Court File No.: 03-CV-259202CM1

ONTARIO
SUPERIOR COURT OF JUSTICE

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

- 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

APPLICANTS' FACTUM

December 2, 2003

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I. NATURE OF APPLICATION

1. The applicants seek declaratory relief about an agreement-in-principle to create a new political party, signed by the leaders of the Progressive Conservative Party of Canada (the "PC party") and the Canadian Conservative Reform Alliance (the "Alliance party").

2. The applicants take no issue with the right of any person to form or join a different political party at any time. This application is focused exclusively on what happens to the PC party if some of its members elect to leave it and start a new party while others wish to remain. The agreement-in-principle is deliberately ambiguous as to what is to become of the Party. The applicants seek declaratory relief to clarify the legal rights of those who choose not to join the new party which is being created.

II. THE FACTS

A. Background

3. The PC party is an unincorporated association and is registered as a federal political party under the *Canada Elections Act*. The applicants are party members opposed to any merger with the rival Alliance party.

> Affidavit of David Orchard, sworn November 20, 2003, para. 2, *Application Record*, Tab 2, p. 2 ("Orchard Affidavit"); Affidavit of Dominique Bellemare, para. 6, *Responding Record*, Tab A, p. 3; Affidavit of David Orchard, sworn November 30, 2003, paras. 39-59, *Supplementary Application Record*, Tab 1 ("Orchard Reply Affidavit")

4. The PC party pre-dates Confederation. It is Canada's oldest political party and, under various names, is the only party in Canada aside from the Liberals to have won national office. It has played a critical role in Canada's history.

> Orchard Affidavit, paras. 3-4, Application Record, Tab 2, pp. 2-3

5. The respondent Peter MacKay is the party's 18th elected leader. He won this position at a national convention conducted in Toronto on May 29 to June 1, 2003. Counsel have agreed that for the purposes of this proceeding Mr. MacKay is properly

named under Rule 10.01 as representing all members of the PC party aside from the applicants.

Orchard Affidavit, para. 5, *Application Record*, Tab 2, p. 3

B. The PC Party Constitution

6. Nothing in the PC party's constitution provides for the party's merger or dissolution. On the contrary, the entire constitution is premised on the party's continuing existence. Indeed, article 2.2.3 provides that one of the party's fundamental aims is to nominate "Progressive Conservative candidates in every constituency" in Canada.

> AIMS
>
> 2.2 The Progressive Conservative Party of Canada exists to:
>
> 2.2.1 Build a national coalition of people who share these beliefs and who reflect the regional, cultural and socio-economic diversity of Canada;
>
> 2.2.2 Develop this coalition, embracing our differences and respecting our traditions, yet honouring a concept of Canada as the greater sum of strong parts; and
>
> 2.2.3 Provide an organizational framework within which Members of the Progressive Conservative Party of Canada can effect change, gather public support for its policies and influence government policy **through the nomination of Progressive Conservative candidates in every constituency and the election of Progressive Conservative Members of Parliament**, for the betterment of Canada. [emphasis added]
>
> 2.3 The Party will operate in a manner accountable and responsive to its Members.

Constitution, Article 2, *Application Record*, Tab 2-A

7. The constitution also requires that the Leader of the party "shall promote the Party and its Aims and Principles".

Constitution, Article 11.1, *Application Record*, Tab 2-A

8. The rules respecting the governance of the Party are set out in article 8 of the constitution:

8.2 The government, management and control of the activities of the Party are vested in the Members at national meetings.

8.3 Between national meetings of the Party, the government, management and control of the activities of the Party are vested in the National Council, subject to general direction from, accountability to and review by the Members at national meetings.

8.4 Between meetings of the National Council, the government, management and control of the activities of the Party are vested in the Management Committee, subject to general direction from, accountability to and review by the National Council at meetings of the National Council.

...

8.9 Special meetings of Members may be convened at any time by the National Council or the Management Committee through the National President to transact any business relating to the government, management and control of the activities of the Party.

Constitution, Article 8, *Application Record*, Tab 2-A, and see National Restructuring Committee Report, March 1995, Exhibit F, Orchard Reply Affidavit, Applicants' Supplementary Record, Tab 1-F

C. Members are Against Merger with Alliance

9. In the mid 1990s, discussions began about a merger or some type of co-operation between the PC party and a predecessor to the Alliance called the Reform party. The vast majority of PC party members have, on repeated occasions, decisively affirmed their decision that they do not want to merge with the Reform/Alliance.

Orchard Affidavit, para. 13, *Application Record*, Tab 2, p. 5-6

(i) Consistent Rejection of Merger Proposals

10. In 1998 the leader of the Reform Party began pressing for the creation of a "united alternative", a term which was intended to signify either merger of the parties, or at least some sort of affiliation or co-operation, including strategic co-operation in the nomination process in ridings across Canada, so that PC and Reform party candidates did not stand for election opposite each other in the same ridings. In the 1998 PC leadership race, the

two leadership candidates who indicated that they were open to such co-operation with the Reform Party placed fourth and fifth out of a field of five candidates.

Orchard Affidavit, paras. 14-15, *Application Record*, Tab 2, p. 6

11. At the PC party's 1999 national convention in Toronto, the most important piece of business was a resolution passed in response to continuing merger overtures. The resolution, colloquially known as the "301 Rule", was supported by roughly 95% of the delegates in attendance. It enshrined an amendment to the PC party constitution which, as noted in paragraph 6 above, provides in article 2.2.3 that one of the party's fundamental aims is the nomination of Progressive Conservative candidates in every federal constituency in Canada, and the formation of a Progressive Conservative government, as contrasted with running a partial slate of candidates, or attempting to form a coalition government in coalition. It is by definition a categorical rejection of full-blown merger with the Alliance or the deliberate vaporization of the PC party to allow for an Alliance take-over. This decision of the membership to constitutionally codify any form of affiliation with the Alliance was taken in the face of considerable pressure from members of the Reform/Alliance party to vote against the "301 resolution".

Orchard Affidavit, para. 16-17, *Application Record*, Tab 2, p. 6-7

12. Following the 2000 general election, the Alliance Party (as the Reform Party had become) persisted in its overtures to merge with the PC party. The caucus of PC Members of Parliament under Joe Clark initiated a form of co-operation in the House of Commons between the PC party caucus and eight dissidents who had left the Alliance caucus. At no time did Mr. Clark propose giving up the name of the party, merging it with any other party or dissolving it. In fact, he forcefully resisted any such suggestions.

