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 McCRAKEN, 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 all members of the
PROGRESSIVE CONSERVATIVE PARTY OF CANADA
other than the applicants

Respondents
(Respondents in Appeal)

FACTUM OF THE RESPONDENTS

PART I – OVERVIEW

1. The Progressive Conservative Party of Canada (the "PC Party") was, at all material times, a registered federal political party under the *Canada Elections Act*, S.C. 2000, c.9, as am. (the "*Elections Act*"). The appellants concede that the *Elections Act*, along with other benefits and obligations, expressly provides for the merger of political parties registered under it.

2. To obtain the resolution of the PC Party required under section 400 (2)(b) of the *Elections Act*, the leader of the PC Party (the "Leader") placed a document entitled "Agreement-in-principle on the establishment of the Conservative Party of Canada" (the "AIP"), before a special national meeting of the PC Party members for consideration and

a vote on December 6, 2003. The AIP clearly contemplated a merger of the PC Party with the Canadian Reform Conservative Alliance Party (the "Alliance Party"), and expressly stated that necessary filings would be made under the *Elections Act.*

3. The calling and conduct of the special meeting of the members on December 6 was valid, and conformed with the Constitution of the PC Party (the "Constitution"). Although the appellants initially challenged the constitutionality of the December 6 meeting, and the rules set for it, all their requests for relief in that respect were abandoned during argument before the learned Application Judge.

4. In the result, if the December 6 special meeting produced at least a two-thirds majority vote approving the AIP, the Leader could, in conjunction with the leader of the Alliance Party, apply to the Chief Electoral Officer of Canada (the "CEO") under sections 400 to 403 of the *Elections Act*, to accomplish the statutory merger of the two registered political parties.

5. Contrary to the appellants' assertion, the *Elections Act* regulates significantly more than mere registration of federal political parties and bestows some legal personality and legal capacity on a registered political party. Merger between registered political parties is expressly regulated by the *Elections Act*.

6. By virtue of its status as a political party registered under the *Elections Act*, the PC Party enjoyed significant benefits and was subject to substantial regulation. This regulation by the *Elections Act* included controlling the means by which it could merge with another registered political party and the disposition of its assets upon changes in status, such as a merger. As a result of this statutory regulation, common law cases regarding unregulated voluntary associations were not applicable to it.

7. Further, the appellants' interpretation of the common law cases upon which they seek to rely is incorrect. The appellants seek to attach a condition of unanimous consent by all members of the PC Party, and by implication all members of the Alliance

Party, to a resolution authorizing merger. Even absent the merger provisions in the *Elections Act* which regulate this matter, unanimity of all members of the PC Party, and by implication all members of the Alliance Party, would not have been required for the two parties to merge.

8. Finally, the threshold issue on this appeal is whether the judgment of the learned Application Judge is entitled to deference. Even on appeals from an entirely written record, the decision of the court hearing an application is entitled to deference. In this case, the findings of the learned Application Judge are findings of mixed fact and law. As such, they can not be overturned unless they are found to be unreasonable. The respondents submit that the findings of the learned Application Judge were both reasonable and correct and that this appeal must therefore be dismissed.

PART II - FACTS

Matters Abandoned by the Appellants

9. The respondents disagree with the facts set out by the appellants in Part III of their factum. In Part III, the appellants seek to revisit issues related to the 2003 PC Party Leadership contest involving Peter MacKay, the rules and procedures set for the special meeting of December 6, 2003, and matters which are opinion, but not fact based. None of these issues were before the learned Application Judge, as the appellants abandoned various portions of the relief they sought both before and at the hearing:

> 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. MacKay 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.
>
> **Reasons for Judgment, Appeal Book and Compendium, Tab 3, page 11**

10. The respondents served affidavit evidence fully explaining how the actions of the PC Party, its Management Committee (the "Management Committee"), and others within the Party adhered to the Constitution and By-laws for the calling and conduct of the special meeting on December 6, 2003. The respondents' evidence on these points was uncontroverted, and the appellants did not cross-examine.

