Court File No. C41105

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ETHEL AHENAKEW, ALBERT BELLEMARE, C. HANSON DOWELL, MARIE GATLEY, JEAN GLOVER, HEWARD GRAFFTEY, AIRACA HAVER, LELANND HAVER, ROBERT HESS, ALBERT HORNER, OSCAR JOHVICAS, ARTHUR LANGFORD, NEALL LENARD, PATRICIA MCCRACKEN, BLAIR MITCHELL, TOM MITCHELL, DAVID ORCHARD, ARLEIGH ROLIND, DONALD RYAN, LOUIS R. (BUD) SHERMAN, GERALD WALTERS, CADY WILLIAMS and JOHN PERRIN

Applicants
(Appellants)

- and -

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

Respondent
(Respondent in Appeal)

FACTUM OF THE APPELLANTS, RESPONDING PARTIES ON THE CROSS-MOTION TO QUASH THE APPEAL (MOTION RETURNABLE APRIL 27, 2004)

BIGIONI LLP
Barristers & Solicitors
201-6060 Highway No. 7 East
Markham, Ontario L3P 3A9
Paul Bigioni
LSUC: 30959D
Tel. (905) 294-5222
Fax: (905) 294-1607
solicitors for the appellants

TABLE OF CONTENTS

Court File No. C41105

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ETHEL AHENAKEW, ALBERT BELLEMARE, C. HANSON DOWELL, MARIE GATLEY, JEAN GLOVER, HEWARD GRAFFTEY, AIRACA HAVER, LELANND HAVER, ROBERT HESS, ALBERT HORNER, OSCAR JOHVICAS, ARTHUR LANGFORD, NEALL LENARD, PATRICIA MCCRACKEN, BLAIR MITCHELL, TOM MITCHELL, DAVID ORCHARD, ARLEIGH ROLIND, DONALD RYAN, LOUIS R. (BUD) SHERMAN, GERALD WALTERS, CADY WILLIAMS and JOHN PERRIN

Applicants
(Appellants)

- and -

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

Respondent
(Respondent in Appeal)

FACTUM OF THE APPELLANTS,
RESPONDING PARTIES ON THE CROSS-MOTION TO QUASH THE APPEAL
(MOTION RETURNABLE APRIL 27, 2004)

PART I - OVERVIEW

1. The respondents have brought a motion for an Order quashing the appeal as moot.

2. In the alternative, the respondents also seek an Order striking out paragraphs (e), (f) and (g) of the Notice of Appeal.

3. On April 1, 2004, LaBrosse, J.A. made an Order to the effect that the appellants' motion to extend the time for perfection of the appeal, the respondent's motion to quash and the merits of the appeal itself shall all be heard on April 27, 2004. The Order of LaBrosse, J.A. does not contemplate any other motion by the respondent for other relief; nor does his Order provide any time for the hearing of such other motion.

4. In support of his motion to quash the appeal, the respondent relies upon an affidavit provided by Brad Chapman, an articling student employed at the office of the respondent's solicitors.

PART II - FACTS

Facts that the appellants accept as correct

5. The appellants originally brought an application to the Ontario Superior Court of Justice by way of a Notice of Application issued on November 20, 2003. The appellants' application was heard by Juriansz J., as he then was, on Thursday, December 4, 2003. He dismissed the application in its entirety. The appellants then commenced this appeal by means of a Notice of Appeal dated December 19, 2003. Copies of the following documents are contained within the Cross-motion Record of the respondent:

Tab 3 of Cross-motion Record - Notice of Application

Tab 4 of Cross-motion Record - Reasons for Judgment of Juriansz J., as he then was.

Tab 5 of Cross-motion Record - issued and entered Judgment of Juriansz J., as he then was.

Tab 6 of Cross-motion Record - Notice of Appeal.

