Court File No. T-2465-03

FEDERAL COURT OF CANADA

(TRIAL DIVISION)

BETWEEN :

THE HONOURABLE SINCLAIR STEVENS

Applicant

-and-

THE CONSERVATIVE PARTY OF CANADA

Respondent

APPLICANT'S MEMORANDUM OF FACT AND LAW

Overview

This is an application to judicially review the decision of the Chief Electoral Officer to merge the Progressive Conservative Party with the Canadian Alliance Party and thereby create the new Conservative Party of Canada. A consequence of the merger was the dissolution of the Progressive Conservative Party. The Applicant is one of the "PC Loyalists" who take the position that there was no proper "merger resolution" as required by the *Canada Elections Act*. Moreover, he submits that the constitution of the PC Party prohibited merger.

The resolution that the Chief Electoral Officer accepted as the "merger resolution" was passed at a meeting of the PC Party on Saturday, December 6, 2003. The Applicant had previously retained counsel to make submissions to the Chief Electoral Officer on Monday, December 8, 2003. However, the Chief Electoral Officer both received the application to merge and registered the merger on Sunday, December 7. There is evidence that the reason the application to register the new party was made so quickly was to preclude legal action by the Applicant and others.

Nonetheless, counsel for the Applicant did make submissions to the Chief Electoral Officer on December 8, urging him to re-consider his decision to register the merger. Over the next ten days, counsel submitted additional evidence that appears to support the contention that there was no real "merger resolution," and that the PC Party Leader had contravened the resolution that had been passed and had usurped the role of the Party's Management Committee in pursuing the creation of the new Conservative Party. On December 17, 2003, the Chief Electoral Officer informed the Applicant's counsel that he did not have the power to re-open his decision to merge the parties.

It is submitted that the Chief Electoral Officer made several errors of law and based his decision on several erroneous findings of fact in accepting the resolution as a "merger resolution". It is also submitted that he erred in failing to find that the PC Party constitution precluded the merger. It is further submitted that he denied the Applicant and others similarly situated both their common law rights as members of a voluntary association and their political rights pursuant to section 3 of the *Canadian Charter of Rights and Freedoms*.

Part I: A concise statement of the facts

A) The Applicant

1. The Applicant ran as a Progressive Conservative Party candidate and was elected as the Progressive Conservative Member of Parliament for the riding of York-Simcoe in the elections of 1972 and 1974. Following redistribution of ridings, he was elected as the Progressive Conservative member of Parliament for the riding of York-Peel in the elections of 1979, 1980 and 1984. He was sworn to the Privy Council in 1979, and served as the President of the Treasury Board between 1979 and 1980, as Minister of Regional and Industrial Expansion from 1984 to 1986, and as the Chairman of the Cabinet Committee on Economic and Regional Development from 1984 to 1986.

   Affidavit of the Honourable Sinclair Stevens, Paragraphs 3 - 7, Application Record, Volume I, Tab 1, Page 49.

2. The Applicant makes the representations described in his Affidavit on behalf of a group of twelve members of the Progressive Conservative Party. The eleven others in addition to the Applicant are: Libby Burnham, Q.C. (PC Party Fundraiser), Jim Conrad (PC Party Activist), Dorothy Dobbie (former M.P.), Brian Doody (President, Laval Center PC Association), John Dowson (York North Riding Executive), The Honourable Heward Grafftey (former cabinet minister), Joe Hueglin (former M.P.), Farsad Kiani (businessman, Party Fundraiser), The Honourable Flora MacDonald (former cabinet minister), Senator Lowell Murray, and The Honourable Brian Peckford (Former Premier). Numerous other members of the Progressive Conservative Party have informed the Applicant that they agree with the position he is taking.

   Affidavit of the Honourable Sinclair Stevens, Paragraph 8, Application Record, Volume I, Tab 6, Page 49.

B) The Progressive Conservative Party

3. The Progressive Conservative Party of Canada has had that name since 1942 but has existed under other names since before Confederation. In 1942 the Party's name was changed to the Progressive Conservative Party of Canada. It has frequently been referred to simply as the "Conservative Party" or the "Tory Party".

   Affidavit of the Honourable Sinclair Stevens, Paragraph 10, Application Record, Volume I, Tab 6, Page 50.

4. The Progressive Conservative Party was a voluntary association governed by its constitution. An amendment to the *Canada Elections Act* proclaimed in 2001 included a provision deeming a registered party to be a person for the purpose of judicial proceedings.

   Constitution of Progressive Conservative Party, Exhibit 'A' to Affidavit of the Honourable Sinclair Stevens, Application Record, Volume I, Tab 6, Pages 69 - 88; *Canada Elections Act,* S.C. 2000, c. 9, s. 504; 2001, c. 21, s. 24.

