Court File No. C41105

COURT OF APPEAL FOR ONTARIO

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

Applicants
(Appellants)

- and -

PETER MacKAY
on his own behalf and on behalf of the
PROGRESSIVE CONSERVATIVE PARTY OF CANADA
other than the applicants

Respondent
(Respondent in Appeal)

APPELLANTS' FACTUM

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PART I - THE APPELLANTS AND THE COURT APPEALED FROM

1 The appellants are members of the Progressive Conservative Party of Canada (the "PC Party"). The appellants are opposed to the merger of the PC Party with the Canadian Conservative Reform Alliance (the "Canadian Alliance").

1 The appellants commenced an application in the Ontario Superior Court of Justice by way of a Notice of Application issued on November 20, 2003. The application was heard on December 4, 2003 by the Honourable Mister Justice Juriansz, as he then was.

2 In their application, the appellants sought declaratory relief regarding an Agreement-in-Principle (the "Agreement-in-Principle") signed by the leaders of the PC Party and the Canadian Alliance to create the new Conservative Party of Canada. The Ontario Superior Court of Justice dismissed the appellants' application in its entirety and invited counsel for the parties to address the issue of costs. The Court below has received the submissions of the parties on costs but has not as yet ruled on them.

PART II - OVERVIEW

3 The appellants sought from the Court below declaratory relief regarding the Agreement-in-Principle. The PC Party is an unincorporated association. It is registered as a federal political party under the *Canada Elections* Act (the "Act"). While the Act contains provisions which allow for the merger of registered political parties, the common law applicable to unincorporated associations stipulates that an association can merge with another only in strict accordance with the Constitution of the merging association or, if the Constitution is silent, by the unanimous consent of all members of the association.

4 The Court below decided that the existing common law pertaining to unincorporated associations does not apply to registered political parties because registered political parties are governed by the Act. In essence, the Court below decided that the Act supplants the existing common law. In its Reasons for Judgment, the Court below did not consider whether or not the merger of the PC Party with the Canadian Alliance conformed to the procedural and substantive requirements of the PC Party Constitution.

5 The appellants contend that the common law pertaining to unincorporated associations is applicable to the PC Party and further that the PC Party cannot merge with any other political party

unless such merger is in accordance with all requirements of the PC Party Constitution. The appellants' position is that the correct application of the common law and the provisions of the PC Party Constitution yields the result that the PC Party cannot merge without the unanimous consent of all its Members, and that Judgment should issue in accordance with that legal conclusion.

PART III - FACTS

6 The PC Party Constitution does not provide for merger or dissolution. The portions of the PC Party Constitution and By-laws relevant to this appeal are set out at Tab 5 of the Appeal Book and Compendium.

7 Since the mid 1990's, there has been discussion about a merger or some type of cooperation between the PC Party and the Canadian Alliance (or its predecessor). The majority of PC Party members have, on repeated occasions, decisively affirmed their decision that they do not want to merge with the Canadian Alliance.

> *Affidavit of David Orchard sworn November 20, 2003*
> *("Orchard Affidavit"), para. 13, Appeal Book and Compendium, Tab 6*

8 The PC Party Constitution contains a provision (Article 2.2.3) which was added to the Constitution in order to prevent any attempt to form a coalition between the PC Party and the Reform/Canadian Alliance Party. Article 2.2.3 was added to the PC Party Constitution at a national meeting held in 1999. It was motivated by the desire of the party not to forge closer ties with the Reform/Canadian Alliance Party. Article 2.2.3 manifests the desire of PC Party Members to maintain a separate existence from the Canadian Alliance in every Federal riding in Canada. In light of Article 2.2.3, it is not appropriate to imply into the PC Party Constitution any authority to merge with the Canadian Alliance.

Orchard Affidavit, paras. 16-17, Appeal Book and Compendium, Tab 6

9 At the PC Party leadership convention which took place on May 29th to June 1st, 2003, one of the appellants, David Orchard, sought the leadership of the PC Party and entered the convention with the second highest level of delegate support next to the respondent Peter MacKay. Five other candidates also ran for leadership of the PC Party.