Orchard Affidavit, para. 18, *Application Record*, Tab 2, p. 7

13. At the September 2001 meeting of the PC party's National Council, proponents of closer relations with the Alliance put forward a motion which, among other things, endorsed on-going discussions "with other Canadians" with the objective of forming a "principled and

unified conservative government". An amendment to this motion was put forward, in which the word "Progressive" was added to make it clear that the objective of the party was to form "a principled and unified ***Progressive*** Conservative government". The proponents of the original motion responded by expressly stating that the amendment was hostile to the original motion. Thus, it was clearly understood that the amendment opposed any further discussions about possible electoral co-operation or merger with the Alliance Party. The amendment was then voted upon and passed by an overwhelming majority of the members of the National Council present. As a result, the 1999 vote at the national convention not to enter into any coalition with the Alliance Party was strongly reaffirmed by the National Council.

Orchard Affidavit, paras. 22-24, *Application Record*, Tab 2, pp. 8-9

14. At the Party's national convention in August 2002, the delegates once again overwhelmingly reaffirmed their opposition to any merger with the Alliance party. A resolution which began with a recital that "the promotion of democracy in Canada and the electoral defeat of the Liberal Party of Canada makes necessary a single conservative alternative" proposed that "the Leader and his caucus and the National Council be directed to take all responsible steps to negotiate a single conservative alternative". The resolution was overwhelmingly defeated.

Orchard Affidavit, para. 25, *Application Record*, Tab 2, p. 9

(ii) Members' Recent Rejection of Merger in June 2003

15. Shortly before the national convention in August 2002 the former leader, the Right Honourable Joe Clark, announced his intention to retire as party leader and a leadership convention took place on May 29 to June 1, 2003. One of the applicants, David Orchard, stood as a candidate for the leadership of the party, and entered the convention with the second highest delegate support, behind the front runner, the respondent Peter MacKay. Five other candidates also ran for party leader.

Orchard Affidavit, para. 27, *Application Record*, Tab 2, p. 9

16. Of the seven candidates, only one campaigned in favour of or expressed any public support for the idea of merging the PC party with the Alliance Party. That candidate received less than 1% of the delegate support, and withdrew from the race before the first ballot.

Orchard Affidavit, para. 28, *Application Record*, Tab 2, p. 10

17. By the end of the second ballot only three candidates, including Mr. MacKay and Mr. Orchard remained in the race. This led to discussions between Mr. Orchard and Mr. MacKay's representatives, and subsequently to a direct meeting between Mr. MacKay and Mr. Orchard. Mr. MacKay expressly and unequivocally agreed that if Mr. Orchard threw his support behind Mr. MacKay there would not be a merger of the PC and Alliance parties. The agreement, which was reduced to writing, not only provides in plain English that there will be no merger, it makes reference to maintaining the "301 Rule".

Orchard Affidavit, paras. 29-31, *Application Record*, Tab 2, p. 10-11; MacKay - Orchard Agreement, *Application Record*, Tab 2-E

18. On the strength of Mr. MacKay's signed agreement, Mr. Orchard withdrew from the race and threw his support behind Mr. MacKay. He asked the delegates who had supported him to vote for Mr. MacKay as leader of the party. A majority of the over 600 delegates who had originally supported Mr. Orchard voted for Mr. MacKay, and he was elected leader.

Orchard Affidavit, para. 32, *Application Record*, Tab 2, p. 11

19. Following the convention, Mr. MacKay not only assured Mr. Orchard that he would fully live up to his promise, he also reminded Canadians on several occasions that his agreement with Mr. Orchard simply restated the position the party had already adopted in respect of co-operation with the Alliance. He repeated that he had always opposed a merger with the Alliance, and that the PC party had voted at its 2002 Edmonton convention to field its own candidates in all 301 ridings, which quashed any notion of running joint candidates or merging with the Alliance. In an article in the June 4, 2003 edition of the *Toronto Star*, Mr. MacKay is quoted 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, *Application Record*, Tab 2, p. 11

20. In mid-September Mr. MacKay's chief of staff assured Mr. Orchard that, notwithstanding any media reports he may have heard regarding negotiations with the Alliance party, no merger was being contemplated and that the talks being reported in the media at the time were simply explorations about co-operation between the two parties in the House of Commons.

Orchard Affidavit, paras. 35-36, *Application Record*, Tab 2, p. 12

D. The Agreement-in-Principle

21. On October 15, 2003 Mr. MacKay announced that he had signed an agreement with the leader of the Alliance party to form a new party. To the extent that Mr. MacKay intended that the agreement would disband the PC party, he acted without regard to the clearly expressed views of the party's members over a number of years, ignored his clear repeated commitments to respect the constitutionally codified "aim" of the PC party that it will not merge with the Alliance, and breached his obligations under the party's constitution to support its aims and principles.

Orchard Affidavit, paras. 35-36, *Application Record*, Tab 2, p. 12

22. In particular, on October 15, 2003, Mr. MacKay and Stephen Harper, acting in his capacity as leader of the Alliance Party signed an "Agreement-in-principle on the establishment of the Conservative Party of Canada" (the "AIP"). The AIP provides for the formation of a "new party" to be called the Conservative Party of Canada. There are a number of other provisions in the AIP, including the following:

(a) Filings with the Chief Electoral Officer pursuant to the *Canada Elections Act*, with respect to the ***founding*** of the new party, will be completed by December 31, 2003.

(b) At some unspecified point in the future the new party "will assume all the rights, obligations, assets and liabilities of the PC party and the Alliance".

(c) Anyone who joins or renews their membership in either the PC party or the Alliance after October 15, 2003 will automatically become a member of the new party.

(d) There is to be a "stand still on nominations". In particular, in paragraph 14 of the agreement, Messrs. Harper and MacKay purported to agree on behalf of their respective parties that meetings in constituency associations across Canada for the nomination of candidates to stand for election to Parliament in the coming federal election will be "cancelled, and further nominations will be frozen", pending ratification of the agreement.

AIP, *Application Record*, Tab 2-C

23. The Management Committee has convened a meeting for December 6, 2003 at which selected delegates will 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.
>
> Orchard Affidavit, paras. 37, 40, *Application Record*, Tab 2, pp. 12, 14

24. Although the AIP expressly contemplates the creation of a new party, it is silent as to what exactly is being proposed in respect of the existing PC party. It refers neither to its merger nor dissolution, but only to the establishment of the new Conservative Party of Canada. In late October, Glenn Solomon, a solicitor and one of the Directors of the PC Canada Fund (the registered agent of the PC party), and a supporter of the AIP, wrote that the membership "may be voting on merger, rather than dissolution", that "the party's constitution can be amended to allow a merger to occur with anther political party", and that he suspected "that members will be asked to vote on merger, or to vote on dissolution and merger, so that all bases are covered". In fact, members are voting only to approve the AIP for the establishment of the new party and no resolution is being placed before the December 6 meeting to amend the PC party constitution, or to dissolve the party, or to

merge it with the Alliance, or merge it with a new party to be created. The filing with the Chief Electoral officer mentioned in the AIP is specified to be the filing required to "found" a new party (see paragraph 22 above). The word 'merge' does not appear in the resolution being placed before the December 6 meeting or the AIP referred to in it.

