHN PERRIN	)	Paul Bigioni for the appellants
Applicants (Appellants)	)	Arthur L. Hamilton and Laurie Livingstone for the respondents
- and -	)	
PETER MacKAY on his own behalf and on behalf of all members of the PROGRESSIVE CONSERVATIVE PARTY OF CANADA other than the applicants	)	
Respondent (Respondent in Appeal)	)	**HEARD:** April 27, 2004

On appeal from the judgment of Justice Russell G. Juriansz of the Superior Court of Justice dated December 5, 2003.

GOUDGE J.A.:

[1] The fundamental issue in this appeal is whether the Progressive Conservative Party of Canada (the "PC Party") requires the unanimous consent of all of its members to merge with the Canadian Reform Conservative Alliance Party (the "Alliance Party").

[2] Looking particularly to *Astgen v. Smith et al*., [1970] 1 O.R. 129 (C.A.), the appellants say that the common law principles governing voluntary associations make this necessary.

[3] At first instance, Justice Juriansz disagreed. He found the *Canada Elections Act*[1] (the "Act") to be the governing law since it regulates the merger of registered political parties and both the PC Party and the Alliance Party are registered pursuant to the Act. He therefore held that the *Astgen* requirement of unanimous consent does not apply.

[4] I agree with his conclusion, although for somewhat different reasons, and would therefore dismiss the appeal.

BACKGROUND

[5] On October 15, 2003, Peter MacKay, leader of the PC Party, and Stephen Harper, leader of the Alliance Party, signed an agreement-in-principle to establish the

Conservative Party of Canada. The agreement set out a road map by which the two old parties would come together to create the new party, which would then assume all the rights, obligations, assets and liabilities of both predecessor parties.

[6] Paragraph 11 of that agreement required the two leaders to take the steps necessary to achieve the support of their respective parties for this agreement as expeditiously as possible, and by December 12, 2003 at the latest.

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[1] S.C. 2000, c. 9, as am.

[7] On October 25, 2003, the Management Committee of the PC Party met to consider the agreement-in-principle. It decided to call a special meeting of members of the PC Party on December 6, 2003 and to put the following question to the voting delegates:

> Be it resolved that: 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.

[8] At its October 25 meeting, the Management Committee also decided that this question would require the approval of at least two-thirds of the delegates voting on the question. It also decided that those entitled to vote would be certain persons listed in the by-laws of the PC Party and delegates elected from each constituency association, campus club and affiliated organization. Finally, it resolved that any dispute in connection with its authority to convene the special meeting or its decisions concerning that meeting should be referred to the Arbitration Committee of the PC Party for decision. Article 13 of the Party's constitution provides that the Management Committee may refer any matter other than a dispute related to the leadership selection process to the Arbitration Committee for consideration and decision and that its decision is final and binding and not subject to appeal or review on any grounds.

[9] Pursuant to this reference to arbitration by the Management Committee, on November 5, 2003, a group of PC Party members opposed to the proposed merger (including one of the appellants) asked the Arbitration Committee to decide whether the resolution to be put to the special meeting was a proper question and whether that resolution was capable of authorizing the leader of the PC Party to take all necessary steps to implement the agreement-in-principle. The Arbitration Committee set November 28 as the date to consider these matters.

[10] On November 20, 2003, the appellants commenced this application. They sought a number of declarations relating to the special meeting scheduled for December 6. The most important of these was a declaration that the constitution of the PC Party does not permit it to merge with another political party or to be dissolved except with the unanimous consent of all of its members. They also sought a permanent injunction to prevent the assets of the party from being transferred to the Conservative Party. All of the relief sought was premised on the appellants' fundamental position that common law principles prevent the PC Party from dissolving or merging with another political party except with the unanimous consent of all of its members.

[11] On November 26, 2003, the Arbitration Committee invited the appellants to attend and participate in its hearing on November 28. Through counsel, the appellants declined to do so, taking the position that the issues raised in their application could not be referred to arbitration under the Party's constitution.

[12] On December 3, 2003, the Arbitration Committee delivered its decision on the matters before it, including the challenge to the resolution to be put to the special meeting on December 6. In a fully reasoned report, it decided that this resolution, if passed by the appropriate majority (namely two-thirds of the voting delegates), satisfies the requirements of the PC Party's constitution and is capable of both implementing the agreement-in-principle and constituting the appropriate resolution of the members of the PC Party approving the merger for the purposes of the Act.