Orchard Affidavit, para. 27,Appeal Book and Compendium, Tab 6

10 Of the seven candidates for the leadership, only one publicly supported the idea of merging with the Canadian Alliance. That candidate received less than one percent of delegate support and withdrew from the race before the first ballot.

Orchard Affidavit, para. 28,Appeal Book and Compendium, Tab 6

11 In the course of the leadership convention, Peter MacKay agreed in writing that if David Orchard supported MacKay's leadership bid, there would be no merger of the PC Party with the Canadian Alliance. Paragraph 1 of the agreement dated May 31, 2003 between Peter MacKay and David Orchard reads as follows:

"No merger, ~~talks~~, joint candidates, w alliance. Maintain 301."

By this agreement, the leader of the PC Party committed himself not to pursue merger with the Canadian Alliance. The words "Maintain 301" in the agreement represent MacKay's commitment to abide by Section 2.2.3 of the PC Party Constitution. Section 2.2.3 is sometimes referred to by party Members as the "301 rule", as it requires the PC Party to run PC Party candidates in all 301 PC Party Riding Associations in Canada. The 301 rule was designed to stop any coalition or electoral cooperation between the two parties.

Orchard Affidavit, paras. 29-31,Appeal Book and Compendium, Tab 6
Agreement between MacKay and Orchard, Appeal Book and Compendium, Tab 8

12 In consideration of Peter MacKay's agreement, David Orchard withdrew from the leadership race and asked all his delegates to vote for Peter MacKay as leader. As a result, Peter MacKay was elected leader of the PC Party.

Orchard Affidavit, para. 32,Appeal Book and Compendium, Tab 6

13 Subsequent to the leadership convention, Peter MacKay repeated in public his opposition to merger with the Canadian Alliance. He was quoted in the June 4, 2004 edition of The Toronto Star as saying: "I have never been an advocate of institutional merger ... I'm saying we're running a slate of Progressive Conservative candidates in the next election."

Orchard Affidavit, paras. 33-34,Appeal Book and Compendium, Tab 6

14 Notwithstanding his agreement with David Orchard, Peter MacKay then proceeded to negotiate the Agreement-in-Principle with the Canadian Alliance. The Agreement-in-Principle called for creation of a new political party, "The Conservative Party of Canada", through the joint cooperation of the PC Party and the Canadian Alliance. The Agreement-in-Principle calls for the new party to "assume all the rights, obligations, assets and liabilities of the PC Party and the Alliance".

Orchard Affidavit, paras. 35-36,Appeal Book and Compendium, Tab 6
Agreement-in-Principle, Appeal Book and Compendium, Tab 10

15 Subsequently, the Management Committee of the PC Party called a special meeting for December 6, 2003 at which selected delegates were to consider the following resolution:

> 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.

Neither the resolution nor the Agreement-in-Principle explicitly calls for the merger or dissolution of the PC Party. While the Agreement-in-Principle contemplates the creation of a new party, it does not state

the exact means by which the new party is to be constituted. The resolution does not actually call for approval of the merger of the two parties.

Orchard Affidavit, paras. 37, 40,Appeal Book and Compendium, Tab 6

16 The Management Committee of the PC Party established Rules and Procedures for the December 6, 2003 special meeting. These Rules and Procedures did not conform to the requirements of By-law 4 of the PC Party.

Rules and Procedures for December 6, 2003 special meeting, Appeal Book and Compendium, Tab 9
By-law 4 excerpts, Appeal Book and Compendium, Tab 5

17 The Rules and Procedures did not permit all members to vote on the resolution. They allowed only a limited number of delegates to vote. The Rules and Procedures stipulated that the largest constituency association in the country must send the same number of voting delegates to the meeting as the smallest, and that the delegates were to be elected in each constituency association by a bare majority, and not by a process of proportional representation. In each constituency where a bare majority of members supported the resolution, all of the elected delegates from that constituency were required to vote in favour of the resolution. The Rules and Procedures are structured so that a 2/3 majority of delegates could vote for the resolution and end the PC Party even if a majority of Party Members was opposed.