Orchard Affidavit, para. 11, *Application Record*, Tab 2, p. 5; AIP, *Application Record,* Tab 2-C

25. The applicants' affidavit material squarely raises the ambiguity in the AIP as to what is proposed for the PC party as an issue in this proceeding, yet the respondents chose not to address the question in their responding affidavit. Even at this late date the respondents have chosen not to explain whether or not it is intended that approval of the AIP would result in the merger or dissolution of the party. It is on this very issue that the applicants seek declaratory relief.

Bellemare Affidavit, *Responding Record*, Tab A

E. Vote Cannot Be Said To Reflect the Will Of Party Members

26. The Management Committee has purported to stipulate that the resolution will be passed if two-thirds of the delegates at the December 6 meeting who cast votes support it. This does not mean, however, that two-thirds of the party's members must be in support of the resolution in order for the resolution to be passed. Not all members are being permitted to vote on the resolution. Rather only a limited number of delegates will vote on December 6. The largest constituency association in the country will send the same number of voting delegates to the meeting as the smallest, and the delegates are to be elected in each constituency association by bare majority, and not through a process of proportional representation. In each constituency where a bare majority of members support the resolution, all of the elected delegates from that constituency will be required to vote in favour of the resolution. Assuming *arguendo* that the resolution is legally effective to authorize dissolution or merger, it would follow that not only could a bare majority of the party's members bring about its demise, but in fact the voting process is

structured in such a way that two thirds of the delegates could support the AIP even where a majority of members oppose it.

Orchard Affidavit, paras. 41-43, *Application Record*, Tab 2, p.14-15

27. Further, unlike the Alliance Party, which closed its membership list a few days after the AIP was announced and is conducting a poll of all of its members for ratification of the AIP, the Management Committee of the PC party failed to take any steps to prevent memberships of convenience being taken out by people who do not support the aims and objectives of the PC party, but who joined merely for the purpose of voting in favour of the AIP.

Orchard Affidavit, paras. 44-45, *Application Record*, Tab 2, p. 15

28. Indeed, the *National Post* and members of the Alliance Party have actively encouraged members of the Alliance Party to join the PC party, to "help push this deal through from the PC side". Brian Pallister, an Alliance Member of Parliament, has announced that he intends to vote twice in the same election and he and others maintain web-sites which publicly encourage other Alliance members to avail themselves of the PC party's decision to keep its membership lists open. Since the AIP was signed, membership in the PC party has burgeoned by 50%. This type of increase *following* a leadership race is unheard of in Canadian politics.

Orchard Affidavit, para. 46 and 47, *Application Record*, Tab 2, p. 15; Orchard Reply affidavit, paras. 21-24, Applicants' Supplementary Record, Tab 1

29. Swamping the party with new members in a winner-take-all delegate selection process has apparently had the desired result. For example, of the 50 Party members who attended the delegate selection meeting on November 29, 2003 in the riding of Saskatoon Blackstrap, at least twelve had joined since October 15, 2003. On the vote, 24 members voted "no" and 26 voted "yes", with the result that all eight delegates from a riding that was narrowly split will attend the December 6th meeting in support of the resolution.

Orchard Reply affidavit, para. 24, Applicants' Supplementary Record, Tab 1

F. Objects of PC Party Irreconcilable with Objects of Alliance Party

30. As set out above, one of the PC Party's aims is addressed directly to not merging with the Alliance. This makes perfect sense; the PC and Alliance Parties have radically different policies on, for example, health care, bilingualism, the rights of First Nations, agriculture and a variety of social issues. PC party members have repeatedly decided not to include free trade as a fundamental principle of the Party, whereas it has been identified as a founding principle of the proposed new party.

Orchard Affidavit, paras. 48-57, *Application Record*, Tab 2, p. 16; Orchard Reply Affidavit, paras. 4-8, *Supplementary Application Record*, Tab1

G. The Stevens Arbitration

31. On or about November 5, 2003, a group of members of the PC party, including Sinclair Stevens, requested that a dispute they had with the Management Committee be referred to arbitration under article 13 of the Party's Constitution (the "Stevens Arbitration"). Article 13 provides:

> 13.1 Save and except for any dispute related to the leadership selection process, any ten (10) members of a constituency association, affiliated organization or youth association may give notice in writing to the National Director of a claim that the requirements of the Constitution, By-laws or Rules and Procedures are not being met by the executive of their constituency association, affiliated organization or youth association.
>
> ...
>
> 13.3 If the National Director decides not to intervene or is unsuccessful in resolving the dispute, the matter will be referred by the National Director to the Arbitration Committee with a written report from the National Director.
>
> 13.4 On receipt of the written report from the National Director, the Arbitration Committee shall select three (3) members of its Committee to arbitrate and decide on the dispute.
>
> 13.5 The National Council or Management Committee may refer any matter, other than any dispute related to the leadership selection process, to the Arbitration Committee for reference to a panel of the Arbitration Committee for consideration and decision.
>
> 13.6 The decision of any Arbitration Committee panel is final and binding and is not subject to appeal or review on any grounds.

Constitution, Article 13, *Application Record*, Tab 2-A; Orchard Reply Affidavit, para. 11, *Supplementary Application Record*, Tab 1

32. Three members of the Party's standing arbitration committee were appointed to deal with the Stevens Arbitration, Brian Heald, Michael Maddalena and Martin Mason. Following their appointment, counsel for the party members who had commenced the Stevens Arbitration suggested that their appointment raised a reasonable apprehension of bias and that they were not disinterested in the outcome of the dispute. The arbitration panel rejected any suggestion of bias, but did not provide any reasons and did not deal with the substance of the arguments alleging bias.

Orchard Reply Affidavit, paras. 12-14, *Supplementary Application Record*, Tab 1

33. The members who launched the Stevens Arbitration subsequently withdrew from the process, however the Management Committee determined to proceed with the arbitration in their absence and appointed counsel to speak to the issues raised by the referral.

Orchard Reply Affidavit, para. 15, *Supplementary Application Record*, Tab 1

34. One of the Applicants in this application (Donald Ryan) was also an applicant in the Stevens Arbitration, however aside from him none of the applicants herein are in any way connected with the Stevens Arbitration.