[13] Justice Juriansz heard this matter on December 4, 2003. The next day he released his eleven page reasons for judgment dismissing the application.

[14] The special meeting proceeded on December 6, 2003, and 90.4 per cent of the delegates voting at the meeting voted in favour of the resolution.

[15] On December 7, 2003, both the PC Party and the Alliance Party applied to the Chief Electoral Officer pursuant to s. 400 of the Act to merge and become the Conservative Party of Canada.

[16] On the same day the Chief Electoral Officer reviewed and accepted the application to merge and the Elections Canada Registry of Parties was amended, by replacing the names of the Alliance Party and the PC Party with the name of the Conservative Party.

ANALYSIS

[17] As a preliminary matter, the respondent moves to quash the appeal as now being moot. It argues that there is no longer a live issue affecting the rights of the parties because the merger has happened and the Conservative Party has been registered by the Chief Electoral Officer in place of the PC Party and the Alliance Party.

[18] In my view, the motion must be dismissed. There remains the same real legal issue between the parties that existed before December 6, 2003, namely, whether the PC Party

can be dissolved or merged with another political party without the unanimous consent of all of its members. The only difference is that if they are successful, the appellants must now seek a remedial order undoing what has happened rather than an order to prevent it from occurring. The respondent has not shown that this would be impossible. The underlying legal issues still have an effect on the rights of the parties and hence mootness does not apply.

[19] On the appeal itself, the appellants' fundamental contention is that the common law requires the PC Party to obtain the unanimous consent of all of its members to merge with the Alliance Party. In making this argument they place significant reliance on *Astgen.*

[20] That case, decided almost thirty-five years ago, involved the merger of two trade unions. The majority decision in this court turned on its view of a trade union as a voluntary association with no legal existence apart from its members, who are bound to one another by contact. The majority held that the common law recognized the voluntary association not as a legal entity, but as nothing more than a complex of contracts between each member and every other member. The terms of these contracts are to be found in the constitution and by-laws of the voluntary association.

[21] In the majority's view, a merger with another voluntary association meant not just the termination of the contractual relationship of all the members with each other but also the substitution of new contractual relationships with persons outside the group with whom the members were previously associated. The majority viewed this two-fold change as so fundamentally affecting the contractual rights of each member that a merger could only be effected with the unanimous approval of all of the members, either directly, or through a procedure to which all had agreed. In other words, each member of the voluntary association must consent to the termination of his or her existing set of contractual relationships and to be bound to a new set of contractual relationships. Only then can the voluntary association merge lawfully. In short, because its legal essence is to be viewed as a web of contracts between each member and every other member, a voluntary association can merge only with the unanimous consent of all of its members.

[22] Based on *Astgen*, the appellants' argument is simple. The PC Party is a voluntary association, whose constitution contains no provision concerning merger, let alone a procedure for merger to which all of the members have agreed. The meeting of December 6, 2003, did not obtain the unanimous consent of all of the members of the PC Party. Hence the merger cannot lawfully proceed.

[23] In my view, this argument cannot succeed for two reasons. First, it fails to take account of the view that the law takes today of the legal status of a registered political party such as the PC Party. That status depends on the evolution that has taken place in the relevant case law, together with the existence of the Act. Second, it fails to address the specific requirements for the merger of registered political parties which Parliament has set out in ss. 400 to 402 of the Act. I will address each of these in turn.

[24] The law as enunciated in *Astgen* was significantly changed by the Supreme Court of Canada in 2002 in *Berry v. Pulley*, [2002] 2 S.C.R. 493. That case also involved a trade union. The particular issue was whether one group of union members could sue another group in the same union in breach of contract for violating the terms of the union constitution.

[25] In concluding that this could not be done, the Supreme Court reviewed the historic case law relating to unions as voluntary associations and the development of what it called the legal fiction of a web of contracts among the members. It then turned to what it described as the sophisticated statutory regime under which trade unions are recognized as entities with significant rights and obligations who must control and regulate their internal affairs in order to fulfill their labour relations functions. Given this modern reality, the Supreme Court decided that when a member joins a union, the contractual relationship is properly viewed as being between the union and the member. Both are bound by the terms of the union constitution. The legal fiction of the union as a voluntary association whose legal essence is simply a complex of contracts between all of its members was rejected as no longer appropriate.