PART IV - THE ISSUES AND THE LAW

ISSUE 1: Did the Court below err when it failed to apply the provisions of the PC Party Constitution and By-laws to the facts of this case?

18 At paragraph 7 of his Reasons for Judgment, Juriansz J. as he then was, stated as follows:

> In this case we are dealing with a political party. The social interest of members in insuring 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.
>
> *Reasons for Judgment, Appeal Book and Compendium, Tab 3*

19 In the Court below, the appellants sought, among other things, declarations that provisions of the Constitution of the PC Party do not permit the party to be dissolved or merged with another political party except with the unanimous consent of all members of the PC Party.

Notice of Application, Appeal Book and Compendium, Tab 4

20 The Court below was of the view that the merger of the PC Party with the Canadian Alliance is entirely regulated by sections 400 to 403 of the Act, and that existing common law principles regarding voluntary associations are inapplicable to the PC Party.

Reasons for Judgment, paras. 19, 39 and 40, Appeal Book and Compendium, Tab 3

21 At no point in its Reasons for Judgment did the Court below actually consider and apply the specific provisions of the Constitution and By-laws of the PC Party to the facts of this case. It is respectfully submitted that the Court below made a fundamental error in principle when it failed to do so. The Court's view of the applicable common law cannot, in any circumstances, obviate the need for a thorough consideration of the relevant portions of the PC Party Constitution and By-laws.

22 Furthermore, given the importance of political parties, as recognized by the Court below, the members of the PC Party are entitled to a strict and meaningful application of the Party's Constitution.

23 It is respectfully submitted that the Act itself does not permit the PC Party to merge with any other political party unless such merger is authorized by the PC Party in accordance with its Constitution and By-laws. Section 400(2)(b) of the *Act* explicitly requires all merger applications to be accompanied

by a resolution of each of the merging parties approving the proposed merger. It is respectfully submitted that in order for the PC Party to pass a valid and binding resolution in favour of merger with any other political party, such resolution must be passed in accordance with all substantive and procedural requirements of the PC Party's Constitution and By-laws.

Act, ss. 400-403,Appeal Book and Compendium, Tab 17

24 The *Act* does not deal with the internal governance of political parties. The *Act* does not provide rules for political party meetings or decision making processes. The *Act* was never designed to directly govern the inner workings of political parties. In this respect, the Act contrasts starkly with the *Ontario Business Corporations Act* (the "OBCA"). For example, Part VII of the OBCA provides very specific and detailed rules governing shareholders' meetings. The OBCA speaks in a detailed fashion to matters such as minimum notice of meetings, quorum for meetings, voting rights, manner of voting and resolutions. By contrast, the Act contains no such provisions. To determine the validity of PC Party resolutions, one must look beyond the Act to the Party's Constitution and By-laws.

Part VII of the OBCA, Appeal Book and Compendium, Tab 16

25 The PC Party Constitution and By-laws speak explicitly to the manner in which meetings of Party Members are held. A valid resolution of the PC Party may be adopted only in compliance with all requirements of its Constitution and By-laws. By requiring a resolution in support of a merger application, the Act implicitly but clearly relies upon the Constitution and By-laws of the party.

Constitutional Analysis:

26 The PC Party is an unincorporated association. Its aims and principles are set out in its Constitution. Its activities are governed by its Constitution and By-laws. The PC Party Constitution does not in any way contemplate the Party's dissolution or merger with another political party. Dissolution or

merger of the party are obviously not ordinary activities of the PC Party. They are fundamental, Constitutional changes.

27 While section 14.1 of the PC Party Constitution allows for Constitutional amendments to be made at national meetings, no Constitutional amendment has been passed at any PC Party national meeting for the purpose of facilitating the merger of the PC Party with any other party.