C) Previous attempts to merge the PC Party

5. Over the past decade, there were numerous discussions of possible relationships between the PC Party and the Canadian Alliance (and the predecessor to the Canadian Alliance, the Reform Party). Before the latter part of 2003, the PC Party had formally rejected several attempts to create cooperation between the parties. For example, at a national meeting in 1999 the PC Party amended its constitution to include the provision in section 2.2.3 that the party would run candidates in every constituency in Canada. This amendment became known as the "301 rule" in light of the fact that there are 301 constituencies in Canada. It was a firm rejection of the concept of cooperating with the Canadian Alliance by dividing the ridings so that candidates from the two parties would not compete against each other. At the national meeting of the PC Party in August 2002, a resolution that "the leader and his caucus and the National Council be directed to take all responsible steps to negotiate a single conservative alternative" was defeated by a wide margin.

   Affidavit of the Honourable Sinclair Stevens, Paragraphs 11, 12, and 14; Application Record, Volume I, Tab 6, Page 50.

6. The most recent leadership convention of the Progressive Conservative party was held from May 29th to June 1st 2003. Just before the final ballot, leadership candidate David Orchard made an agreement with leadership candidate Peter MacKay: In consideration of Mr. Orchard's withdrawing from the leadership race and requesting that his delegates vote for Mr. MacKay, Mr. MacKay made several commitments to Mr. Orchard, including that there would be not be a merger with the Canadian Alliance, that the PC Party would not have joint candidates with the Canadian Alliance, and that the "301 Rule" would be maintained.

   Affidavit of the Honourable Sinclair Stevens, Paragraphs 15 and 16, Application Record, Volume I, Tab 6, Page 51; Exhibit 'B' to the affidavit of the Honourable Sinclair Stevens, agreement between Peter MacKay and David Orchard, Application Record, Volume I, Tab 6, Page 89.

7. In accordance with the agreement, Mr. Orchard withdrew his candidacy and indicated his support for Mr. MacKay, after which Mr. MacKay was elected leader of the Progressive Conservative Party of Canada. Approximately 40% of Mr. MacKay's support on the last ballot came from "Orchard delegates."

Affidavit of the Honourable Sinclair Stevens, Paragraph 17, Application Record, Volume I, Tab 6, Page 49.

D) The Path Towards Merger

8. After his election as leader, Mr. MacKay, without any authorization from the executive, the National Council or the Managament Committee of the PC Party, appointed three "emissaries" who met with three "emissaries" from the Alliance Party to explore a possible union of the two parties. After secret negotiations among those "emissaries", Peter MacKay and the leader of the Canadian Alliance Party signed and publicly released a document entitled "Agreement-in-Principle on the establishment of the Conservative Party of Canada."

Affidavit of the Honourable Sinclair Stevens, Paragraphs 18 and 19, Tab 6, Page 51.

9. All members of the Canadian Alliance were given the opportunity to vote on the Agreement-in-Principle by mail ballot. On the other hand, most members of the Progressive Conservative Party were not given the opportunity to vote directly on the Agreement-in-Principle. Delegates who were to vote on the Agreement-in-Principle were selected by a plurality or majority of votes by each constituency association, youth association, campus club and affiliated organization of the PC Party.

Affidavit of the Honourable Sinclair Stevens, Paragraphs 21, 22 and 24, Application Record, Volume I, Tab 6, Pages 52 - 53.

10. After the public announcement of the Agreement-in-Principle, there were campaigns organized to get people to join the PC Party specifically in order to elect delegates who would vote to approve the Agreement-in-Principle. For example, there was a "two-card movement"

that urged members of the Canadian Alliance to "buy your PC membership to ENSURE a Merger vote victory."

Affidavit of the Honourable Sinclair Stevens, Paragraph 26, Application Record, Volume I, Tab 6, Page 53.

11. The delegates at the PC National Meeting of December 6th, 2003 voted in favour of the resolution that stated "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 of Canada and its Management Committee are instructed and authorized to take all necessary steps to implement the Agreement."

Affidavit of the Honourable Sinclair Stevens, Paragraphs 29 and 31, Application Record, Volume I, Tab 6, Page 54.

E) Agreement-in-Principle

12. The Agreement-in-Principle is an agreement that the two parties create a new party to be called the "Conservative Party of Canada." It does not use the word "merger" or any related words such as "amalgamation," "consolidation," or "unification." The leader of the Progressive Conservative Party and others urging ratification of the Agreement-in-Principle refrained from using the word "merger" in describing its effect, as did the news release issued by the PC Party after the ratification vote. Moreover, the Agreement-in-Principle provides that members of the PC or Alliance Parties who did not either acquire or renew their membership after October 15th, 2003 would not be members of the new Conservative Party unless they individually joined it. The Agreement-in-Principle does not state what will happen to the Progressive Conservative Party or to the Canadian Alliance once the new Conservative Party is formed, although it does state that their assets will be transferred to the new party.

Affidavit of the Honourable Sinclair Stevens, Paragraph 47, Application Record, Volume I, Tab 6, Pages 57 - 58; Exhibit "C" to the Affidavit of the Honourable Sinclair Stevens, Agreement-in-Principle on the establishment of the Conservative Party of Canada, Application Record, Volume I, Tab 6, Pages 90 – 97.

13. The Agreement-in-Principle specifies that an "Interim Joint Council" consisting of six individuals appointed by each of the PC Party and the Alliance will carry out such actions as are necessary to give affect to the Agreement-in-Principle. In particular, the Interim Joint Council had the responsibility of making the filings concerning the new party with Elections Canada.