> **Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 1, pages 3, 4–11, 17-19, paragraphs 33, 37 to 60 and 88-97, Exhibit Book, Volume I, Tab 12, pages 117, 118–125, 133-136**

11. For these reasons, paragraphs 7 to 18 of the appellants' factum are of no moment to this appeal.

The PC Party and the AIP

12. The respondents rely upon additional facts not set out by the appellants. The PC Party was an unincorporated voluntary association that derived its meaningful existence as a registered federal political party under the *Elections Act*. The PC Party was governed internally by its Constitution and By-laws. Its existence as a federal political party was governed by the *Elections Act* which also controlled the disposition of its assets upon changes in status, among other things.

> **Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 1, page 1, paragraph 6 and 7, Exhibit Book, Volume I, Tab 12, pages 143–169**
>
> **Exhibit 1 to the Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 2, pages 20-26, Exhibit Book, Volume I, Tab 13, pages 143-169**
>
> **Exhibit 2 to the Affidavit of Dominque Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 3, pages 27–32, Exhibit Book, Volume I, Tab 14, pages 170-195**

13. Article 14 of the PC Party's Constitution specifically permitted amendments to be made at any national meeting. An amendment carried when at least two-thirds of the voting delegates voted in favour of the motion.

> **Exhibit 1 to the Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 2, page 26, Exhibit Book, Volume I, Tab 13, page 169**

14. On October 15, 2003 the Leader and the Alliance Party Leader agreed to place the recommendations contained in a document entitled "Agreement-in-principle on the establishment of the Conservative Party of Canada" (previously defined as the "AIP") before their respective members for consideration. The terms of the AIP required it to be considered before December 12, 2003.

> **Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 1, page 2, paragraph 13, Exhibit Book, Volume I, Tab 12, page 113**
>
> **Exhibit 3 to the Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 4, pages 33–35, Exhibit Book, Volume I, Tab 15, page 196-204**

15. Rules and Procedures were set for the special meeting of PC Party members, scheduled for December 6, 2003, to consider the resolution to approve the AIP. These Rules and Procedures expressly required (in Article 7.7) at least a two-thirds vote for that resolution to be carried.

> **Exhibit 6 to the Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 5, pages 36-37, Exhibit Book, Volume I, Tab 18, pages 217-226**

16. The AIP did not contemplate a common law merger of unincorporated associations. It contemplated, on its face, a process where two registered federal political parties would complete filings with Elections Canada to establish the Conservative Party of Canada as a registered federal political party.

> **Exhibit 3 to the Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 4, page 35, Exhibit Book, Volume I, Tab 15, pages 202-204**

The PC Party's Arbitration Requirement

17. In accordance with the Constitution, the Management Committee referred all disputes arising out of or in connection with the December 6 special meeting to consider and vote on the AIP, to the PC Party's independent arbitration committee (the "Arbitration Committee") for adjudication and resolution.

> **Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 1, pages 10–11, 15, at paras. 59 and 84, Exhibit Book, Volume I, Tab 12, pages 124–125, 131-132**

18. On November 5, 2003, nine persons, including the appellant Donald Ryan, filed a submission to arbitration and initiated a hearing before a panel of the Arbitration Committee. The issues raised by Mr. Ryan and the others before the Arbitration Committee were substantially the same as those raised by the appellants before the learned Application Judge.

> **Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 1, pages 12-14, at paras. 76 and 82, Exhibit Book, Volume I, Tab 12, pages 128-130**
>
> **Exhibit 10 to the Affidavit of Dominique Bellemare, Respondents' Compendium, Tab 6, pages 35–41, Exhibit Book, Volume I, Tab 22, pages 250-254**

19. The appellants were all invited to attend and make submissions to the Arbitration Committee panel assembled to hear the issues raised in the submission to arbitration. The appellants declined to attend at the arbitration hearing on November 28, 2003 and instead made unfounded allegations of bias against the members of the Arbitration Committee panel adjudicating the matter.