PC Party Constitution excerpts, s. 14.1, Appeal Book and Compendium, Tab 5

28 The process by which the merger of the PC Party with the Canadian Alliance Party was sought was Constitutionally invalid. While the party's Management Committee and/or its National Meeting Organizing Committee ("NMOC") can establish Rules and Procedures for national meetings, neither the Management Committee nor the NMOC are permitted to set Rules and Procedures which violate any provision in the Constitution or By-laws of the Party. By-law 4 section 4.2 makes it clear that the NMOC is subject to the Constitution and By-laws. Constitution article 8.17.5, while allowing the Management Committee to set Rules and Procedures, must be subject to Constitution article 8.5. Constitution article 8.5 states that meeting procedure shall be set out in the Party By-laws. Since By-law 4 establishes the procedures for national meetings, no Rules and Procedures can be permitted to contradict it. It is important to note that, while the Party's Management Committee implemented Rules and Procedures for the December 6, 2003 special meeting, the Party did not seek to amend either its Constitution or its By-laws as they pertain to Party meetings.

PC Party Constitution excerpts, Appeal Book and Compendium, Tab 5

29 The Rules and Procedures drawn up for the special meeting of Members to be held on December 6, 2003 meeting violate section 4.9 of By-law 4 of the Party because they fail to conform to the requirements of Wainberg Society Meetings including Rules of Order (CCH Canadian).

PC Party Constitution excerpts, Appeal Book and Compendium, Tab 5
Orchard Affidavit, paras. 65-76,Appeal Book and Compendium, Tab 6
Wainberg's Rules of Order excerpts, Appeal Book and Compendium, Tab 11

30 The severe limitations on debate mandated by the Rules and Procedures for the December 6th meeting represent a blatant violation of Article 8.1.1. of the Constitution Article 8.1.1. of the PC Party Constitution requires full representation of the interests and view of Members.

PC Party Constitution excerpts, Appeal Book and Compendium, Tab 5

ISSUE 2: Did the Court below err by concluding that the *Canada Elections Act* has rendered the existing common law inapplicable to the facts of this case?

The Common Law Position:

31 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 associations, 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* is a clear articulation of this common law principle.

Reasons for Judgment, paras. 17 and 18, Appeal Book and Compendium, Tab 3
Astgen v. Smith et al., [1970] 1 O.R. 129 (Ont. C.A.)

32 When the Constitution of an unincorporated association purports to delegate operational authority to a committee or executive board, such delegation does not extend to changes in fundamental policy, such as amendment of the association's Constitution.

Astgen v. Smith et al., p. 7

33 "Because of the peculiar nature of the interest of the Members of an unincorporated association in the property of the association the Courts have been zealous to protect that interest where factions develop and the fellowship of the association is broken. They have been particularly concerned to do this where the fragmented association has split into a disloyal faction, which has gone its separate way and attempted to take the association's property with it, and an ongoing loyal group of adherents seeking to preserve the property and the fellowship of the original association. The tempestuous history of religious denominations, fraternal societies and trade unions affords many examples of local congregations or units seeking to break away from the parent body either to affiliate with another organization or achieve independence. It has been held many times 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; *Vick v. Toivonen* (1913), 4 O.W.N. 1542 12 D.L.R. 299. In that case, McLaren, J.A., said at p. 1543 O.W.N., p. 301 D.L.R.: "It is a well settled principle of law that the property of a voluntary society like this cannot be diverted by a majority of its members from the purposes for which it was given by those who contributed to it, or devoted to purposes that are alien to or in conflict with the fundamental rules laid down by the society.....