Exhibit "C" to the Affidavit of the Honourable Sinclair Stevens, Agreement-in-Principle on the establishment of the Conservative Party of Canada, Application Record, Volume I, Tab 6, Pages 94 - 95.

F) Implementation of the Agreement-in-Principle

14. The constitution of the PC Party gives the Management Committee broad powers to act on behalf of the membership. On the other hand the powers of the leader are quite limited.

Exhibit "A" to the Affidavit of the Honourable Sinclair Stevens, Constitution of the Progressive Conservative Party of Canada, Section S. 8.4, 8.17 and 11, Application Record, Volume I, Tab 6, Pages 74, 78-79, 84 - 86.

15. On October 25th and 26th, 2003, the Management Committee tabled a motion naming the six PC members of the Interim Joint Council on the grounds that it would be more appropriate that the Agreement-in-Principle be voted on before there was a vote for the manner of its implementation. The Management Committee agreed to meet on December 7 and 8 to consider tasks related to the merger of the two parties. In particular, the motion concerning representatives to the Interim Joint Council was to be voted upon at the December meeting.

Affidavit of Marjaleena Repo, Paragraphs 2 - 5, Application Record, Volume I, Tab 4, Pages 18 - 19.

16. On December 7, 2003, PC Leader MacKay and Alliance Leader Harper provided the Chief Electoral Officer with an application to merge their parties. The Application listed "officers" of the new Conservative Party, but did not specify which "officer" held which office. The Application listed a "Leader" of the new party, even though the Agreement-in-Principle

stated that a leader would not be chosen until March 2004.

Documents produced by Elections Canada, Application Record, Volume III, Tab 20, Pages 396 – 397.

17. The Management Committee met informally at dinner on December 7 and had a formal meeting the next morning. There was no indication at the Management Committee dinner on December 7 that members of the Interim Joint Council had been selected or that there had been any application to the Chief Electoral Officer. PC Leader MacKay attended the beginning of the December 8 meeting but was evasive about what had occurred on the previous day. Paul Lepsoe, a lawyer who was closely associated with Mr. MacKay in pushing the Progressive Conservative Party toward merger, divulged the information that representatives of the Interim Joint Council had already been selected and that the application to register the merger had been accepted by the Chief Electoral Officer on the previous day. Either Mr. Lepsoe or someone else stated that the Sunday meeting had been arranged to pre-empt legal challenges. In a memorandum written later, Mr. Lepsoe wrote "on Sunday, December 7 (when no appeal had yet been filed in the Orchard litigation and no other litigation, for example from Stevens, had yet been started, but both were threatened and potentially able to be filed at the opening of Court offices bright and early on Monday, December 8…), Mr. MacKay and Mr. Harper…decided to proceed that day with a filing under the Act to form the new party."

Affidavit of Marjaleena Repo, Paragraph 6, Application Record, Volume I, Tab 4, Page 19; Exhibit "B" to the Affidavit of Marjaleena Repo, Memorandum from Paul Lepsoe, Application Record, Volume I, Tab 4, Pages 32 - 37.

18. There were media accounts on December 5 and 6 suggesting that both David Orchard and the Applicant would take legal action to oppose the merger. David Orchard was quoted by the Canadian Press as saying that the judge who dismissed his application to block the merger "seemed to invite us to go to the Chief Electoral Officer," and his lawyer was quoted to similar effect in the Globe and Mail.

Affidavit of the Honourable Sinclair Stevens, Paragraphs 72 - 75, Application Record, Volume I, Tab 6, Page 64.

19. The Management Committee of the PC Party met again on December 12. At that meeting they resolved to appeal to the Arbitration Committee of the PC Party the question of who had the right to appoint the PC members of the Interim Joint Council. The referral to the Arbitration Committee by the President of the PC Party of Canada stated that the Leader had endeavored to appoint the members of the Interim Joint Council but that the Management Committee had also appointed six members to the Interim Joint Council by resolution on December 8, 2003. The question referred to the Arbitration Committee was whether the power to appoint representatives to the Leadership Election Organizing Committee and to the Interim Joint Council resided in the Management Committee or the Leader.

Affidavit of Marjaleena Repo, Paragraph 7, Application Record, Volume I, Tab 4, Page 20; Exhibit "A" to the Affidavit of Marjaleena Repo, Letter from R. Buck Easton Q.C., President Progressive Conservative Party of Canada, Application Record, Volume I, Tab 4, Pages 22 - 23.

20. Mr. Paul Lepsoe wrote a memorandum to the Arbitration Committee. He asserted that, as a result of the approval of the merger by the Chief Electoral Officer, the PC Party and its organs such as the Arbitration Committee had no continuing existence. The Arbitration Committee accepted this submission and thus did not consider the merits of the question referred to them. The Arbitration Committee held that their conclusions "hold true even if the filings that were made with the Chief Electoral Officer were made without authority… Once the Chief Electoral Officer has updated the Register of Political Parties, unless a court of competent jurisdiction overturns such action, the merger of the parties pursuant to section 402 of the *Canada Elections Act* is effective."