> **Affidavit of David Orchard, sworn November 30, 2003, Respondents' Compendium, Tab 7, pages 42-43, paras. 12, 14 and 20, Exhibit Book, Volume II, Tab 29, pages 288, 290**
>
> **Exhibit E to the Affidavit of David Orchard, sworn November 30, 2003, Respondents' Compendium, Tab 8, pages 44–47, Exhibit Book, Volume II, Tab 33, pages 320-323**
>
> **Arbitration Committee Reasons for Decision, Respondents' Compendium, Tab 9, pages 49–50, Respondents' Exhibit Book, Tab 1, pages 5-6**

20. The decision of the Arbitration Committee panel was released on December 3, 2003 and formed part of the record before the learned Application Judge. The Arbitration Committee panel found that the AIP was clear and that the resolution for its approval constituted a resolution of the PC Party for the purposes of ss. 400-403 of the *Elections Act.*

> **Arbitration Committee Reasons for Decision, Respondents' Compendium, Tab 9, pages 52, Respondents' Exhibit Book, Tab 1, pages 18-19**

The AIP Was Clear

21. In his first affidavit, the appellant David Orchard ("Orchard") deposed that the AIP was unclear in various respects, suggesting that members could not be expected to make an informed decision to approve it.

> **Affidavit of David Orchard, sworn November 20, 2003, Respondents' Compendium, Tab 10, pages 53-55, paragraph 9, 12 and 39 Exhibit Book, Volume I, Tab 1, pages 4, 5, 13-14**

22. However, on cross-examination, Orchard resiled from that testimony and agreed that he was able to easily understand the AIP from the moment he read it on October 15, 2003. The intent of the AIP was clear to him – he understood that the PC Party and the Alliance Party would be succeeded by the Conservative Party of Canada (the "Conservative Party"). Orchard never sought any clarification concerning the AIP from the Leader or the Management Committee, as it was not necessary for him to do so.

> **Transcript of the Cross-Examination of David Orchard, taken December 1, 2003, Respondents' Compendium, Tab 11, Questions 32-39 and 62-78, Question 469, Exhibit Book, Volume II, Tab 36, pages 354–355, 359–363, 455**

23. Although Orchard swore an affidavit stating that it was not clear to him that the AIP would affect the PC Party, he subsequently testified that it was clear to him that there would be a significant affect on the PC Party - he believed it would be "destroyed".

> **Affidavit of David Orchard, sworn November 20, 2003, Respondents' Compendium, Tab 10, pages 55-56, paragraph 39, Exhibit Book, Volume I, Tab 1, pages 13-14**

Transcript of the Cross-Examination of David Orchard, taken December 1, 2003, Respondents' Compendium, Tab 11, pages 64–65, Questions 318, 465 and 466, Exhibit Book, Volume II, Tab 36, pages 414–415, 454

Findings of the Learned Application Judge

24. The learned Application Judge held that the intent of the parties to the AIP to merge was clear:

> 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". … 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.
>
> **Reasons for Judgment, Appeal Book and Compendium, Tab 3, paragraph 12**

25. The learned Application Judge further rejected the appellants' contention that common law cases such as *Astgen v. Smith* and the *Organizaton of Veterans of the Polish Second Corps of the Eighth Army v. Army, Navy and Air Forces Veterans in Canada* applied to the PC Party. A key distinction between the PC Party and the associations that were the subject of the common law cases, was that the PC Party was not a voluntary association devoid of any legal recognition and without any legal capacity. Rather, as a political party registered under the *Elections Act*, the PC Party enjoyed significant benefits of registration and was subject to regulation under the *Elections Act*.

Reasons for Judgment, Appeal Book and Compendium, Tab 3, paragraphs 18–25

26. The reasons of the learned Application Judge made express reference to the scope and nature of the regulation of registered political parties under the *Elections Act.* His Honour noted that a registered political party is able to gain access to public funding

in various forms, and other benefits such as allocation of free broadcasting time. His Honour further noted that the *Elections Act* imposes stringent reporting requirements on registered parties, and expressly interferes with aspects of their internal governance. Under the *Elections Act*, the Chief Electoral Officer retains significant powers to suspend registered political parties, the consequences of which have significant implications for a party's assets. Following this review, the learned Application Judge held:

> 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.
>
> 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. [emphasis added]
>
> **Reasons for Judgment, Appeal Book and Compendium, Tab 3, paragraphs 31-32**

27. The "essential substance" of the *Elections Act* includes merger. The learned Application Judge expressly held that sections 400 to 403 of the *Elections Act* authorize and regulate the merger of two registered political parties to create a single merged registered party:

> … 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.
>
> . . .