Organization of Veterans of the Polish Second Corps of the Eighth Army v. Army, Navy and Air Force Veterans in Canada et al. (1978), 20 O.R. (2d) 321 at p. 15
Vick v. Toivonen (1913), 4 O.W.N. 1542 (Ont. C.A.) at p. 1543

The Court Below Did Not Apply the Common Law:

34 The Court below decided that these common law principles do not apply to the PC Party because:

(i) the PC Party has been given a form of statutory "personhood" by the Act;

(ii) the assets of the PC Party have "acquired a public dimension" because the PC Party is a registered political party under the *Act*, and registration under the Act requires a political party to account for its financial activities to the Chief Electoral Officer (the "CEO") and, in some case, to remit its net assets to the CEO; and

(iii) a merger application process is provided for in sections 400 to 403 of the *Act* such that merger of a registered political party now occurs purely by reason of the Act and not by reason of any common law principle.

Reasons for Judgment, paras. 19, 28-32, Appeal Book and Compendium, Tab 3

35 Section 504 of the Act reads as follows:

> 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.

36 Section 402(1)(f) of the Act indicates that a registered party has the legal capacity to engage in civil, penal and administrative proceedings both as an initiating and responding party. In addition, paragraph 402(1)(g) of the Act indicates that a judicial or quasi-judicial decision may be enforced by or against a registered party.

37 It is submitted that the Act makes eligible parties, registered parties and suspended parties persons in a very limited way. The Act does not make registered parties persons for all purposes. Conferral of limited personhood has been included in the Act purely to give effect to the enforcement provisions of the Act. This contrasts starkly with Section 15 of the *Ontario Business Corporations Act* which provides that "a business corporation has the capacity and the rights, powers and privileges of a natural person". Furthermore, nothing in the Act makes unregistered political parties into persons in any circumstances. In view of this, it cannot be said that the Act fundamentally changes the legal nature of a political party. It was thus wrong for the Court below to decide that the common law principles noted above have no application to this case.

38 The Act is comprised of twenty-two (22) parts only one of which (Part 18) directly regulates the operations of political parties. The focus of Part 18 of the Act is upon the registration of political parties. As noted in the Reasons for Judgment of the Court below, political parties are not obligated to register under the Act, but registration does give a political party significant benefits such as the ability to gain

access to public funding, reimbursement of some election expenses and allocation of broadcasting time.

Reasons for Judgment, para. 28, Appeal Book and Compendium, Tab 3

39 Registered political parties must submit to the accounting requirements set out in Part 18 of the Act. Unregistered political parties are not at all subject to these accounting requirements. The merger provisions of the Act (ss. 400-403) are contained within Part 18, immediately after the sections that deal with registration and deregistration of registered parties.

Act excerpts,Appeal Book and Compendium, Tab 17

40 Contrary to what is stated in paragraph 32 of the Reasons for Judgment, the regulation of political parties under the *Canada Elections Act* is focused almost entirely on matters of registration and reporting. The Act does not extend to matters of essential substance. The Act provides public funding to registered political parties on the condition that they account carefully for their use of those public funds. This does not in any fundamental way change what political parties do. It was therefore wrong for the Court below to conclude that the Act rendered the existing common law irrelevant.

41 Sections 400 to 403 of the Act do not alone effect the merger of registered political parties. The merger of political parties must occur at common law before it can be recognized under the Act. As noted above, Section 400(2)(b) of the Act provides that the application of a registered party for merger must be accompanied by a resolution proving the proposed merger. By requiring a resolution from each merging party, the Act explicitly acknowledges that something outside of itself is required before a merger can be accomplished. By requiring a resolution, the Act appeals to the common law and to the Constitution and By-laws of the party. If such a resolution has not been validly enacted in accordance with the common law, then a merger application under the Act cannot proceed. Since the PC Party Constitution does not provide for merger, merger can occur only in accordance with the common law

requirement that the unanimous consent of all Members be obtained.