Exhibit "B" to the Affidavit of Marjaleena Repo, Application Record, Volume I, Tab 4, Pages 36 and 39.

21. On December 11, 2003, counsel for the Applicant wrote to the Chief Electoral Officer pointing out that the Progressive Conservative Party and the Canadian Alliance were maintaining separate caucuses in the House of Commons, in spite of the fact that they had purportedly merged into one party. The same letter informed the Chief Electoral Officer of

the fact that the six PC representatives to the Interim Joint Council had not been appointed in accordance with the PC constitution. The letter also indicated that the procedure contained in the Agreement-in-Principle had not been followed.

Affidavit of the Honourable Sinclair Stevens, Paragraph 61, Application Record, Volume I, Tab 6, Page 61.

G) The "Merger Resolution"

22. Subsection 400(2)(b) of the *Canada Elections Act* requires that an application for registration of a party as a merged party must be accompanied by a "resolution from each of the merging parties approving the proposed merger."

***Canada Elections Act,* S. 400 (2)(b), Applicant's Book of Authorities, Application Record, Volume V, Appendix 'A', Tab 1.**

23. The resolution from the Progressive Conservative Party that the Chief Electoral Officer accepted as the required merger resolution stated "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."

Document signed by Peter MacKay, Documents produced by Elections Canada, Application Record, Volume III, Tab 20, Page 399.

24. The first communication to Elections Canada from those arranging the merger on behalf of the constituent parties appears to be a letter dated October 21, 2003 from the secretary of the Canadian Alliance to an official with Elections Canada. Mr. Jerry Rice wrote that a group representing the Canadian Alliance Party and the Progressive Conservative Party would like to meet with the Chief Electoral Officer to discuss the agreement currently in place between their respective leaders. He continues,

"Is it (sic) our hope that we will be able to start a new party in the middle of December called the 'Conservative Party of Canada.' This party would merge with the Progressive

Conservative Party of Canada and the Canadian Reform Conservative Alliance some time in February/March 2004."

Letter from Jerry Rice, Documents produced by Elections Canada, Application Record, Volume III, Tab 10, Page 339 - 340.

25. The material provided by Elections Canada includes a memorandum describing a meeting between the Chief Electoral Officers and other officials of Elections Canada with PC Party representative Paul Lepsoe and a person representing the Canadian Alliance on November 25, 2003. The memorandum indicates that a copy of a draft of a potential merger application letter was given to the Chief Electoral Officer for his review. The draft letter describes the application as being "for the creation of a new registered party"; this phrase is circled on the copy of the draft letter produced by Elections Canada. The memorandum states that Elections Canada suggested to the Party Representatives that "they may wish to give further thought" to certain issues, including "the value of clarity of intent in the resolutions to merge the parties."

Memorandum from the Senior General Counsel, Documents produced by Elections Canada, Application Record, Volume III, Page 355; Draft Letter, Documents produced by Elections Canada, Application Record, Volume III, Tab 12, Page 357.

26. The final letter sent by the leaders of the Canadian Reform Conservative Alliance and the Progressive Conservative Party of Canada applying for the merger of the parties omits the phrase "for the creation of a new registered party." However, the wording of the resolutions to merge the parties remained the same as it had been on November 25.

Letter from leaders of the constituent parties, Documents produced by Elections Canada, Application Record, Volume III, Tab 20, Page 395; Merger Resolution, Documents produced by Elections Canada, Application Record, Volume III, Tab 20, Page 399;

Part II: Points in Issue

27. It is submitted that the following points are in issue in this Application for Judicial Review:

a) Did the Chief Electoral Officer err in law and/or base his decision on erroneous findings of fact that were made in a capricious manner in holding that the resolution passed by the Progressive Conservative Party of Canada on December 6, 2003 was a resolution "approving the proposed merger"?

b) Did the Chief Electoral Officer err in law in holding that the *Canada Elections Act* authorized the merger even if the constitution of the Progressive Conservative Party of Canada prohibited mergers?

c) Did the Chief Electoral Officer err in law in registering the Conservative Party of Canada as a merged party when he knew or ought to have known that the Conservative Party of Canada did not yet have any structure whatsoever?

d) Did the Chief Electoral Officer's swift approval of the merger on Sunday December 7, 2003 contravene the principles of natural justice and/or the principles embodied in section 3 of the *Canadian Charter of Rights and Freedoms* by denying members of the Progressive Conservative Party of Canada the right to be heard with respect to the merger application?

e) Did the Chief Electoral Officer err in law in failing to reconsider his decision and quash the merger when he learned that:

    i) The Leader and officers of the new Conservative Party had not been chosen in accordance with the Agreement-in-principle;

    ii) Progressive Conservative Party of Canada leader Peter MacKay had usurped the role of the Management Committee in selecting the Progressive Conservative Party of Canada members of the Interim Joint Council;

    iii) Days after he had amended the Registry to "merge" the constituent parties, the Leaders of each of the constituent parties were maintaining that their parties were separate and distinct from each other in Parliament?