6. It appears that on Sunday, December 7, 2003, the Chief Electoral Officer ("CEO") amended the Elections Canada Registry of Political Parties by replacing the name of the Canadian Alliance Party and the Progressive Conservative Party of Canada (the "PC Party") with the name "Conservative Party of Canada". It further appears that since that time, the PC Party no longer appears as a registered political

party on the Elections Canada Registry.

Affidavit of Brad Chapman sworn April 12, 2004 - paras. 8 and 9,
Cross-motion Record, Tab 2

7. The decision of Juriansz J., as he then was, was released to the parties on Friday, December 5, 2003. The appellants did not take steps to seek interim injunctive relief in respect of the conduct of the PC Party or any of its members between the time on Friday, December, 5, 2003 when the decision was released and the time on Sunday, December 7, 2003 when the CEO amended the Elections Canada Registry.

Affidavit of Brad Chapman sworn April 12, 2004 at para. 12
Cross-motion Record, Tab 2

Facts with which the appellants disagree

8. Some of the statements contained in the Affidavit of Brad Chapman are not facts, but instead are legal conclusions or characterizations.

9. Brad Chapman characterizes the appellants' application as one that sought "to effectively prevent the PC Party and the Canadian Alliance from making an application to merge under the *Canada Elections Act*". The application, if successful at first instance, might well have prevented or hindered the merger of the two political parties; the relief sought in the Notice of Application, however, did not specify that. The relief sought at paragraphs 1(a) through (n) of the Notice of Application was for specific items of declaratory and injunctive relief.

Affidavit of Brad Chapman, para. 2, Cross-motion Record, Tab 2
Notice of Application, Cross-motion Record , Tab 3

10. At paragraph 3 of his affidavit, Brad Chapman swears that "a special meeting of PC Party members was scheduled to take place on December 6, 2003 to vote on authorizing the leader of the PC Party and its Management Committee to take all necessary steps to implement an agreement in principle to merge with the Alliance Party". The evidence filed on this appeal discloses that this statement is inaccurate in two

respects. First, the December 6, 2003 special meeting was not a meeting of all members of the PC Party. According to the Rules and Procedures established for this meeting, it was a meeting of a limited number of delegates selected from the PC Party membership. Second, the agreement in principle to which Brad Chapman refers does not explicitly refer to merger of the two political parties.

Affidavit of Brad Chapman, para. 3, Cross-motion Record, Tab 2
Rules and Procedures for December 6, 2003 Special Meeting - Appeal Book and Compendium, Tab 9
Agreement-in-principle on the establishment of the Conservative Party of Canada, Appeal Book and Compendium, Tab 10

11. Brad Chapman's contention, at paragraph 10 of his affidavit, that the class of named respondents no longer exists, is a conclusion of law with which the appellants disagree.

PART III - ISSUES AND THE LAW

Striking paragraphs 1(e), (f) and (g) of the Notice of Appeal

12. The relief sought by the appellants at paragraphs 1(e), (f) and (g) of the Notice of Appeal is not new. The declaration sought at paragraph 1(e) of the Notice of Appeal is essentially identical to the declaration sought at paragraph 1(f) of the original Notice of Application. The declaration sought at paragraph 1(f) of the Notice of Appeal is essentially identical to the declaration sought at paragraph1(h) of the Notice of Application. The injunctive relief sought at paragraph 1(g) of the Notice of Appeal is essentially identical to the injunctive relief sought at paragraph 1(i) of the Notice of Application, except that in the Notice of Appeal, the appellants require, in addition to the permanent injunction which they originally sought, an accounting from any person who has dealt with any PC Party assets in a manner inconsistent with the declarations sought by the appellants. It is submitted that such an accounting is a logical extension of the injunctive relief originally sought in the Notice of Application. In any event, section 134(1) of the Courts of Justice Act permits the Court of Appeal to make any Order that could have been made by the Court below, to order a new trial or to "make any other Order or decision that is considered just".