[26] Thus, the Supreme Court recognized that where an entity has been accorded significant statutory powers and duties, the concept that its members are bound to each other through a complex of contracts is not applicable. For such an entity, the requirement of unanimous consent for merger as set out in *Astgen* can have no application. This requirement applied where the legal essence of the entity was simply the web of contracts between its members in order to protect the contract each member was said to have with every other member and to prevent new contracts with new members from being imposed on each member without his or her consent.

[27] If the legal essence of the PC Party cannot properly be viewed as a set of contracts between each member and every other member, then in my view, the common law requirement that there be unanimous consent of all of its members for merger is not applicable.

[28] It is thus important to determine whether an entity like the PC Party has been clothed with sufficient statutory rights and obligations that the principles enunciated in *Berry, supra,* apply.

[29] For that, a brief examination of the provisions of the Act is necessary. It contains detailed provisions by which a political party may become a "registered political party". That status is achieved once the necessary application has been made and the various conditions set by the legislation have been fulfilled. The PC Party has done so, and has been accorded that status.

[30] The Act accords a number of rights to a registered political party, including access to public funding in the form of tax credits, reimbursement of up to 22.5 per cent of its election expenses directly from the Treasury of Canada and specific allocations of broadcast time.

[31] The Act also imposes a number of obligations on a registered political party. For example, it must observe significant reporting requirements of both general and financial information. It must maintain certain officials such as registered agents and auditors. It must ensure that its election advertising meets the statutory conditions. It must comply with the terms of any compliance agreement that the Commissioner of Canada Elections may impose upon it. The Act also provides that a registered political party is deemed to be a person for any judicial proceeding and that it may be prosecuted for certain specified offences.

[32] In short, the Act is a sophisticated statutory regime under which registered political parties are recognized as entities with significant rights and obligations. Following the reasoning in *Berry*, I think registered political parties are legal entities at least for the purposes of fulfilling their roles in the election process. To do so they must control and regulate their internal affairs. It is as inappropriate to conceive of them as comprised simply of a web of contracts between members as it is to do so for trade unions.

[33] Since this legal fiction is inapplicable to a registered political party, so too is the corollary common law legal principle set out in *Astgen* that a voluntary association, if it is to merge with another, requires the unanimous consent of all of its members. In my view, the legal status of the PC Party as a registered political party renders inapplicable to it the requirement contended for by the appellants.

[34] My second reason for rejecting the appellants' position that the PC the Party can merge only with the unanimous consent of all of its members is simply that it is not required by the Act. Parliament has displaced any common law requirements that might otherwise apply in this context by speaking in detail about what is necessary for the merger of two registered political parties. Sections 400 – 402 read as follows:

> 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.
>
> (2) An application to merge two or more registered parties must
>
> (a) be certified by the leaders of the merging parties;
>
> (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.

[35] Section 400 provides for two registered parties to apply to become a single registered party resulting from their merger. Section 400(2)(b) sets out one of the things Parliament has chosen to require of each party to achieve this, namely, to provide a resolution of the party approving the proposed merger.

[36] Section 401 requires the Chief Electoral Officer to be satisfied that each merging party has discharged its obligations under the Act before replacing the names of the merging parties with that of the merged party in the registry of parties.

[37] Section 402 provides that the merger takes effect when the Chief Electoral Officer amends the registry. It then goes on to spell out the consequences of the merger: the merged party becomes the successor of each merging party and acquires the assets of the merging parties.

[38] There is no suggestion in this detailed regulatory scheme that Parliament considered it necessary to require the unanimous consent of all of the members of a merging party. The legislation contains no such requirement. The obligation resting on a party is simply to pass the resolution approving the proposed merger. Parliament did not deem it necessary that this resolution achieve any special level of support amongst those voting, let alone the support of all of the members of the party. Rather, the legislation treats registered political parties as having reached a sufficient level of organizational maturity that they can determine for themselves whether more than majority support of those voting is needed for a resolution approving a proposed merger.

[39] While Parliament has chosen not to require from a registered party any exceptional level of support for a proposed merger, it is implicit in s. 400(2)(b) that the approving resolution be passed according to the rules found in the constitution of the party. Parliament must be taken to require a resolution that in that sense is lawful. However, in my view, the appellants' argument that the common law requires the unanimous consent of all of the members of the PC Party for it to lawfully merge with the Alliance Party is simply inconsistent with Parliament's intention as embodied in s. 400(2)(b).