f) Did the Chief Electoral Officer's dissolving of the Progressive Conservative Party contravene the rights of members of the Progressive Conservative Party embodied in section 3 of the *Canadian Charter of Rights and Freedoms?*

g) Should an Order be issued quashing the registration of the Conservative Party of Canada and restoring the Progressive Conservative Party of Canada to the Registry of political parties pursuant to the *Canada Elections Act*?

h) In the alternative, should an Order be issued setting aside the December 7, 2003 decision of the Chief Electoral Officer to amend the Registry of parties and referring the application for registration of the Conservative Party of Canada as a "merged party" back to the Chief Electoral Officer for determination in accordance with such directions as this Honourable Court considers to be appropriate?

i) Should an Order be issued quashing the decision of the Chief Electoral Officer to award the Conservative Party of Canada $8,476,872.25?

j) Should an Order be issued requiring the Chief Electoral Officer to answer the questions he was asked by counsel for the applicant in his letter of December 9, 2003?

k) What Order should be made with respect to costs?

Part III: Submissions

A) Did the Chief Electoral Officer err in law and/or base his decision on erroneous findings of fact that were made in a capricious manner in holding that the resolution passed by the Progressive Conservative Party of Canada on December 6, 2003 was a resolution "approving the proposed merger"?

28. The Chief Electoral Officer recently proposed that the *Canada Elections Act* should be amended to include provisions for merger of registered parties.

Thirty Fifth Report of the Standing Committee on Procedure and House Affairs, Applicant's Book of Authorities, Application Record, Volume V, Appendix 'B', Tab 9.

29. The *Canada Elections Act* was amended, and the procedure governing the merger of registered political parties is now specified in the *Act*:

400. (1) Two or more registered parties may, at any time other than during the period beginning 30 days before the issue of a writ for an election and ending on polling day, apply to the Chief Electoral Officer to become a single registered party resulting from their merger.

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(2) An application to merge two or more registered parties must

(a) be certified by the leaders of the merging parties;

(b) be accompanied by a resolution from each of the merging parties approving the proposed merger; and

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

Registration for eligible merged parties

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

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

(b) the Chief Electoral Officer is satisfied that

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

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

Notice

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

Notice in Canada Gazette

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

Effective date of merger

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

Consequences of merger

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

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

(b) the merged party becomes a registered party;

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

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

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

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

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

***Canada Elections Act*, S.C. 2000, c. 9, as amended, Applicant's Book of Authorities, Application Record, Volume V, Appendix 'B', Tab 9.**

30. It is submitted that the December 7, 2003 application to merge the parties did not fulfill the requirement of subsection 400(2)(b) of the *Act* in that the application was not "accompanied by a resolution from each of the merging parties approving the proposed merger". What was submitted in purported fulfillment of this requirement by the PC Party was a resolution approving the Agreement-in-principle and authorizing the Management Committee and the Leader to implement it.

31. It is submitted that Agreement-in-principle is, on its face, an agreement to create a new party rather than to merge existing parties. A merged entity comes into existence upon the merger of the component organizations. The *Canada Elections Act* specifies the day on which a merger of registered parties takes effect: it is the date on which the Chief Electoral Officer amends the registry of parties to reflect the merger. (*Act*, section 402(1)) Thus any merger resolution would state that. However, the Agreement-in-principle brings the new party into existence before any merger could be effected pursuant to the *Act* if the procedures in the Agreement-in-principle were followed. The Agreement requires that the new party begin selling memberships within ten days of the ratification of the agreement (section 7), which would have been by December 16, 2003. It indicates that filings with Elections Canada will be completed by December 31, 2003 (section 15), *after* the new Party must come into existence. This shows an intention to create a functioning new party and subsequently apply for its registration, rather than to create a merged party pursuant to the *Act*. The Agreement-in-Principle does not indicate the fate of the two old parties; in particular, it does not state that the old parties merge into the new one. Members of the old parties do not automatically become members of the new party. The Agreement-in-Principle is an agreement to create a new party rather than to merge two existing parties.

32. Moreover, when Elections Canada was first formally approached about the creation of the new Conservative Party, the representatives of the constituent parties indicated that they wanted to discuss the implementation of the Agreement-in-principle. At that point they expressed the hope that the new party could be started in December, 2003 and then merge with the two existing parties in March, 2004. Thus they clearly interpreted the Agreement-in-principle as an agreement to form a new party, not to merge existing parties. Had that "hope" been realized, merger resolutions would have been required from each of the three parties stating that each party was to merge with the other two.

33. The draft of a potential merger application letter given to the Chief Electoral Officer by party representatives at a meeting on November 25, 2003 said that the application was "for the creation of a new registered party"; this phrase was circled by someone at Elections Canada, and did not appear in the final application letter of December 7, 2003. At that meeting of November 25, Elections Canada officials suggested that the party representatives "give further thought" to "the value of clarity of intent in the resolutions to merge the parties." It is submitted that this demonstrates that Elections Canada recognized that the resolutions lacked sufficient "clarity of intent" to serve as the merger resolutions required by the *Act*. Nonetheless, the resolutions put before the parties were not changed, and were accepted by the Chief Electoral Officer as fulfilling the statutory requirement.