Notice of Appeal, Cross-motion Record, Tab 3

13. The appellants have not sought leave to rely upon any evidence in addition to that which was before the Court below at the hearing of the original application. The appellants do not rely upon any such additional evidence in this appeal. The relief sought in the Notice of Appeal requires no enquiry into any such additional evidence. There are no "new issues", as alleged by the respondent, and it is therefore impossible for the respondent to be procedurally prejudiced in any way by the relief sought in the Notice of Appeal. The respondent does not need additional evidence to respond to anything in the Notice of Appeal.

14. The respondent's motion to strike paragraphs 1(e), (f) and (g) of the Notice of Appeal should not be granted because:

(i) the Notice of Appeal does not raise any new grounds or issues other than those dealt with by the Court below; and

(ii) in any event, the Order dated April 1, 2004 of LaBrosse, J.A. does not contemplate any such motion.

<u>The Mootness Analysis</u>

15. An appeal is not moot if there is a live controversy between the parties.

Borowski v Canada (Attorney General), [1989] 1 S.C.R. 342 at p. 353,
Respondent's Book of Authorities, Tab 4

16. The respondent seems to be arguing that the appeal is moot because he has proceeded with an application to merge the two political parties regardless of the appellants' right of appeal from the decision of the Court below.

The fact that the CEO has amended the Elections Canada Registry by removing the PC Party therefrom is not any kind of statutory change or change in factual circumstances which makes this appeal moot. The CEO may amend the Elections Canada Registry at any time, from time to time, in order to reflect the most current information available to him. Depending upon the outcome of this appeal, the CEO may again amend the Elections Canada Registry.

17. In any event, the respondent cannot remove this appeal from the jurisdiction of this Court by his own actions. It would be unjust to give to any litigant the power to unilaterally bring about the mootness of an appeal. Things done by the respondent after the judgment of the Court below are not, for the purposes of a mootness determination, the same as statutory changes or changes in factual circumstances beyond the control of the litigants.

18. By characterizing the original application as an application "to effectively prevent the merger of the two political parties", the respondent gives himself the semantic opportunity to argue that the mere fact of the subsequent merger approval renders this appeal moot. The dispute underlying this litigation has not gone away. The decision of this Court on appeal will still have a material impact upon the parties.

Even a moot appeal may be heard by the Court

19. The Court may exercise its discretion to hear an appeal even if it is considered to be moot. In such cases, the Court will consider the following factors:

(i) whether or not an adversarial context still exists despite the absence of a live controversy;

(ii) concern for judicial economy; and

(iii) recognition of the proper law-making function of the Court.

Borowski v Canada (Attorney General), [1989] 1 S.C.R. 342 at p. 358, Respondent's Book of Authorities, Tab 4

Adversarial Context:

20. The appellants and the respondent agree that an adversarial context continues to exist in this proceeding.

Respondent's Cross-motion Factum , para. 25

Judicial Economy:

21. It is respectfully submitted that this appeal involves matters of serious public interest and importance. The role of political parties in our democratic society is an important one. As is noted at paragraph 7 of the Reasons for Judgment of the Court below, " citizens exercise important rights in participating in political activity through membership in political parties". There is a significant social cost to leaving this appeal undecided. This appeal involves a review of the propriety of the internal processes of the PC Party, and the scope and relevance of the PC Party's Constitution. This appeal will require the Court to decide the appropriate manner of interpreting and applying a political party's constitution. Political parties play a large part in protecting and perpetuating Canada's democratic traditions of governance. The hearing of this appeal will allow Canadian citizens to see the extent to which those democratic principles are required to govern the internal workings of political parties themselves.

22. This appeal will deal with issues that relate not only to political parties but to other kinds of unincorporated associations as well. To that extent, members of church groups, veterans' associations and other kinds of voluntary associations will look to the decision in this appeal to find out to what extent they can rely upon their own associations' constitutions. This is a matter of social importance which extends beyond the realm of politics. For these reasons, it is respectfully submitted that the hearing of this appeal on its merits represents a wise allocation of judicial resources.