> 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 paragraph 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.
>
> 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.
>
> 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.
>
> **Reasons for Judgment, Appeal Book and Compendium, Tab 3, paragraphs 35 and 37-39**

28. The learned Application Judge therefore dismissed the appellants' application in its entirety.

PART III – POSITION OF RESPONDENT WITH RESPECT TO ISSUES RAISED BY APPELLANTS

Elections Act Governs the Matter

29. The learned Application Judge correctly held that the status of registered federal political parties is governed by the *Elections Act*. That statute deals with all aspects of status and governs registration, deregistration, suspension and merger of federal political parties. The *Elections Act* also regulates the manner in which the assets of registered political parties can be dealt with and what happens to them when the CEO changes the status of a registered party.

***Elections Act, supra,* ss. 366-374, 385-391, 397 and 400-402**

30. A registered political party differs significantly from other unincorporated associations because of the control the *Elections Act* exerts over it and its assets. Once a party is registered, control over the ultimate disposition of its assets is governed by the statute. A registered party can not opt out of any of the statutory controls over its existence. For example, unlike the unincorporated associations in the cases the appellants rely upon, the members of registered political parties cannot divide up the assets of the association upon dissolution. The *Elections Act* states that upon deregistration of a registered political party, voluntary or otherwise, the net balance of assets of the party must be remitted to the CEO to be forwarded to the Receiver General. The *Elections Act*, in fact, dictates what happens to the assets and liabilities of a registered political party upon any change in its status.

***Elections Act, supra,* ss. 397 and 402**

31. Under the *Elections Act*, two registered federal political parties may change their status and become one (which the *Elections Act* expressly refers to as a "merger") upon application to the CEO. Under the *Elections Act*, such an application is to:

> (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 [subject to an exception which is not relevant in the circumstances].

***Elections Act, supra,* s. 400**

32. Following review of a merger filing, the CEO is then required to amend the registry of parties by replacing the names of the merging parties with the names of the merged party, provided that the application is not made within thirty days before the issuance of an election writ, and the CEO is satisfied that:

(a) the merged party is eligible for registration as a political party under the *Elections Act*; and

(b) the merging parties have discharged their obligations under the *Elections 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.

***Elections Act, supra,* s. 401**

33. A merger of registered parties takes effect when the CEO amends the registry of parties and, as of that day, *inter alia*:

(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;

***Elections Act, supra,* s. 402**

34. It is the CEO, as an officer of Parliament, who determines whether the information and documentation provided is satisfactory to merge two registered political parties under the *Elections Act*. The decision of the CEO is subject to review by the Federal Court.

***National Party of Canada et al. v. Stephenson et al.* (1996), 124 F.T.R. 108, aff'd. 230 N.R. 342 (C.A.), Respondents' Book of Authorities, Tab 1**

***Cavilla v. Canada (Chief Electoral Officer)* (1994), 76 F.T.R. 77, Respondents' Book of Authorities, Tab 2**

***Reform Party of Canada v. Reform Party of Manitoba et al.* (1991), 39 C.P.R. (3d) 440 (Man. C.A.), Respondents' Book of Authorities, Tab 3**

***Federal Courts Act*, R.S.C. 1985, c. F-7, as am., s.18**

35. Consequently, it is the provisions of the *Elections Act* which control the result in this case. The learned Application Judge correctly held that regulation of political parties, including merger, is not confined to mere registration but extends to matters of essential substance:

> …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.

