

REPORT

REMOVING THE LEGAL ROADBLOCKS:

The Road Forward to Unification of
Alberta's Conservative Parties



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MEMORANDUM

To: PC Alberta
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Calgary, AB T2P 2Y6

Wildrose Party
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Edmonton, Alberta T5J 3M1

Attention: Katherine O'Neill

Attention: Jeff Callaway

From: Alberta Conservative Consolidation Legal Review and Strategy Committee
Date: March 20, 2017
Re: Union of the Conservative Parties in Alberta

A. EXECUTIVE SUMMARY

1. Executive Summary

Since the first change of Alberta's governing political party in 44 years took place May 5, 2015, many commentators and observers believe it is because the vote among traditionally conservative voters was split among the Progressive Conservative Association of Alberta ("PCAA") and the Wildrose Party of Alberta ("Wildrose"). Mathematically, this appears correct. According to Elections Alberta, the winning party received 40.6% support from those who voted while PCAA and Wildrose received 52.0%.

While politics is always much more complicated than simple mathematics, politicians, pundits and the public displeased with the outcome almost immediately adopted the mantra of uniting the right. Had the PCAA and Wildrose been one party instead of two the outcome would have been different. A Unite the Right movement verging on an industry has emerged since that time and remains the subject of daily discussion among media commentators, pundits, social media and Albertans.

Unfortunately, the challenge is not just *what* but *how*. Multiple options have been put forth by PCAA leadership candidates and Wildrose and other commentators accompanied by multiple analysis of Alberta law with differing opinions. Not all include a merger such as was accomplished by the Conservative Party of Canada among the Canadian Alliance and Progressive Conservatives at the federal level in 2003. However, for those not directly involved this is the most popular interpretation of what Unite the Right actually means. Unite the Right is often used as the term for the outcome, not necessarily the means.

Without going into the politics of the competing visions, players and motives, the first step should be an independent review of Alberta legislation regarding the combination of what is essentially two not-for-profit organizations operating as what are called political parties.

In the fall of 2016 a group of five concerned Albertans, all of whom are practicing lawyers, agreed an independent review of the legal structure and underpinning of such a combination would be a useful contribution to the discussion. After multiple meetings and conversations a group calling itself the Alberta Conservative Consolidation Committee ("ACCC") held its first meeting December 13, 2016 and has since held numerous meetings and teleconferences. The various elements of the projects were assigned to members with the first draft compilation circulated March 3, 2017. This document has undergone significant refinement thereafter. We acknowledge with gratitude the assistance in organization and research of Mr. David Yager.

2. Conclusion

The following memorandum and all the reservations and limitations therein qualify this summary. However this summary is useful as a guide and general comment.

The PCAA and Wildrose can legally merge. This corporate merger, though complicated in execution, in our opinion, avoids any rules or restrictions under the elections and finance legislation in Alberta. Our purpose was to provide a road map on how it can be accomplished.

We have found no legislation specifically prohibiting the merger of two non-profit organizations that happen to be registered political parties. It is within the constitutional mandate of the government of Alberta to legislate, monitor and control the activities of political parties when its representatives or members elected seek public office. In that regard legislation has been passed governing the registration of political parties entitled to have candidates listed on ballots in provincial elections and preventing the transfer of assets (and more recently any act of cooperation) between political parties.

In our view an amalgamation of two societies, registered as political parties, will not result in any sanctions pertaining to transfer of assets between parties; amalgamations in and of their nature are fusions of assets, not transfers of assets. Further, there is no bar to prevent societies, registered as political parties, holding a type of political licenses or franchise, from amalgamating under law. In that case the amalgamated entity would have two valid registrations under Alberta law and could elect to terminate or suspend one of the registrations.

These political party organizations, if they follow a proscribed path, may amalgamate under Alberta law without consent or penalty should they and their leadership members choose to do so.

Andy Crooks, Barrister and Solicitor, Spokesperson and Chair on behalf of:

P.N. (Rick) Breen, Q.C., Barrister and Solicitor,

Richard Jones, Barrister and Solicitor

Julia C. Loney, Barrister and Solicitor

Tyler Shandro, Barrister and Solicitor

3. Other Considerations

Not considered in the following memorandum are multiple issues that must be resolved during the process of negotiations or after the two organizations become one. They include:

- Constitution;
- Executive Committee/Board of Directors;
- Articles of Incorporation and by-laws for the combined entity and constituency associations;
- Eliminating 87 redundant constituency associations and combining respective assets;
- Membership criteria;
- Leadership race and criteria; and
- All the other considerations typical of an association operating as a political party.

B. BACKGROUND

1. Terms of Reference

While this is a legal memorandum, it provides only an overview of our analysis and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

Some capitalized terms and acronyms are defined herein and referenced in Appendix 8.

The authors are five Albertans, all of whom are lawyers in Alberta who have a long-term and active interest in political matters. We have party affiliations with both the PCAA and the Wildrose. We, like many Albertans, are interested in the unification or merger conversations taking place between parties.