Orchard Reply Affidavit, para. 16, *Supplementary Application Record*, Tab 1

H. The November 24th Referral to Arbitration

35. This application was commenced on November 20, 2003. On November 24, 2003 the Management Committee purported to refer the matters in dispute in this application directly to the same panel hearing the Stevens Arbitration. The constitution and by-laws do not empower the Management Committee to do this, but rather allow it to refer a dispute to the standing arbitration committee. Thereafter, the chair of the arbitration committee is required to consult with both of the parties to the dispute, and with the party which referred the dispute (in this case the Management Committee) *before* appointing a panel. Not only did the Management Committee purport to choose its own panel, the chair

of the arbitration committee, who is a member of the chosen panel, did not consult with the applicants before purporting to move forward with the arbitration.

Orchard Reply Affidavit, paras. 17-18, *Supplementary Application Record*, Tab 1; Constitution, Article 13.5, *Application Record*, Tab 2-A; By-laws, Article 6.6, *Application Record*, Tab 2-B, p. 9; Bellemare Affidavit, para. 84, *Responding Record*, Tab A, pp. 26-27

36. Article 6.6 of the Party's by-laws provide that the chair of the arbitration committee shall engage in "consultation with the parties to the dispute" and the referring party before referring the dispute to a panel of three members of the arbitration committee. While there was consultation with counsel for the Management Committee before the matters in dispute in this proceeding were purportedly referred to Messrs. Heald, Maddalena and Mason, there was no consultation whatsoever with the Applicants or their counsel.

Orchard Reply Affidavit, para. 19, *Supplementary Application Record*, Tab 1

37. The Applicants have never requested nor agreed to submit the issues raised in this proceeding to arbitration. To the contrary, the Applicants take the position that the arbitration provision does not apply, that there is a reasonable apprehension of bias in respect of both the process and the identity of the individual arbitrators, and that any purported agreement to arbitrate has been revoked.

Orchard Reply Affidavit, para. 10, *Supplementary Application Record*, Tab 1; Exhibit E, Orchard Reply Affidavit, *Supplementary Application Record*, Tab 1-E

III. THE LAW

A. Plan to Merge or Dissolve Requires Unanimous Support

(i) General Principles

38. As an unincorporated association registered as a federal political party under the *Canada Elections Act*, the PC party has no independent legal existence apart from the individuals comprising its membership.

McKinney v. Liberal Party of Canada (1987), 61 O.R. (2d) 680 (S.C.O.)

MacAlpine v. Progressive Conservative Party of Ontario [2003] O.J. No. 3089 (S.C.J.), at paras. 27-31

Munroe v. Canada (Attorney General), [1993] O.J. No. 2370 (Gen. Div.), at para.8

Zundel v. Liberal Party of Canada [1999] O.R. No. 74 (Gen. Div.) at paras. 5 and 11, appeal dismissed (1999), 46 O.R. (3d) 410 (C.A.), application for leave to appeal dismissed June 29, 2000 (S.C.C.)

39. The objects and purposes of the PC party, as well as the procedures to be followed in undertaking those purposes or changing them, are prescribed in its constitution and by-laws. Each member of the Party subscribed to those objects and purposes upon being granted membership and, in so doing, entered into a contractual relationship with all other members. Thus, the members of the PC party are bound together by a complex of contracts between each member and every other member of the Party, the terms of which are those expressed in the Party's constitution and by-laws.[1]

Astgen v. Smith, [1970] 1 O.R. 129 (C.A.), at p. 134-135

And see *Bimson v. Johnston*, [1957] O.R. 519, at p. 530, aff'd (1958), 12 D.L.R. (2d) 379 (C.A.):

> ...[A] contract is made by a member when he joins the union, the terms and conditions of which are provided by the union's constitution and bylaws ... The contract is not a contract with the union or the association as such, which is devoid of the power to contract, but rather the contractual rights of a member are with all other members thereof.

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[1] In *Berry v. Pulley*, 2002 SCC 40, the Supreme Court of Canada held that the notion that union members are bound to each other through a complex of contracts should be discarded as unnecessary and impractical in the context of modern labour relations legislation. In this respect, the Court held that the unique status of trade unions, as a consequence of the complex labour relations regimes governing their existence and operations, and their powers and corresponding duties vis-a-vis their members, justified the formal recognition of trade unions as legal entities. Thus, when a member joins a trade union, a relationship in the nature of a contract arises between the member and the trade union as a legal entity. However, the Court emphasized that the recognition of the legal status of trade unions was based on their unique status and role and that the decision did not extend to other unincorporated associations (see paras. 46-51). There is no basis to extend the Court's holding in *Berry v. Pulley* to political parties. In any event, the question of whether the Applicants' contractual relationships are with all other members of the PC party or with the PC party itself has no effect on the claims made in this application, since *Berry v. Pulley* simply involved the question of who was liable for breach of the constitution (i.e. other individual members or the trade union itself). Nothing in *Berry v. Pulley* suggests that the underlying substantive principles and legal requirements that unincorporated associations must comply with their constitutions and the common law has been changed. Indeed, even in respect of trade unions, *Berry v. Pulley* restates the well-settled proposition that each member is entitled to insist that the trade union comply with its constitution.

And see *Orchard v. Tunney* (1957), 8 D.L.R. (2d) 273 (S.C.C.), per Rand J. at p. 281:

> ...[E]ach member commits himself to a group on a foundation of specific terms governing individual and collective action ... and made on both sides with the intent that the rules shall bind them in their relations to each other.

40. While the members of an unincorporated association are free to transform the objects of the association, merge with other associations or even terminate their association, where they seek to make such fundamental changes to an association, they may do so only in accordance with the terms of the association's constitution and by-laws. Where the constitution and by-laws are silent, they may only do so with the unanimous consent of all members.

> There is no limit to the lawful objects for the furtherance of which men may associate voluntarily, and in my view, **provided it is properly authorized by every member of the association**, there is no restriction upon the powers of the members to alter the objects for which they became associated or to terminate the relationship *inter se* if those associated, or to agree individually to become bound by other contractual relationship to the members of the same or some other group of associates. In this sense of the meaning of *ultra vires* I do not consider that the realization of what was contemplated by the merger agreement would be beyond the capacity of the members of Mine Mill **provided that there was unanimous approval individually or by means of some procedure which all of the members had agreed upon**.
>
> *Astgen v. Smith*, *supra*, at p. 135-136 [emphasis added]

41. In this respect, the courts have consistently held that, where the constitution and by-laws are silent, ongoing activities falling within the objects and purposes of the association may be determined by a majority vote of the members. However, where the rules are silent and the activity or decision is outside the scope of the ordinary purposes and objects of the association, unanimous approval of all members is required.