Proper Law-Making Function of the Court:

23. Despite the respondent's contention that this case is about politics, it is not. This appeal is about the legal rules that guide some political activities. It is also about the principles which apply to the governance and operations of unincorporated associations generally. There is an existing body of case law pertaining to the activities of unincorporated associations. This case law is referred to at Schedule "A" of the appellants' Factum in this appeal. The Courts have not shied away from the task of reviewing the validity of actions of members of unincorporated associations, nor have the Courts hesitated to enforce the governing rules of such associations. This appeal turns in large part upon the issue of if and how the Court will apply the provisions of the PC Party Constitution. That is a legal determination.

Additional Issues on the Motion

24. Nothing at common law or in the *Canada Elections Act* supports the proposition apparently argued by the respondent that the merger of the PC Party with the Canadian Alliance has resulted in the dissolution of the PC Party. While the merger of registered political parties represents a fundamental, constitutional change, it is not equivalent to dissolution. It is respectfully submitted that the merger of two registered political parties is more akin to the amalgamation of two business corporations pursuant to the *Ontario Business Corporations Act*. In both cases, the merging entities continue to exist in the form of the merged entity. In any event, it is a fundamental question in this appeal whether or not merger of the PC Party and the Canadian Alliance was validly effected. That issue can only be resolved upon a full consideration of the merits of this appeal.

25. Contrary to what is argued at paragraph 32 of the respondent's Cross-motion Factum, the comments made by the appellant David Orchard on the December 5, 2003 CBC Radio show "As It Happens" are irrelevant to this motion. It is patently obvious that both parties to this appeal have political interests which are in some way affected by this proceeding. That is beside the point both of the cross-motion and

the appeal. In any event, the comments made by Mr. Orchard in the above-noted radio programme barely touch on any specific political issues. The comments are almost exclusively answers to specific questions presented by the host of the radio programme regarding the original application and the decision of the Court below.

26. This appeal is in no way an attack on the decision of the CEO. This proceeding is an appeal as of right from a final order of the Ontario Superior Court of Justice.

27. The CEO is fundamentally not a judicial official. Decisions made by the CEO do not represent exercises of judicial or quasi-judicial discretion. Unlike this Court, the CEO does not in any case conduct a legal review of the internal processes of any registered political party. What is at issue in this appeal is not a review of any decision made by the CEO, but rather a review of the propriety of actions

taken by and on behalf of the PC Party. Such actions were never ruled upon by the CEO, but they should be ruled upon by this Court.

28. In any event, the respondent's argument that this appeal is some kind of attack on the CEO's decision does not go to the support the respondent's motion to quash.

PART IV - ORDER SOUGHT

29. The appellants seek an Order dismissing this motion with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

_____

PAUL BIGIONI

SCHEDULE "A"

LIST OF AUTHORITIES

Borowski v Canada (Attorney General), [1989] 1 S.C.R. 342 (S.C.C.)

SCHEDULE "B"

RELEVANT STATUTORY PROVISIONS

Courts of Justice Act, section 134(1)

Powers on Appeal

134. (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
(b) order a new trial;
(c) make any other order or decision that is considered just.

ETHEL AHENAKEW et al.
- and - PETER MacKAY et al

Applicants
(Appellants)

Respondent

Court File No. C41105

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

FACTUM OF THE APPELLANTS, RESPONDING ON THE CROSS-MOTION TO QUASH THE APPEAL (MOTION RETURNABLE APRIL 27, 2004)

BIGIONI LLP
Barristers & Solicitors
201-6060 Highway No. 7 East
Markham, Ontario
L3P 3A9

Attention: Paul Bigioni
LSUC No. 30959D
(905) 294-5222
(905) 294-1607

solicitors for the applicants
(appellants)