Reasons for Judgment, Appeal Book and Compendium, Tab 3, at para. 39

36. Beyond the status of registered political parties, the *Elections Act* governs such matters of essential substance as its name, its logo, its fiscal year, the methods by which its financial statements are prepared, the form in which its financial statements are prepared, who may act as its auditors and agents, how many auditors and agents it may have, the duties and liabilities of its chief agent, the methods by which it may seek financial and other contributions, from whom it may accept contributions and, among other things, the amounts it is permitted to spend on activities such as election advertising. The *Elections Act* also requires certain information about registered political parties, such as the identity of their auditors and chief agents and their election expenses, to be made public.

***Elections Act, supra*, ss. 364, 368, 373, 374, 375-381, 392-397, 399(5), 404, 412-415, 424-435**

The Ratio in *Astgen v. Smith* Does Not Control the Result in the Circumstances

37. *Astgen v. Smith* is not authority for the proposition that unanimous consent is required to change the constitution of an unincorporated association. Amendments may be made by means of those procedures which are expressly or impliedly authorized by

the constitution, or by statute. The majority in *Astgen v. Smith* only held that the provisions which were said to authorize the merger in that particular case were not sufficient because they were limited to "internal management" or "house-keeping matters".

> ***Astgen v. Smith* (1970), 1 O.R. 129 (C.A.) at 136, 138, Respondents' Book of Authorities, Tab 4**

38. It was noted in the minority judgment of Laskin J.A. (as he then was), in a portion of his reasons with which the majority agreed, that there was no statute by which the merger could take place in that case:

> The contest as to the validity and force of the merger agreement has at its base a recognition by all parties that unincorporated associations such as Canadian Mine Mill and its local 598 must act in conformity to their constitutions or rules or by-laws, according to their application; that failing direction in such documents they are thrown back to the common law, unless there is legislation upon which they can rely. [emphasis added]
>
> ***Astgen v. Smith, supra,* at 146**

39. The majority in *Astgen v. Smith* placed great weight on the process requirements of the organization's constitution in construing the article which permitted amendments. It was noted that a referendum at the request of the Executive Board (the process utilized in that case) was appropriate to internal management changes, but did not apply to fundamental changes, such as the pursuit of entirely new objects. It was also noted that more democratic processes were provided for in the constitution, in the form of a convention and a referendum, which had not been followed. Thus, it would appear that, in the view of the majority, had an amendment first been properly enacted which provided for the merger, the merger could then have been voted on and passed if favoured by the necessary majority.

40. The dissenting judgment of Laskin J.A. construed the constitution differently. He held that the constitution required more elasticity and, therefore, a more pragmatic and functional approach was taken with respect to its interpretation. He held that the constitution did permit a common law merger which, ordinarily, should have been completed sequentially by an amendment to the constitution and subsequent approval

of the merger. However, no violence would be done either to constitutional propriety or the will of the membership by treating the single referendum vote as creating a valid merger.

***Astgen v. Smith, supra,* at 159-161**

41. *Astgen v. Smith*, if applied at all, should be confined to its own particular context, trade union law. Even in that context, the decision has faced much criticism:

> The holding that a trade union was a voluntary unincorporated association effectively equated it to a private social club. Indeed, the rules derived from private club cases were imported into the case-law of the regulation of internal union affairs. While there is a case to be made for allowing unions to be free to regulate their own internal affairs, as private clubs can do, clearly the two are not the same. The actions of a trade union can directly affect a person's ability to earn a livelihood and significantly determine his or her work future. A denial of union rights to a member is not the same thing as the loss of a privilege associated with a club. In many respects, the voluntary association is an inapposite paradigm for the regulation of trade union affairs and its application to unions can lead to manifestly impractical results. Still, there is no question that the prominence of this paradigm in the area of internal union affairs 'has coloured the law and materially influenced the nature and scope of the rules'.

***Adams, Canadian Labour Law* (2nd ed., Looseleaf), at para. 14.950, Respondents' Book of Authorities, Tab 5**

42. In point of fact, *Astgen v. Smith* has not been followed in the provincial labour law context. It has not been viewed as an impediment to the statutory recognition of mergers and amalgamations of trade unions under the *Labour Relations Act*, S.O. 1995, c. 1, even when a merger has received less than the unanimous support of members. The Ontario Labour Relations Board has consistently recognized the successor rights of trade unions so long as the matter of merger was put before the membership on proper notice and any procedures outlined in the constitution were adhered to. Likewise, it has been held that where there is an unrestricted procedure for amending the constitution, this contemplates merger with another union.