> The contractual relationship between the members prescribes both the ambit of the activities of the association and the procedures to be followed in undertaking them. Even where the rules are silent, it is agreed that the day-to-day activities falling within its objects and purposes may be authorized by a majority vote of the members. **Where, however, the activity is outside the scope of the ordinary purposes and objects of the association and is not provided for in the rules, it cannot be approved by a majority and requires unanimous approval of all members**...
>
> ...

> In the absence of provisions in the rules, unanimity is required where organic and fundamental changes are proposed. Examples of such changes include amendments to the constitution... or dissolution of the association...
>
> *Organization of Veterans of the Polish Second Corps of the Eighth Army, Navy & Air Force Veterans in Canada* (1978), 20 O.R. (2d) 321 (C.A.), per Blair J. A. at p. 337-338 [emphasis added]. See also Wilson J.A. at p. 345-346 and Dubin, J.A. in dissent, at p. 325
>
> There is ample authority for the proposition that the authority of the majority to amend the constitution could not accomplish a change in the fundamental objects of the association. The power of amending the constitution must be always interpreted as limited to the variation of the provisions of the constitution in so far as they are ancillary to the accomplishment of the objects. The agreement of a member that the constitution may be amended by a majority vote cannot be stretched into an authority to vary the objects and purposes of the association.
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> *Astgen v. Smith*, *supra*, at p. 139-140
>
> While it is true that in all internal affairs, that is, in action taken within the boundaries of the rules and regulations which govern the conduct of an association, and always subject to those rules and regulations, a majority of the members can control and guide the fate of the minority under the authorities, **that principle does not apply where the group or association is going outside its powers by seeking to bring an end to its existence or to sever the cord through which it derives its being** ... [I]n the absence of some provision to the contrary ... the entire membership must be in favour of the move before it can be validly enforced.
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> *International Nickel Company of Canada, Limited. Sheddon v. Kopinak*, [1949] O.R. 765, at p. 780 [emphasis added]
>
> *Smart v. Trigiani* (1985) 86 CLLC ¶ 14,006 (S.C.O.), at 12, 035
>
> *Fredericton Police Association v. Fredericton (City)*, [1986] N.B.J. No. 725 (Q.B.), reversed 37 D.L.R. (4^{th}) 564 (C.A.)

42. In other words, the contractual relationship between members is impressed with rights and obligations which cannot be destroyed in the absence of the specific consent of each person whose rights would be affected.

> The contract of association is not between the member and some undefined entity which lacks the capacity to contract; it is a complex of contracts between each member and every other member of the union. These are individual contracts impressed with rights and obligations **which cannot be destroyed in the absence of the specific consent of each person whose rights would be affected thereby.** [emphasis added]
>
> *Astgen v. Smith, supra*, at p. 135

43. Similarly, the property of an unincorporated association cannot be diverted by a majority of members from the purposes for which it was given by those who contributed to it, or devoted to purposes that are in conflict with its fundamental aims and objects. In this regard, where a majority of members seek to divert an association's property in a manner that does not comply with the association's constitution, the Courts have consistently protect the loyal minority who wish to maintain the association:

> 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 on ongoing loyal group of adherents seeking to preserve the property and the fellowship of the original association ... 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.
>
> *Organization of Veterans of the Polish Second Corps of the Eighth Army, supra*, per Blair J.A., at p. 339
>
> *Smart v. Trigiani, supra*
>
> *Vick v. Toivonen*, [1913] 12 D.L.R. 299 (C.A.), at p. 301

(ii) The PC Party Constitution

44. As noted above, there nothing in the PC party's constitution which provides for or even contemplates the merger or dissolution of the Party. Nor does the constitution contain any general provision for making decisions which could be relied upon as *implicitly* allowing a decision to be made with respect to the merger or dissolution of the association.

45. Consequently, if some members wish to dissolve the Party or merge it with another, they must obtain the unanimous concurrence of each member of the Party before they may do so.[2] The whole purpose of what is called the 'club man's veto' is to protect a loyal

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[2] In practical terms, this means that adequate notice must be given to each member to enable the member to vote or cast a ballot and that the results of the vote must be unanimous: *Astgen v. Smith, supra*, per Laskin, J. (dissenting) at p. 155; *Organization of Veterans of the Polish Second Corps of the Eighth Army, supra*, per Wilson J.A., at p. 345-346

minority, while not preventing the majority from establishing or joining new clubs or, as in this case, political parties. This veto is also particularly important where it is reasonable to infer that a number of individuals have joined the organization with the sole purpose of bringing it to an end.

Astgen v. Smith, supra, at p. 136

Organization of Veterans of the Polish Second Corps of the Eighth Army, supra, per Blair, J.A., at p. 339

Vick v. Toivonen, supra, at p. 301

46. Even if something less than unanimity may be permitted, the provisions of the constitution of an unincorporated association constitute the contractual obligations to each member. Where such a fundamental change to the association is contemplated, and the constitution is silent, the courts have held that each member is entitled to vote. Never has it been suggested that the right of each member to vote can be replaced by delegates, particularly where the delegate voting structure is hopelessly skewed by the absence of proportional representation and where voting eligibility rules have led to an influx of 'members' who have joined solely to destroy the association.

Astgen v. Smith, supra

47. It is anticipated that the respondents will rely on article 8.9 of the Constitution:

> 8.9 Special meetings of Members may be convened at any time by the National Council or the Management Committee through the National President to transact any business relating to the government, management and control of the activities of the Party.

Constitution, Article 8.9, *Application Record*, Tab 2-A

48. That is, the members "manage" the ongoing "activities" of the Party, not its demise. Article 8.9 does not in any way allude to the complete termination of the Party's activities, nor does it contemplate ceding the government, management and control of the activities of the Party to another as yet unestablished entity. Indeed, article 8.9 provides for the exact opposite; it envisages that the activities of the Party will be ongoing and that those activities

will be governed, managed and controlled by the members of the Party, the National Committee and the Management Committee.

Constitution, Articles 8.2, 8.3 and 8.4, *Application Record*, Tab 2-A

49. Further, the same right to 'govern, manage and control' activities is vested in the National Council between membership meetings and the Management Committee between National Council meetings. If the respondents' interpretation of the meaning of "government, management and control" is as broad as they suggest, the constitution would permit the Management Committee itself to dissolve the party and divert the assets as it saw fit.