Act ss. 400-403,Appeal Book and Compendium, Tab 17

42 It is important to note that the Act does not provide for the CEO to actually approve the merger of registered parties. Section 401(1) of the Act simply provides that the upon a successful application for merger, the CEO "shall amend the registry of parties by replacing the names of the merging parties with the name of the merged party". The fact that the CEO does not actually approve the merger itself but only amends the registry in respect of the merger indicates that the merger of registered political parties is primarily the product of the internal governance of the parties. The merger, while regulated by the Act, does not occur exclusively because of the *Act*. The focus of section 401 of the Act is on the public recording of the merger by the CEO. This is consistent with the observation of the Court below that the Act's objective is to make available to the public accurate and up-to-date information about registered political parties. This is also consistent with the fact that the Act does not regulate the internal governance of political parties. Again, reliance must be placed on the common law to determine if one political party can merge with another.

Act, s. 401,Appeal Book and Compendium, Tab 17

The Act is not a Code:

43 The Court below appears to conclude that the Act entirely supplants the existing common law of unincorporated associations, as it pertains to political parties. This conclusion is not only inconsistent with the common law, it is insupportable by anything in the Act itself.

44 The Act (or rather that portion of the Act which governs the registration and reporting requirements for registered political parties) was never designed to be a comprehensive code. It is

important to note in this regard that the Act does not even define the term “political party”. The Act does not regulate political parties unless they are registered parties, eligible parties or suspended parties, as defined in the Act. Unregistered political parties are not subject to the accounting requirements or indeed any of the requirements of Part 18 of the Act. The limited form of personhood conferred by section 504 of the Act is not conferred on unregistered parties. Political parties simply are not creatures of statute.

45 It is not logical to conclude that there is no common law governing the operation of political parties simply because the Act regulates certain political parties in certain ways. To do so would result in an unacceptable situation where there is no law governing certain political parties and no law governing certain activities of political parties. For example, if the common law does not apply, then how is it possible for a registered political party to dissolve? The Act does not provide any mechanism for dissolution of a registered political party. The answer must be that the common law continues to apply, subject only to the specific regulatory requirements of the Act.

Common Law Analysis:

46 Applying the common law principles referred to at paragraphs 32-34 above, it is submitted that, in the absence of any provision in the PC Party Constitution contemplating merger, merger can only proceed on the basis of the unanimous consent of each Member of the PC Party.

47 It is further submitted that, pursuant to all of the cases referred to herein, the Constitution of an unincorporated association is the definitive articulation of the rights of each member. The cases speak of a complex of contracts between each member and all other members of the association. The Court below considered that the complex of contracts was not an appropriate legal concept for registered political parties since registered parties are recognized by the Act as legal persons, at least for certain purposes. It is submitted that whether a member of a political party has a contract with all other members or with the

party itself is not relevant to this case. The "complex of contracts" analysis can be critical for determining who may be liable in damages for the breach of an association's Constitution. The locus of liability for damages is not an issue in this case. The issue in this case is what does the Member's contract say? The law is clear that it is the Constitution and By-laws of the PC Party that determine what each Member is entitled to. All of the cases referred to herein and even the Court below recognize "the social interest of members in insuring that the organization's affairs are conducted in accordance with its governing Constitution".

The New Party has Different Aims:

48 The common law is clear that the assets of a voluntary association cannot be diverted to another association having different objects.

> *Organization of Veterans of the Polish Second Corps of the Eighth Army v. Army, Navy and Air Force Veterans in Canada et al. (1978), 20 O.R. (2d) 321 at p. 15*
> *Vick v. Toivonen (1913), 4 O.W.N. 1542 (Ont. C.A.) at p. 1543*

49 The Agreement-in-Principle does, however, sets out a number of "founding principles" which it describes as the new party's policy basis. Three of these "founding principles" stand in marked contrast to the established policies of the PC Party.