***Re Melnor Manufacturing Ltd.*, [1989] O.L.R.B. Rep. (Apr.) 360, Respondents' Book of Authorities, Tab 6**

***Re Waterloo Region District School Board* (2001), 72 C.L.R.B.R. (2d) 86, at 95-96 (O.L.R.B.), Respondents' Book of Authorities, Tab 7**

43. The Supreme Court of Canada conclusively displaced the narrow ratio arising from the specific facts of *Astgen v. Smith* in its unanimous judgment in *Berry v. Pulley*. In rejecting the "legal fiction" that a web of contracts exists amongst all the individual members of a trade union, the Supreme Court noted the importance of recognizing that a "statutory labour relations scheme is superimposed over the contract between the member and the union." A statutory scheme is superimposed over the members of registered federal political parties as well. The Supreme Court found that the existence of a statutory scheme will inform the interpretation of a contract related to it:

> Consequently, the contract must be viewed in its overall statutory context. For example, the statutory right of members to be represented by the union of their choice implies that the contract only exists as long as the members maintain that union as their bargaining agent, and no penalty could be imposed by the contract against members for exercising this statutory right. … I simply note that the unique character and context of this contract, as well as the nature of the questions in issue, will necessarily inform its construction in any given situation.
>
> ***Berry v. Pulley*, [2002] 2 S.C.R. 493, at 514-515, Respondents' Book of Authorities, Tab 8**

44. In light of the rejection of the legal fiction of contractual privity of members in an unincorporated association, and the operation of federal elections legislation, neither the court below nor this court is bound by the narrow and fact specific majority judgment in *Astgen v. Smith*. Alternatively, or in addition, the approach of the minority can be adopted as the more pragmatic and functional approach.

There Has Been Constitutional Compliance In Any Event

45. The PC Party was a voluntary unincorporated association which derived its meaningful existence as a registered federal political party under the *Elections Act*. The relationship between its members was regulated by its Constitution, By-laws and other rules to which the members have subscribed. As a registered federal political party, the rules to which the members subscribed included the *Elections Act.*

> ***Munro v. A.G. Canada*, [1993] O.J. No. 2370 (Gen. Div.), at para. 5, Respondents' Book of Authorities, Tab 9**

46. Even if the resolution passed at the December 6, 2003 special national meeting is characterized as a constitutional amendment, Article 14 of the Constitution

specifically permits amendments to be made at any national meeting. An amendment is carried when at least two-thirds of the voting delegates vote in favour of the motion. The December 6 special national meeting was properly convened and there was no legal impediment to the delegates voting on the resolution to approve the AIP. All of the notice, information and delegate selection procedures for a special national meeting to consider a constitutional amendment were complied with. The appellants conceded the PC Party's compliance in this respect, as they abandoned all claims for relief in respect of the calling and conduct of the special national meeting in the course of the hearing before the learned Application Judge. A two-thirds majority of the delegates in attendance voting in favor of the resolution could authorize the Leader of the PC Party and the Management Committee to take all necessary steps to implement the AIP, as outlined in the AIP.

> ***Itter v. Howe*, (1896), 23 O.A.R. 256 (C.A.), at 283-284, 295-296, Respondents' Book of Authorities, Tab 10**
>
> ***The Lutheran Free Church v. The Lutheran Free Church* (not Merged), 141 N.W. 2d 827 (Minn. S.C.), Respondents' Book of Authorities, Tab 11**

PART IV - ADDITIONAL ISSUES RAISED BY THE RESPONDENT

Standard of Review

47. The threshold issue on this appeal is whether the judgment of the learned Application Judge is entitled to deference in this court. This issue has two branches, one concerning the characterization of his conclusions, the other concerning the nature of the record before him. On the first branch, the conclusions are properly characterized as involving findings of mixed fact and law, which can not be overturned unless they are unreasonable. Further, the facts of this case are sufficiently unusual that the conclusion of the learned Application Judge is of little precedential value and therefore should be accorded deference by this court:

> …the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great

> precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact.
>
> …
>
> In short, the Tribunal forged no new legal principle, and so its error, if there was an error, can only have been of mixed law and fact. It should be noted that no one has suggested that the Tribunal erred in its findings of fact. All of this tends to suggest that some measure of deference is owed to the decision of the Tribunal because, to paraphrase what Gonthier J. stated in *Nova Scotia Pharmaceutical Society, supra*, appellate courts should be reluctant to venture into a re-examination of the conclusions of the Tribunal on questions of mixed law and fact.

***Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, at 13-15, Respondents' Book of Authorities, Tab 12**

***Gottardo Properties (Dome) Inc. et al. v. the City of Toronto et al.* (1998), 162 D.L.R. (4th) 574 (C.A.), at 590-591, Respondents' Book of Authorities, Tab 13**

48. With respect to the second branch, the record before the learned Application Judge was entirely documentary. In such circumstances, deference should likewise be accorded to it:

> …Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice. See *Schwartz v. Canada*, [1996] 1 S.C.R. 254, 133 D.L.R. (4th) 289; *Kerans, Standards of Review Employed by Appellate Courts, supra*; *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.); and Charles Wright, *"The Doubtful Omniscience of Appellate Courts"* (1957), 41 Minn. L. Rev. 751. These reasons for deference apply even if no issue of credibility arises. Issues of credibility raise an added concern about the ability of appellate review to improve the quality of justice, because an appeal court does not have the trial judge's advantage of seeing and hearing the witnesses. Therefore, a deferential standard of review may be applied more strictly to findings of credibility or other findings that depend on the trial judge's or motion judge's advantage in seeing and hearing the witnesses. But deference is still called for on an appeal from an entirely written record.

***Gottardo Properties, supra,* at 591**

***Equity Waste Management of Canada v. Town of Halton Hills* (1997), 35 O.R. (3d) 321 (C.A.), at 336, Respondents' Book of Authorities, Tab 14**

The Subject Matter of the Application is Not Justiciable

49. The dispute herein relates to the requirements of the Constitution and By-laws, other than in relation to the leadership selection process and has, in fact, been the subject of arbitration by members of the PC Party, including one of the appellants, in accordance with Article 13 of the Constitution. Indeed, the subject matter of the application was directed to arbitration by the Management Committee. Under Article 13 of the Constitution, where a dispute has been referred to the Arbitration Committee, arbitration becomes mandatory, and a court action must therefore be stayed.

***Canadian National Railway Co. et al.* v. *Lovat Tunnel Equipment Inc.* (1999), 174 D.L.R. (4th) 385 (Ont. C.A.), at 388, Respondents' Book of Authorities, Tab 15**

Exhibit 1 to the Affidavit of Dominique Bellemare, sworn November 26, 2003, Respondents' Compendium, Tab 2, pages 25–26, Exhibit Book, Volume I, Tab 13, pages 168-169

50. There is a very strong public policy in this jurisdiction that where parties have agreed that they will have an arbitrator decide their claims instead of resorting to the courts, they should be held to their contract. The Arbitration Committee was the body charged with responsibility and had the necessary expertise to consider the relevant PC Party procedures and political history in order to arrive at the appropriate result. To permit this application to proceed instead of deferring to the arbitral process violated that strong public policy.

***Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257(C.A.), at 268, Respondents' Book of Authorities, Tab 16**

51. The application was therefore ill-conceived. Arbitration was mandated by the Constitution and was invoked. That being the case, in addition to the findings stated by the learned Application Judge in his Reasons for Judgment, it was also open to him to

dismiss the application in its entirety on the basis that the subject matter was not justiciable.