50. Second, article 8.9 cannot be read as empowering any decision-making organ of the Party to exercise its government, management and control powers in a manner inconsistent with the aims of the Party, including the Party's aim to continue in existence and to run its own candidates in every riding in Canada. In this respect, article 2.3.3 is an explicit bar to merger and dissolution.

Constitution, Article 2.3.3, *Application Record*, Tab 2-A

51. Third, the much broader constitutional provision in issue in *Astgen v. Smith* was held by a majority of the Ontario Court of Appeal to be insufficient to implicitly authorize a merger. While Laskin J.A. held in dissent that the provision there in issue could implicitly allow for merger, it was not limited, as article 8.9 of the PC Party constitution is, to "business arising out of the government, management and control of the activities" of the organization.

Astgen v. Smith, supra

See also *Smart v. Trigiani, supra*

52. Further, even in dissent Laskin J.A. held that such a provision could not be relied upon for a purpose inconsistent with the fundamental aims and objects of the organization. On the facts of that case, Laskin J.A. held that changing the identity of the bargaining agent who represented employees did not constitute such a fundamental change. He

contrasted that with changing religious organizations, where people come together on the basis of strongly held beliefs and values. In this case, the evidence and common sense indicate that at the core of any political party are shared beliefs and values. The evidence is incontrovertible that the aims and objects of the PC and Alliance parties are irreconcilable in many fundamental respects. Thus, even if article 8.9 was equivalent to the provision at issue in *Astgen v. Smith* and this Court determined that it was not bound by the majority judgment, on Laskin J.A.'s own terms the power contained in article 8.9 cannot be used to subvert the fundamental objects of the PC Party's constitution.

Astgen v. Smith, supra, per Laskin J.A. (dissenting) at p. 159 Orchard Affidavit, paras. 48-57, *Application Record*, Tab 2, p. 16-19; Orchard Reply Affidavit, para. 8, *Application Record*, Tab 1

53. As the March 1995 Report of the Restructuring Committee which led to the enactment of the present version of the party constitution recognizes, "in the case of a political party, the statement of principles is its claim to uniqueness". That is, the various different aims and objects of the PC party and the Alliance, and the PC party and the proposed new party, go the very foundation of the three distinct organizations.

Exhibit F, Orchard Reply Affidavit, *Supplementary Application Record*, Tab 1-F, p. 8

54. Further, the respondents have not purported to amend the constitution, nor have they given any notice that they intend to amend any constitutional provision as is required under the terms of the constitution.

Constitution, Article 14, *Application Record*, Tab 2-A

B. Agreement-in-Principle Lacks Clarity

55. Indeed, as set out in paragraphs 24 to 25 above, even those members of the Party who are in favour of the AIP are not sure what delegates are being asked to vote on or what the legal effect of the approval of the AIP will mean, and the respondents refuse to clarify even for this court, what the legal effect of the approval of the AIP means. Because the AIP does not specifically provide for merger or dissolution, a resolution approving the AIP would be insufficient to clearly authorize a merger of the PC and Alliance parties.

56. In order to effect such a critical change in an organization, particularly with respect to an organization's merger or dissolution, the question put to voters must be clear and unequivocal. While the AIP contemplates that the assets and liabilities of both the PC and Alliance parties will, at some future point in time, be transferred to the new party, it also specifically provides that membership between the existing parties and the new party will overlap, thereby contemplating that the PC and Alliance parties will continue to exist as entities separate from the new party after any approval of the AIP at the December 6th meeting.

AIP, *Application Record*, Tab 2-C

57. Other provisions also strongly suggest that a vote approving the AIP would not result in merger or dissolution, including provisions that provide for an ongoing role for the PC party in appointing individuals to a "leadership election organizing committee" after the vote (AIP, para. 4); the appointment by both parties to an "Interim Joint Council" (AIP, para. 8); and filings with Elections Canada regarding the "founding" of the Conservative Party by December 31, 2003 (as opposed to any "merger" of two or more existing parties) (AIP, para. 15). Furthermore, the responsibility of the Interim Joint Council includes drafting and adopting a first constitution (AIP, para.8). No legal entity has been established into which the PC party could merge, as the Conservative Party does not appear to have an existing constitution or any members, both of which are necessary for the creation of an unincorporated association.

AIP, *Application Record,* Tab 2-C

C. Not a Merger Under *Canada Elections Act*

58. The AIP provides for necessary filings to be made with Elections Canada no later than December 31, 2003. Even if a new party is established by that date and filings are made under section 366 of the *Canada Elections Act*, for the reasons set out above, approval of the AIP would not constitute a lawful merger under the *Canada Elections Act*, which provides 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 a general 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
>
> ...
>
> (b) be accompanied by a resolution from each of the merging parties approving the proposed merger;
>
> . . .
>
> 402. (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
>
> *Canada Elections Act, supra*, ss. 400, 402

59. A "merger" within the meaning of the *Canada Elections Act* must obviously mean one that is lawful. For the reasons set out above, for any merger of the PC party to be lawful and effective, it must be unanimously approved by members. Further, approval of the AIP, even if unanimity is not required, cannot amount to approval of the merger of the PC party with some other entity since the AIP does not so much as mention merger.

D. No Basis to Defer to Arbitration

60. The applicants have been advised that the respondents will argue that this Court should dismiss the application on the basis that the Court's jurisdiction has been ousted by an agreement to arbitrate. The respondents rely on article 13.5 of the constitution:

> 13.5 The National Council or Management Committee may refer any matter, other than any dispute related to the leadership selection process, to the Arbitration Committee for reference to a panel of the Arbitration Committee for consideration and decision.
>
> Constitution, Article 13.5, *Application Record*, Tab 2-A

(i) Mandatory Arbitration Requires Joint Agreement

61. It is elementary that the Court's jurisdiction to resolve a dispute cannot be ousted except by clear agreement of the parties to the dispute. In this case, the members of the PC party are parties to the constitution but have no power to refer a dispute to the arbitration committee. That power lies solely within the discretion of the Management Committee or National Council. As a result, it cannot fairly be said that the applicants have agreed to refer their dispute with the Management Committee to arbitration. Rather the language of article 13.5 is more akin to a discretionary internal appeal than a true arbitration agreement.

62. In order to be construed as a mandatory arbitration agreement which ousts the jurisdiction of the court, an arbitration agreement must allow the parties to the agreement to invoke arbitration. In this respect nothing on the face of article 13.5 of the constitution grants members the right to obtain access to arbitration; referral of a dispute to the arbitration committee exists at the sole pleasure of the Management Committee. The applicants' only right was to come to this court. Since the justification for precluding access to the court is the right of access by the parties to an agreement to arbitration, and since the Management Committee has the sole discretion to refer a dispute to the arbitration committee, article 13.5 does not constitute a mandatory agreement to arbitrate.