> *Agreement-in-Principle, Appeal Book and Compendium, Tab 10*

50 The PC Party is committed to the five principles enumerated in the *Canada Health Act* (public administration, comprehensiveness, universality, portability and accessibility), and also to a sixth principle, namely predictable, stable, long-term health care funding for the Provinces. By contrast, the new party has not yet established its own health care policy. The Agreement-in- Principle does, however, list a "founding principle" regarding health care. The Agreement-in-Principle states that the new party will be guided by "a belief that all Canadians should have reasonable access to quality health care regardless of their ability to pay". The Agreement-in-Principle lacks any commitment to public

administration of health care, universality of public health care or stable funding for health care. The agreement in principle is worded broadly enough to permit significant privatization of health care, a policy not supported by the PC Party.

Orchard Affidavit paras. 48-57, Appeal Book and Compendium, Tab 6
Affidavit of David Orchard sworn November 30, 2003
("Orchard Reply Affidavit"), paras. 2-9, Appeal Book and Compendium, Tab 7

51 PC Party traditions and policies are broadly supportive of bilingualism. The agreement in principle for the new party is based upon "a belief that English and French have equality of status, and equal rights and privileges as to their use in all institutions of Parliament and the Government of Canada". This makes it clear that the new party will support bilingualism only within the confines of the Federal Government.

Orchard Affidavit paras. 48-57, Appeal Book and Compendium, Tab 6
Orchard Reply Affidavit, paras. 2-9, Appeal Book and Compendium, Tab 7

52 The agreement in principle also provides that the new party shall also be based upon "a belief that the greatest potential for achieving social and economic objectives is under a global trading regime that is free and fair". By contrast, the membership of the PC Party has on several occasions expressly and overwhelmingly defeated proposals for the insertion of a similar provision in the PC Party Constitution. Support for free trade is not and has never been Constitutionally enshrined by the PC Party.

Orchard Affidavit paras. 48-57, Appeal Book and Compendium, Tab 6
Orchard Reply Affidavit,, paras. 2-9, Appeal Book and Compendium, Tab 7

53 The above-noted policy differences are significant. Applying the common law principles set out above, it would thus be wrong to permit the assets of the PC Party to be transferred to the new party.

The Insufficiency of the Resolution:

54 The Court below declined to make a declaration that "the resolution [for the December 6th special meeting] does not constitute the resolution required pursuant to Section 400(2)(b) of the *Canada Elections Act* in order for the PC Party to merge with another registered party under the Act". In its Reasons for Judgment, the Court below stated that it would not make such declaration because the question of whether the resolution satisfies the requirements of the *Act* must, in the first instance, be decided by the Chief Electoral Officer (the "CEO").

Reasons for Judgment, para. 41, Appeal Book and Compendium, Tab 3

55 It is respectfully submitted that it would have been appropriate for the Court to make a declaration regarding the sufficiency of the resolution. The Court should not defer in any sense to the CEO, since the CEO does not perform a judicial function. When the CEO receives an application for merger supported by resolutions from each of the merging parties, he does not conduct a legal analysis of the resolution. He does nothing more than satisfy himself that the requirements of the Act appear to have been met. The judgment of the Court below was rendered prior to any submission to the CEO of resolutions authorizing the merger. Making a declaration as to the insufficiency of the PC Party's resolution would not, however, have been premature, since the text of the resolution had been established in the Agreement-in-Principle. The Court below was therefore completely capable of analyzing the resolution in the context of the PC Party Constitution and By-laws.

Act, ss 400-403,Appeal Book and Compendium, Tab 17

56 Looking at the text of the resolution put forth for the December 6, 2003 special meeting, one notes that the word "merger" is nowhere to be found.

57 Neither does the Agreement-in-Principle contain the word "merger". One may infer from the Agreement-in-Principle that the proposed new party will represent in some unspecified way the

cooperation of the existing PC Party with the Canadian Alliance, however, the Agreement-in-Principle does not explicitly call for those two parties to merge with each other. Furthermore, the membership provisions in the Agreement-in-Principle (Section 7) do not stipulate that all members of the PC Party and the Canadian Alliance automatically become members of the new party. Section 7 of the Agreement-in-Principle states only that "until membership sales in the Conservative Party commence, members who join or renew their membership in either the PC Party or the Canadian Alliance after October 15, 2003 will automatically become members of the Conservative Party". This is less than the full merger of the membership of each party that would accompany a real merger.