> ***Cureatz v. Progressive Conservative Party of Canada*, [1997] O.J. No. 2309 (Gen. Div.), Respondents' Book of Authorities, Tab 17**

Other Factors Militate Against Judicial Interference

52. The relief sought by the appellants is essentially equitable in nature. That being the case, there are a number of factors which the court below should have considered and which should have led to a dismissal of the application. In particular, the applicants delayed in bringing the application until the eleventh hour and in the face of the obligation to arbitrate. The inescapable conclusion is that the appellants' design was not a legitimate determination of legal issues, but rather a tactical manoeuvre to make it as difficult as possible for the implementation of the AIP to proceed.

> ***Li Preti v. Chrétien*, [1993] O.J. No. 2205 QL (Gen. Div.), at paras. 9-13, Respondents' Book of Authorities, Tab 18**

53. The true substance of the matter herein is a political, rather than a legal one. The courts should be reluctant to interfere with political controversies. Further, courts are loath to delve into disputes between members of voluntary associations, particularly when the parties have remedies they have not exhausted within the rules of the association.

> ***Li Preti v. Chrétien, supra.***
>
> ***Cameron and Others v. Hogan* (1934), 51 C.L.R. (H.C. Aus.), cited with approval in *Conacher v. Rosedale Golf Assn. Ltd.*, [2002] O.J. No. 575 QL (S.C.J.), Respondents' Book of Authorities, Tab 19**

PART V – ORDER REQUESTED

54. The respondents request that this appeal be dismissed in its entirety with costs to the respondents.

55. The respondents' further request that leave be refused on the request made at paragraph 66 of the appellants' factum for their costs before the learned Application Judge.

ALL OF WHICH IS SUBMITTED THIS 16th DAY OF APRIL, 2004.

_____
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SCHEDULE "A"
LIST OF AUTHORITIES

National Party of Canada et al. v. Stephenson et al. (1996), 124 F.T.R. 108, aff'd. 230 N.R. 342 (C.A.)

Cavilla v. Canada (Chief Electoral Officer) (1994), 76 F.T.R. 77

Reform Party of Canada v. Reform Party of Manitoba et al. (1991), 39 C.P.R. (3d) 440 (Man. C.A.)

*Astgen v. Smith (*1970), 1 O.R. 129 (C.A.)

Adams, Canadian Labour Law (2nd ed., Looseleaf), at para. 14.950

Re Melnor Manufacturing Ltd., [1989] O.L.R.B. Rep. (Apr.) 360

Re Waterloo Region District School Board (2001), 72 C.L.R.B.R. (2d) 86, (O.L.R.B.)

Berry v. Pulley, [2002] 2 S.C.R. 493

Munro v. A.G. Canada, [1993] O.J. No. 2370 (Gen. Div.)

Itter v. Howe, (1896), 23 O.A.R. 256 (C.A.)

The Lutheran Free Church v. The Lutheran Free Church (not Merged), 141 N.W. 2d 827 (Minn. S.C.)

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1

Gottardo Properties (Dome) Inc. et al. v. the City of Toronto et al. (1998), 162 D.L.R. (4th) 574 (C.A.)

Equity Waste Management of Canada v. Town of Halton Hills (1997), 35 O.R. (3d) 321 (C.A.)

Canadian National Railway Co. et al. v. *Lovat Tunnel Equipment Inc.* (1999), 174 D.L.R. (4th) 385 (Ont. C.A.)

Automatic Systems Inc. v. Bracknell Corp. (1994), 18 O.R. (3d) 257(C.A.)

Cureatz v. Progressive Conservative Party of Canada, [1997] O.J. No. 2309 (Gen. Div.)

Li Preti v. Chrétien, [1993] O.J. No. 2205 QL (Gen. Div.)

Cameron and Others v. Hogan, (1934), 51 C.L.R. (H.C. Aus.), cited with approval in *Conacher v. Rosedale Golf Assn. Ltd.*, [2002] O.J. No. 575 QL (S.C.J.)

SCHEDULE “B”

Canada Elections Act, S.C. 2000, c.9, as am., ss. 364-435

Federal Courts Act, R.S.C. 1985, c. F-7, as am., s.18

AHENAKEW et al. Appellants	and	PETER MacKAY et al. Respondents	Court File No: C41105

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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