[40] In so far as the appellants argue (separately from their argument about merger) for a requirement of unanimous consent of all members before the PC Party can properly dissolve, the Act provides the same answer. In s. 402(2) Parliament has said that once the merger of registered parties takes effect, the merged party is the successor of each merging party and acquires the assets of those parties. In effect, this constitutes the dissolution of the merging parties. Again, Parliament has chosen not to require the

unanimous consent of all of the members as a prerequisite. In the face of this there is no room for the common law to impose such a precondition.

[41] The last argument raised by the appellants is that even if common law principles do not apply to require the unanimous consent of all members of the PC Party, the merger with the Alliance Party is nonetheless unlawful because the resolution passed on December 6, 2003, does not meet the requirements of the PC Party's constitution and by-laws, and cannot therefore constitute the resolution required pursuant to s. 400(2)(b) of the Act.

[42] The first answer to this argument is that the appellants abandoned this attack at first instance. They indicated to Justice Juriansz that they were not seeking the declaration requested in their original material, namely that the procedures adopted for the December 6, 2003 meeting contravene the PC Party's constitution and by-laws, thus rendering the resolution of no legal effect. At first instance, the appellants made clear that they were making no attack on the specific procedures adopted by the PC Party respecting the special meeting. As a result, the application judge was not called on to adjudicate that issue. In these circumstances, this court should not address that issue for the first time on appeal.

[43] Moreover, even if we were inclined to entertain the argument on its merits, in my view it would not succeed. I agree with the application judge that s. 401(1)(b)(ii) places on the Chief Electoral Officer, not the court, the initial duty to be satisfied that the PC Party as a merging party has provided with its application a resolution approving the proposed merger. While we need not decide it in this case, I am inclined to the view that this task is concerned with the facial validity of the resolution: on its face does the filed resolution come from the merged party and does it approve the proposed merger? This would not involve the Chief Electoral Officer in adjudicating a claim that the resolution is of no legal effect because the party did not follow its own constitutional requirements. In my view the latter, which would require evidence and argument, is a task that Parliament does not appear to have equipped the Chief Electoral Officer to perform.

[44] However, in the circumstances of this case, I do not view this task as being for the court either. The very issue was referred by the Management Committee to the Arbitration Committee of the PC Party pursuant to the provisions of its constitution. The appellants had notice of and the opportunity to participate in the hearing held by the Arbitration Committee. They chose not to do so. The Arbitration Committee issued a thoroughly reasoned decision which concluded that there was nothing in the Party's constitution requiring unanimous consent for the resolution and that the proceedings put

in place for the meeting of December 6 and for voting on the resolution met the Party's constitutional requirements. The resolution was therefore capable of constituting the approval of the proposed merger called for by the Act.

[45] By the terms of the constitution this decision is final and binding. Having had the opportunity to participate in that process the appellants are bound to accept it as final and binding, subject to judicial review which they have not sought. This is a corollary to the obligation of an organization like a trade union to give notice of an arbitration to a member whose rights will be affected because the decision of the arbitration board is final and binding. See, for example, *Hoogendoorn v. Greening Metal Products and Screening Equipment Co.,* [1968] S.C.R. 30. It is not open to the appellants to seek a determination by the court that the resolution is of no legal effect because the PC Party failed to comply with the procedures required by its constitution. In this circumstance, that is a matter for the Arbitration Committee.

[46] In summary, therefore, the appellants' arguments on appeal must be rejected.

[47] The respondent has cross-appealed from the decision of the application judge to award no costs because of the public importance of the issues raised. We did not call on the appellants to respond to the cross-appeal. In our view, it was an entirely appropriate exercise of discretion by the judge of first instance.

[48] As to the costs of the proceedings in this court, success has been divided. The appellants failed on the appeal. The respondent failed to establish mootness and failed on the cross-appeal. Together with the public importance of the questions raised, this makes it appropriate to order that there be no costs in this court.

[49] I would therefore dismiss the motion to quash and the appeal and the cross-appeal. No costs in this court.

RELEASED: June 3, 2004 "DD"

"S.T. Goudge J.A."

"I agree Doherty J.A."

"I agree Janet Simmons J.A."