Agreement-in-Principle, Appeal Book and Compendium, Tab 10

58 It may well be that neither the resolution nor the Agreement-in-Principle speak of merger because Peter MacKay, the leader of the PC Party, had agreed in writing with one of the appellants, David Orchard, not to merge the PC Party with the Canadian Alliance. Whatever the reason, the resolution does not purport to approve the merger.

Agreement dated May 31, 2003 between Peter MacKay and David Orchard, Appeal Book and Compendium, Tab 8

Injunctive Relief:

59 The Notice of Appeal contains a request for declaratory relief and for a permanent injunction enjoining dealings with PC Party assets in a manner inconsistent with the requested declarations.

60 If the declarations are to be of any practical consequence, and if they are to be respected as statements of law, then permanent injunctive relief is required to ensure that the declarations are not simply ignored by the respondents.

61 Damages have not been sought in this appeal, and would not, in any event, be a satisfactory

remedy for the violation by the respondents of the PC Party's Constitution and By-laws.

62 A permanent injunction is justified in this case because the respondents have substantially violated the appellants' enforceable legal rights. The merger of the PC Party with the Canadian Alliance, a party with aims and objectives clearly at odds with those of the PC Party, will effectively deprive the appellants of their own party. The appellants represent Members of the PC Party who seek only to continue pursuing the aims, objectives and policies of the PC Party in accordance with its Constitution and By-laws. Given the importance of the activities of political parties in our society, interference with the appellants' right to do so is a substantial and serious matter.

63 The appellants' come to this Court with clean hands, seeking only to continue the political activities of the PC Party in accordance with the explicit provisions of its Constitution and By-laws.

Conclusion:

64 Canada is a rules-based, democratic society. Our system of government derives its legitimacy in part from the impartial application of rules to all citizens. It is respectfully submitted that to allow the decision of the Court below to stand is to permit a legal void - an absence of rules - for political parties. Canadians join political parties in order to develop, express and promote their values and their aspirations for their country. Political parties thus occupy a place very near the heart of our system. If such important activity takes place in a disorderly and lawless environment, then the contributions of citizens will be severely prejudiced. If members of political parties are promised things by a party's Constitution, but find that the Constitution is ignored, then surely participation in party politics will be discouraged. The result will be stifled policy debate and general disdain for the process by which democratic decisions are made. By giving effect to the PC Party Constitution and the applicable common law, this Court can recognize the importance of the role played by each Member of the Party. This case

is not about politics. It is rather about the legal rules by which party politics takes place.

PART V - RELIEF SOUGHT

65 The appellants seek the Orders specifically requested in the Notice of Appeal, including an Order granting the appellants their costs of this appeal and of the application to the Court below.

Notice of Appeal, Appeal Book and Compendium, Tab 1

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PAUL BIGIONI

CERTIFICATE

Counsel for the appellants hereby certifies that:

(i) an Order under Subrule 61.09(2) is not required, and

(ii) he estimates that 40 minutes will be required for his oral argument, including reply.

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PAUL BIGIONI

SCHEDULE "A"
LIST OF AUTHORITIES

1. Astgen v. Smith et al., [1970] 1 O.R. 129 (Ont. C.A.)

2. Organization of Veterans of the Polish Second Corps of the Eighth Army v. Army Navy and Air Forces Veterans in Canada et al. (1978) 20 O.R. (2d) 321

3. Vick v. Toivonen (1913), 4 O.W.N. 1542 (Ont. C.A.)

SCHEDULE "B"
RELEVANT STATUTORY PROVISIONS

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;

(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(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 the 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 place; and

(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 docuents 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.

ETHEL AHENAKEW et al.

Applicants
(Appellants)

- and

PETER MacKAY et al

Respondent

Court File No. C41105

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

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