(ii) Article 13.5 Does Not Apply

63. In the alternative, even if article 13.5 is a mandatory arbitration provision, it does not apply in the circumstances. In determining whether an arbitration agreement applies, a court will (1) ascertain the precise nature of the particular dispute; and (2) determine whether the dispute is one which falls within the terms of the arbitration clause. The scope of an arbitration clause must be determined in light of its particular language and the nature of the relationship between the parties.

Ontario v. Abilities Frontier Co-operative Homes Inc. [1996] O.J. No. 2586, at paras. 11 and 28

64. This dispute is about the future and very existence of the Party, and the legal effect of an agreement made with a rival party. The clear role of the court is to protect the rights of the loyal minority. Just as clear language is required to merge or dissolve an association in a manner which guts its objects, specific language would also be required to oust the Court's jurisdiction to determine whether the proposed merger does violence to the fundamental objects of the association.

65. Put differently, it is manifest that if article 13.5 is read in context, it is addressed to disputes *between* members relating to the ongoing functions and operations of the party. It cannot be that if the constitution itself does not contemplate merger or dissolution, an isolated provision about arbitration within the constitution could be said to be directed to merger or dissolution disputes:

> The parties could hardly have envisaged, as the subject matter for arbitration, what one party considers to be a subsequent assault on the integrity of the very relationship.
>
> *Jaffasweet Juices Ltd. v. Michael Firestone & Associates* [1996] O.J. No. 533 (Gen.Div.), at para. 7

66. In *Abilities Frontier Co-operative Homes Inc.*, Sharpe J. (as he was) held that it was inappropriate to interpret an arbitration clause which applied to "disputes about the interpretation of this agreement" so as to extend to a dispute over "fundamental issues of contract formation, enforceability and remedies ... [involving] fundamental issues of public law ...". Rather, he held that these were matters which properly fall within the province of the court. Similarly, in determining the scope of "matters" which the members of the PC Party intended could be referred to arbitration under article 13.5, it is inconceivable that it was intended that a change in the fundamental objects of the association - the future existence of the Party - would be confined to be determined by an internal dispute resolution mechanism which might be triggered on a discretionary basis, in this instance, at the whim of one of the very parties to the dispute (the Management Committee).

> *Ontario v. Abilities Frontier Co-operative Homes Inc., supra*, at para. 26

67. Further, an internal dispute resolution process cannot operate so as to validate acts which are not authorized by and fall outside of a constitution.

Bimson v. Johnston, supra, at p. 541

(iii) Agreement Does Not Apply to the Management Committee

68. Even if article 13.5 contemplates a dispute about the very existence of the party, and even if it were a mutual agreement to arbitrate, it does not apply to disputes to which the Management Committee itself is a party. Rather, the plain language of article 13.5 establishes the Management Committee and National Council as the gatekeepers to an internal process, with the discretion to provide members with access to a mechanism to resolve their disputes. Here, the dispute is not between members, as such, but between members and the Management Committee itself. In this respect an interpretation of article 13.5 which would have it apply to disputes *with* the Management Committee should be avoided, as one of the parties to the dispute (i.e. Management Committee) can not only bar access to the Court, but can steer the dispute to a panel composed exclusively of people chosen by certain members of the Management Committee.

(iv) Claim Falls Outside the October 25th Referral

69. Management Committee resolved on October 25 that any dispute in connection with its authority to convene a meeting for consideration of the AIP or in connection with resolutions enacted by it in relation to the meeting or the agreement would be referred to arbitration. However, the applicants do not contest the authority of the Management Committee to convene a meeting, nor do they contest any of the resolutions enacted in respect of the agreement or the meeting. Rather, this application concerns the legal effect and consequences of any approval of the AIP at the December 6 meeting, based on the general legal requirements for effecting a merger or dissolution of an association.

70. The Management Committee itself recognized that the issues raised in this application were not part of the previous referral to arbitration. In this respect, four days

after the application was filed, the Management Committee purported to refer the matters raised in the application to arbitration.

Bellemare Affidavit, para. 84, *Responding Record*, Tab A, p. 26-27

(v) Requirements for Valid Referral to Arbitration Ignored

71. Article 6.6 of the Party's by-laws provide that, on referral of any dispute to the arbitration committee by the Management Committee, the chair of the arbitration committee shall refer the dispute to a panel of three members of the arbitration committee "following consultation with the parties to the dispute and the referring party". In this case, the Management Committee, and not the chair of the arbitration committee, unilaterally referred the matter to a pre-existing arbitration panel without any consultation whatsoever with the Applicants. There has never been a proper referral

By-laws, Article 6.6, *Application Record*, Tab 2-B, p. 9

(vi) Court Should Refuse to Exercise Discretion in Any Event

72. Even if article 13.5 is a mandatory arbitration provision, and the matters raised in this application come within its scope and have been properly referred to an arbitration panel, the Court should nevertheless exercise its discretion to hear the application.

PURE QUESTION OF LAW

73. First, the primary question to be decided is a question of law in respect of which any arbitrator would be required to be correct. There are no material facts in dispute and the dispute is purely one of law, which motions judges in this Court routinely decide summarily.

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, at paras. 15-16

Jussem v. Nissan Automobile Co. (Canada) Ltd. (1972), 32 D.L.R. (3d) 167 (O.H.C.), at p. 176-177

Ontario Rules of Civil Procedure, Rule 20.04(4)

BIAS

74. It is a longstanding principle that parties to an arbitration are entitled to have their disputes decided by independent and impartial decision-makers:

> From its inception arbitration has been held to be of the nature of a judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and *a fortiori* of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular the must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to.
> ...
>
> ... It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.
>
> ... Nor is it that we must be able to infer that the arbitrator 'would not act in an entirely impartial manner'; it is sufficient if there is the basis for a reasonable apprehension of so acting.
>
> *Szilard v. Szasz*, [1955] 1 D.L.R. 370 (S.C.C.)
>
> *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29
>
> *Canadian Pacific Ltd. v. Matsqui Indian Band* (1995), 122 D.L.R. (4th) 129 (S.C.C.), per Lamer C.J., at p. 155-156

75. There is a reasonable apprehension of bias. Under the party's by-laws, there is a standing arbitration panel from which arbitrators in any given case are appointed. The Provincial/Territorial Vice-Presidents, who are all members of the Management Committee, appoint the members of this standing committee. In this dispute between the applicants and the Management Committee, the proposed arbitrators have not been appointed independently. This appearance of a lack of impartiality was demonstrated when the chair of the arbitration committee neglected to follow the mandated procedure for consulting with the parties *before* referring the dispute to a specific panel of arbitrators. In this case, the Management Committee itself purported to refer the matter directly to a particular panel which included the chair and there was no consultation with the applicants, as required by the party's by-laws.