34. The registration of the merger extinguished the Progressive Conservative Party, and thus limited the political rights of the Applicant and of the many other PC Party members who did not wish to join the new Conservative Party. It is submitted that Elections Canada was correct when it had suggested that greater "clarity of intent" was required to extinguish a political party. It is therefore submitted that the Chief Electoral Officer erred in law by ignoring that requirement and capriciously accepting the resolutions as "merger resolutions".

B) Did the Chief Electoral Officer err in law in holding that the *Canada Elections Act* authorized the merger even if the constitution of the Progressive Conservative Party of Canada prohibited merger?

35. In his letter of December 17, 2003 explaining his decision, the Chief Electoral Officer stated that "even if the constitution of the Progressive Conservative Party were to be read to prohibit mergers, the *Canada Elections Act* specifically provides for such mergers, sets the criteria to

be met, and would be paramount." It is submitted that the mere fact that a statute provides for mergers and sets the criteria to be met for mergers does not preclude an organization's having a constitution that does not permit merger. It is submitted that any "resolution from each of the merging parties approving the proposed merger" cannot be accepted as fulfilling the statutory requirement unless it is passed in conformity with the party's constitution and by-laws. The Chief Electoral Officer's interpretation of the legislation allows an unscrupulous leader of a party to merge the party regardless of the wishes of its members.

36. A disloyal faction of an unincorporated organization cannot cause property to be diverted to another association having different objects unless such diversion is authorized by the organization's constitution, even if the faction contains a majority of members.

***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.) at p. 339, Applicant's Book of Authorities, Application Record, Volume V, Appendix 'B', Tab 2.**

37. A voluntary organization cannot be merged into another organization except with either the unanimous consent of its members or by procedures authorized by the organization's constitution and by-laws.

***Astgen v. Smith*, [1970] 1 O.R. 129 (C.A.), Applicant's Book of Authorities, Application Record, Volume V, Appendix 'B', Tab 1.**

C) Did the Chief Electoral Officer err in law in registering the Conservative Party of Canada as a merged party when he knew or ought to have known that the Conservative Party of Canada did not yet have any structure whatsoever?

38. Before registering a new party as a merger, the Chief Electoral Officer must be satisfied that the merged party is eligible for registration as a political party under the *Canada Elections Act*. In particular, the party must have officers and a leader. It is submitted that merely listing

people as "officers" without indicating which offices they hold does not fulfill the requirement of providing the "names of the officers". Moreover, at the time that he approved the merger application, the Chief Electoral Officer knew that the new Party could not have chosen a leader in accordance with the Agreement-in-principle, and it was unlikely that that sufficient time had elapsed for any of the officers to have been appointed in accordance with that agreement. It is therefore submitted that it was patently unreasonable for the Chief Electoral Officer to be satisfied that the new Conservative Party was eligible for registration at the time he registered it.

***Canada Elections Act*, S.C. 2000, c. 9, as amended, S. 401(1)(b)(I), S. 366(2)(d)(f), S. 368, Applicant's Book of Authorities, Application Record, Volume V, Appendix 'B', Tab 15.**

D) Did the Chief Electoral Officer's swift approval of the merger on Sunday December 7, 2003 contravene the principles of natural justice and/or the principles embodied in section 3 of the *Canadian Charter of Rights and Freedoms* by denying members of the Progressive Conservative Party of Canada the right to be heard with respect to the merger application?

39. It is submitted that the common law rights of members of voluntary associations must include, at a very minimum, the right of members to make representations with respect to any application that has the effect of dissolving the association. It is further submitted that the constitutional right of a member of a political party to play a meaningful role in the electoral process includes the right to be heard on any such application that concerns the dissolution of the political party.

***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.).; *Figueora v. Canada (Attorney General)*, [2003] 1 S.C.R. 912; Applicant's Book of Authorities, Application Record, Volume V, Appendix 'B', Tabs 1 - 3.**

40. Although the *Canada Elections Act* was amended in 2001 to include a provision deeming a registered party to be a person for the purpose of judicial proceedings, it is submitted that the essential character of a political party remains that of a voluntary association.

***Canada Elections Act*, S.C. 2000, c. 9, s. 504; 2001, c. 21, s. 24, Applicant's Book of Authorities, Application Record, Volume V, Appendix 'A', Tab 1.**

E) Did the Chief Electoral Officer err in law in failing to reconsider his decision and quash the merger when he learned that:

- **i) The Leader and officers of the new Conservative Party had not been chosen in accordance with the Agreement-in-principle;**
- **ii) Progressive Conservative Party of Canada leader Peter MacKay had usurped the role of the Management Committee in selecting the Progressive Conservative Party of Canada members of the Interim Joint Council;**
- **iii) days after he had amended the Registry to "merge" the constituent parties, the Leaders of each of the constituent parties were maintaining that their parties were separate and distinct from each other for certain purposes?**

41. When he rendered his decision to approve the merger on December 7, 2003, the Chief Electoral Officer knew or ought to have known that there were several defects in the merger application and in the manner in which it had been presented to him. By the time he rendered his decision not to reconsider the merger on December 17, 2003, the Chief Electoral Officer was aware of the following additional concerns with respect to the merger application:

a) the Applicant's submission to the Chief Electoral Officer that there was no proper "merger resolution" had been confirmed by the parties taking steps in the days after December 7, 2003 to preserve their status as separate parties in Parliament;

b) the delegates of the PC Party who voted on December 6, 2003 had been chosen by riding association meetings which contained many members of the Canadian Alliance who had joined the PC Party specifically to vote for pro-merger delegates;

c) the Leader of the PC Party had contravened the Agreement-in-principle and the PC Party constitution by:

i) making the filings with Elections Canada himself rather than having the Interim Joint Council make the filings;

ii) himself appointing the PC members of the Interim Joint Council, although he had no power to make such appointments and the Management Committee had that power and had attempted to exercise it.