76. It is not disputed that the proposed arbitrators have close connections to either the Alliance Party, Stephen Harper of vocal proponents of the merger. In particular, one panel member, a lawyer, is the partner of the secretary of an Alliance riding association, was

campaign manager for the Alliance party in the last federal election, works in Stephen Harper's office and was involved in the negotiations leading to the AIP. A second panel member, also a lawyer, is partners with one of the Alliance party's solicitors. The third panel member was a fund-raiser for a candidate in the recent leadership campaign who is a vocal proponent of the AIP. There was no attempt to balance the arbitration panel with an anti-merger member.

77. The arguments about bias were raised in the Stevens' arbitration and the panel rejected it without providing reasons. This, the applicants submit, ought to itself give rise to an apprehension of bias, namely that the arguments were not considered fully and fairly.

78. Nothing in article 13.5 compels or justifies an interpretation under which the Management Committee, by unilaterally purporting to invoke article 13.5, could preclude access to resolution of this dispute by an independent and impartial judiciary. Rather, whatever discretion is conferred on the Management Committee by article 13.5, it should be interpreted as being constrained by fundamental principles of fairness and natural justice.

IMPOSSIBLE TO SEVER ARBITRABLE ISSUES

79. To the extent that any of the issues in this proceeding concern matters that might be subject to the arbitration provision in the constitution, these issues are inextricably linked to issues that fall wholly outside the constitution, such as the lack of clarity in the AIP as to exactly what its supposed or intended legal effect might be, the provisions of the *Canada Elections Act* touching on merger and the common law requirement for unanimity before a voluntary association can be merged with another or dissolved.

Brown v. Murphy (2002), 59 O.R. (3d) 404 (C.A.), at para. 12

IV. ORDER REQUESTED

80. The applicants therefore seek:

(a) a declaration that the provisions of the constitution of the Progressive Conservative Party of Canada (the "PC Party") do not permit the party to be dissolved except with the unanimous consent of all of its members;

(b) a declaration that the provisions of the constitution of the PC Party do not permit the party to merge with another political party except with the unanimous consent of all members of the PC Party;

(c) a declaration that, except in the ordinary course of business, the provisions of the constitution of the PC Party do not permit the transfer or alienation of any tangible or intangible assets presently held by the PC Party, or held by others in trust for it, or any tangible or intangible assets subsequently acquired by the PC Party or by others in trust for it, including without limitation the names 'Progressive Conservative Party of Canada', 'Parti progressite-conservateur du Canada', all of the PC Party's membership lists, all of its funds and trust funds, all accounts receivable and all amounts due or falling due to the PC Party pursuant to sections 435.01 and 435.02 of the *Canada Elections Act* (collectively, the "PC Party Assets");

(d) a declaration that the provisions of the constitution of the PC Party do not permit the members of the PC Party to authorize by ordinary or special resolution the transfer or alienation of the PC Party Assets to another political party or to any other entity;

(e) a declaration that any resolution approving or purporting to approve an Agreement-in-principle on the Establishment of the Conservative Party of Canada, which resolution is to be considered at a special meeting of the PC Party scheduled for December 6, 2003 will not have the effect of authorizing the dissolution of the PC Party, or the merger of the party with any other party or the transfer or alienation of PC Party Assets to any other party or entity;

(f) a declaration that the provisions of the constitution of the PC Party prohibit the leader of the PC Party from agreeing with the leader of another political party that the PC Party will not nominate candidates in every federal constituency in Canada and do not permit the leader of the PC Party to take any steps in furtherance of any such purported agreement;

(g) a declaration that the resolution referred to in paragraph (d) above does not constitute the resolution required pursuant to sub-section 400(2)(b) of the *Canada Elections Act* in order for the PC Party to merge with another registered party under the *Act*;

(h) a permanent injunction enjoining and restraining any person with notice of the Court's order from dealing with PC Party assets in a manner inconsistent with the declarations of the Court sought above;

(i) an order appointing the respondent Peter MacKay as the representative of all members of the PC Party other than the applicants for the purposes of this proceeding, in order that all members may be bound by any relief granted in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 1, 2003

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SCHEDULE "A"

McKinney v. Liberal Party of Canada (1987), 61 O.R. (2d) 680 (S.C.O.)

MacAlpine v. Progressive Conservative Party of Ontario, [2003] O.J. No. 3089 (S.C.J.)

Munroe v. Canada (Attorney General), [1993] O.J. No. 2370 (Gen. Div.)

Zundel v. Liberal Party of Canada, [1999] O.R. No. 74 (Gen. Div.); appeal dismissed (1999), 46 O.R. (3d) 410 (C.A.)

Bimson v. Johnston, [1957] O.R. 519, at p. 530, aff'd (1958), 12 D.L.R. (2d) 379 (C.A.)

Orchard v. Tunney (1957), 8 D.L.R. (2d) 273 (S.C.C.)

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

Organization of Veterans of the Polish Second Corps of the Eighth Army, Navy & Air Force Veterans in Canada (1978), 20 O.R. (2d) 321 (C.A.)

International Nickel Company of Canada, Limited. Sheddon v. Kopinak, [1949] O.R. 765

Smart v. Trigiani (1985), 86 CLLC ¶ 14,006 (S.C.O.)

Fredericton Police Association v. Fredericton (City), [1986] N.B.J. No. 725 (Q.B.); reversed 37 D.L.R. (4th) 564 (C.A.)

Vick v. Toivonen, [1913] 12 D.L.R. 299 (C.A.)

Ontario v. Abilities Frontier Co-operative Homes Inc. [1996] O.J. No. 2586

Jaffasweet Juices Ltd. v. Michael Firestone & Associates, [1996] O.J. No. 533 (Gen.Div.)

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63

Jussem v. Nissan Automobile Co. (Canada) Ltd. (1972), 32 D.L.R. (3d) 167 (O.H.C.)

Szilard v. Szasz, [1955] 1 D.L.R. 370 (S.C.C.)

Canadian Union of Public Employees v. Ontario (Minister of Labour), 2003 SCC 29

Canadian Pacific Ltd. v. Matsqui Indian Band (1995), 122 D.L.R. (4th) 129 (S.C.C.)

Brown v. Murphy (2002), 59 O.R. (3d) 404 (C.A.)