42. It is therefore submitted that the defects in the merger application that were before Elections Canada by December 17, 2003 were so substantial that it was very unlikely that the Chief Electoral Officer would have registered the new Conservative Party as a merger had he been aware of those defects. However, he determined that "there is no authority in the *Canada Elections Act* providing for the re-opening of a decision made under section 400."

Letter of Chief Electoral Officer of December 17, 2003; Application Record, Volume I, Tab 2, Page 14.

43. The materials provided by the Chief Electoral Officer do not suggest any possible justification for his registering the merger on Sunday December 7. Doing it on that Sunday had the effect of assisting those who wanted to deny to the Applicant and others the opportunity to make submissions concerning the merger, and of allowing the PC Party Leader to usurp the role of the Management Committee in appointing members of the Interim Joint Council. It is submitted that the Chief Electoral Officer's position that he cannot re-open a merger decision increases the harm caused by his rendering that decision so quickly on a Sunday.

44. The *Canada Elections Act* gives the Chief Electoral Officer the general jurisdiction to "exercise the powers and perform the duties and functions that are necessary for the administration of" the *Canada Elections Act*. It is submitted that the *Canada Elections Act* and the principles of fairness and democracy that are embodied in section 3 of the *Canadian Charter of Rights and Freedoms* give the Chief Electoral Officer the power to re-consider his registration of the merger in the circumstances of this case.

***Canada Elections Act*, S.C. 2000, c. 9, as amended, s. 16(d), Applicant's Book of Authorities, Application Record, Volume V, Appendix 'B', Tab 1.**

F) Did the Chief Electoral Officer's dissolving of the Progressive Conservative Party contravene the rights of members of the Progressive Conservative Party embodied in section 3 of the *Canadian Charter of Rights and Freedoms*?

45. The right to play a meaningful role in the electoral process includes a person's right to participate in a political party of her or his choice. That right is not to be balanced against countervailing interests. Interference with the right to play a meaningful role in the electoral process is inconsistent with section 3 of the *Charter*.

***Figueora v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, at paragraph 36, Applicant's Book of Authorities, Application Record, Volume V, Appendix 'A', Tab 3.**

46. The Applicant and other "PC loyalists" spent years building the Progressive Conservative Party. It is submitted that the Chief Electoral Officer's dissolving of the Progressive Conservative Party in the circumstances contravened their rights pursuant to section 3 of the *Charter*. In particular, it is submitted that those rights include the right to insist that the Party constitution be strictly adhered to in implementing any dissolution of the Party.

G) Should an Order be issued quashing the registration of the Conservative Party of Canada and restoring the Progressive Conservative Party of Canada to the Registry of political parties pursuant to the *Canada Elections Act*?

47. As submitted above, there were several errors of law and several erroneous findings of fact made by the Chief Electoral Officer in the course of his merging the parties and consequently dissolving the Progressive Conservative Party of Canada. This is the first case of a merger of parties registered under the *Canada Elections Act*. To allow the decision to stand would threaten our fundamental democratic processes by putting every political party at great risk of being taken over in a similar manner. Should the merger be quashed, the current members of the new Conservative Party and any others who wished to join with them would remain entirely free to start their own new party. In addition, "PC Party Loyalists" would be free to continue their Progressive Conservative Party. Voters would have the choice of voting for candidates of either party. Moreover, another attempt to merge the Progressive Conservative and Canadian Alliance Parties could be made, but any such attempt would have to be made in accordance with the directions that would flow from the decision of this Honourable Court. It is submitted that, in the circumstances, that is the only outcome that is consistent with the democratic rights embodied in section 3 of the *Charter*.

***Federal Courts Act*, R.S., 1985, c. F-7, s. 1; 2002, c. 8, s. 14; section 18.1, Applicant's Book of Authorities, Application Record, Volume V, Appendix 'A', Tab 3.**

H) In the alternative, should an Order be issued setting aside the December 7, 2003 decision of the Chief Electoral Officer to amend the Registry of parties and referring the application for registration of the Conservative Party of Canada as a "merged party" back to the Chief Electoral Officer for determination in accordance with such directions as this Honourable Court considers to be appropriate?

48. It is not clear what decision the Chief Electoral Officer would have made on the merger application if he had been aware of all the evidence that he learned of within the ten days following his original decision. If this Honourable Court finds that the merger application could not lawfully succeed in he light of all of that evidence, then the merger decision should be quashed rather than being referred back to the Chief Electoral Officer. However, if the finding is that it would be within the Chief Electoral Officer's discretion to grant the application to merge in all of the circumstances, it is submitted that the application should be referred back to the Chief Electoral Officer for determination based on all the evidence he would have been aware of had he not acted so precipitously on Sunday December 7.

I) Should an Order be issued quashing the decision of the Chief Electoral Officer to award the Conservative Party of Canada $8,476,872.25?

49. The monies awarded were based on there being a merger, so a quashing or setting aside of the merger would necessarily entail remitting the monies back to the respective parties.

J) Should an Order be issued requiring the Chief Electoral Officer to answer the questions he was asked by counsel for the applicant in his letter of December 9, 2003?

50. It is submitted that both the common law and *Charter* rights of the Applicant and other "PC Loyalists" as members of the Progressive Conservative Party include the right to know the circumstances in which the Chief Electoral Officer dissolved their party.

L) What Order should be made with respect to costs?

51. The Respondents extinguished the Applicant's political party by merging it to create their own party. Even if this Honourable Court decides that the circumstances of the application for merger were not such as to require that it be quashed or reconsidered, it is submitted that the Court should recognize the Respondent's unfair treatment of the Applicant and other "PC Loyalists" by awarding costs to the Applicant in any event of the cause.

Part IV: Orders sought

The following Orders are respectfully requested:

(a) An Order quashing the registration of the Conservative Party of Canada and restoring the Progressive Conservative Party of Canada to the registry of political parties pursuant to the *Canada Elections Act*; or

(b) In the alternative, an Order setting aside the December 7, 2003 decision of the Chief Electoral Officer to amend the registry of parties and referring the application for registration of the Conservative Party of Canada as a "merged party" back to the Chief Electoral Officer for determination in accordance with such directions as this Honourable Court considers to be appropriate; and

(c) An Order quashing the decision of the Chief Electoral Officer to award the Conservative Party of Canada $8,476,872.25;

(d) An Order requiring the Chief Electoral Officer to answer the questions he was asked by counsel for the applicant in his letter of December 9, 2003;

(e) The Applicant's costs of his submissions to the Chief Electoral Officer and of this judicial review on a substantial indemnity scale; and

(f) Such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, Ontario, March 11, 2004.

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Part V: Authorities To Be Referred To

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

2. *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.)

3. *Figueora v. Canada (Attorney General),* [2003] 1 S.C.R. 912.

4. *Vick v. Toiveneu* (1913), The Ontario Weekly Notes, June 26th, 1913, 1542.

5. *Lakeside Colony of Hutterian Brethren v. Hofer,* [1992] 3 S.C.R. 165.

6. *Barnie v. Royal Colwood Golf Club,* (2001) BCSC 1181, 18 B.L.R. 21.

7. *Malcapine v. Executive Officers and Members of the Ontario Progressive Conservative Party Caucus and Specific Board and Directors of the Corporation named,* (2003) Ontario Superior Court of Justice, Court File No. 03-105

8. *Ahenakew, Bellewane, Dowell, Gatley, Glover, Grafftey, Haver, Haver, Hess, Horner, Johvicas, Langford, Lenard McCraken, Mitchell, Mitchell, Orchard, Rolind, Ryan, Sherman, Walters, Williams and Pennin v. McKay,* (2003) Ontario Superior Court of Justice, Court File No: 03-CV-259202CM1

9. *Parliament of Canada, House of Commons, Standing Committee on Procedure and House Affairs, Thirty-Fifth Report, Electoral Financial Issues 12.0 Registration of Parties,* <http://www.parl.gc.ca/infocomDoc/36/1/PRHA/Studies/Rerports/PRHARP35-e.htm>

10. *Parliament of Canada, House of Commons, Standing Committee on Procedure and House Affairs,* Thursday October 28, 1999, <http://www.parl.gc.ca/infocomDoc/36/2/HAFE/meetings/Evidence/Haffev04-e.htm>

11. *Parliament of Canada, House of Commons, Hansard, 36th Parliament, 2nd Session,* Edited Hansard, Number 6, Thursday October 19, 1999, Index, <http://www.parl.gc.ca/infocomDoc/36/2/parlbus/chambus/house/debates/006/_1999-16-19/toc006-e.htm>

12. *Parliament of Canada, House of Commons, Hansard, 36th Parliament, 2nd Session,* Edited Hansard, Number 6, Thursday October 19, 1999, Submission of Petter Mackay (Pictou-Autelouish, Guysborough, PC) 1005.

13. *Parliament of Canada, House of Commons, Hansard, 36th Parliament, 2nd Session,* Edited Hansand, Number 7, Friday, February 25, 2000, Index <http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/057_2000_02-25/toc057-e.htm>

14. *Parliament of Canada, House of Commons, Hansard, 36th Parliament, 2nd Session,* Edited Hansand, Number 57, (Official Version), 1005, 1010, 1020, 1025, Friday, February 25, 2000, Submission by the Honourable Don Boudria (Leader of the Government in the House of Commons Library) <http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/057_2000_02-25/han057_1005-e.htm>