We assigned ourselves the task of considering the legal issues of bringing the two conservative political forces together in Alberta. We bring an historical perspective. We observed the Reform Party (later Canadian Alliance) and Progressive Conservative Party walk in the wilderness at the federal level for ten years and the history of Saskatchewan politics before the Saskatchewan Party under Brad Wall's leadership won its first election. As conservatives, we could see the same scenario running its course in Alberta.

We agreed on Terms of Reference, which are attached hereto as Appendix 1. These make it quite clear that none of us have joined this effort with any official capacity in or sanction from a political party. We are volunteers without a mandate from any party, person, or institution.

2. Mandate

There are many political issues, and it is easy to conflate the issues of joining two political parties with issues relating to leadership. The federal experience saw both of those issues addressed. The Saskatchewan experience was slightly different. The separateness in the Saskatchewan experience is instructive and useful.

Our task, however, was to determine whether or not a union of the two conservative political organizations in Alberta could be legally affected. There has been significant discussion in the media regarding the possibility of a merger. The Manning Foundation published a legal opinion (the "**Manning Centre Opinion**"), which we reviewed carefully. Additionally, Elections Alberta weighed in a very public way regarding the possibility of a unification or merger of political parties in Alberta. Our task was to determine if it can be done, and if so how can it be done. Because of the aforementioned comments by Elections Alberta, we also included in our mandate whether or not Elections Alberta could interfere with the unification process, or whether we could identify a roadmap that would be insulated from interference.

We wanted to identify a roadmap and process map for the leadership of the two political parties, who can then negotiate the specific terms of a unity agreement and turn to their members and ask, "Do you want this done?"

3. Research Process

Let us first turn to the process that we followed and then into the body of the opinion.

The first stop in our analysis was the review of the Manning Centre Opinion and consideration of the views outlined in that letter. We then turned to the history of comparables. We contacted people who had been responsible in a leadership role for the emergence of the Saskatchewan Party. We also called people who were engaged at the highest levels in the federal Conservative unification project. These conversations, together with conversations with some of the current and former leadership of the current PCAA and Wildrose parties helped us to identify points of similarity to and difference from the Saskatchewan and federal experiences.

We then turned to the legislation and regulations in Alberta, which include the *Elections Act*, the *Election Finances and Contributions Disclosure Act* (“**EFCDA**”), regulations issued under those acts, and recent press releases and media interviews granted by representatives of Elections Alberta. We also considered relevant case law pertaining to these issues.

We also investigated the constating documents of the PCAA, the Progressive Conservative Association of Alberta Foundation (“**PCAAF**”), and Wildrose. We investigated the government-filed constating documents for these three organizations and also investigated the constitutions of these organizations, which are superimposed upon the legal framework.

4. **Key Assumptions**

We made several assumptions during our considerations.

Our first assumption is that the Alberta public service is opposed to the idea of political party unification in Alberta. Rather than maintaining a neutral stance and waiting for any application, they have proactively been engaged in a media campaign opposing unification. We have therefore factored into our consideration a regulatory environment questioning the legality and execution of unification.

We also assume that there would be sufficient time available to conduct and hold required meetings. We assume that a sufficient plurality of approval would be obtained to approve the steps involved in the process roadmap.

We have also considered the issue of registered constituency associations in Alberta among both parties. We have assumed in our deliberations and consideration that not all CA executives may agree with a unification or merger; that there would be some holdouts or attempts to run candidates. This assumption is validated when we examined the Saskatchewan experience where several CAs continued to run candidates under the old party banners for at least one election.

Our considerations have also included an assumption that we have inferred from recent comments in the media pertaining to the tone and attitude of multiple spokespersons at multiple levels from both parties to a merger. As can be expected in politics, there is a diversity of views including outright opposition. There are a number of ways to attempt to prevent the combination which makes unification or consolidation problematic. We have therefore considered the potential of a legal solution that might have to ‘work around’ representatives and members from parties, a scenario not uncommon in commercial law, but difficult in any context.

5. **Conclusions**

It is our conclusion that the amalgamation of the PCAA and Wildrose is legally feasible, thereby forming a single, united and integrated legal entity that combines the assets (working capital, leases, membership lists, software licenses¹ and other property) and liabilities of both. It is contemplated that this amalgamated entity would have a new constitution and bylaw, a new and distinct name and brand, and a new administration or management.

¹ Some contracts may have provisions that are triggered on an amalgamation event that might affect this conclusion.

If the amalgamation is moving ahead, the leadership of the parties could request a meeting and discussion with Elections Alberta for clarification on the issues identified. Exposure of the rulings of Elections Alberta and its rulings to this public debate could have a salutatory effect on the whole situation.

C. MANNING FOUNDATION OPINION

On October 22, 2016, the Manning Foundation released a legal opinion titled, “A Tory and Wildrose Merger is Legally Possible”. It was interesting and comprehensive. In summary, the Manning Foundation Opinion suggests that a joint venture formed between the PCAA and Wildrose would be the preferred method of achieving a merger or unification. This would not be a legal but rather a practical initiative. In our view, however, given what we believe to be the obstructive positions of the regulatory regime in Alberta Elections rules and guidelines, it is our view that Elections Alberta would declare this joint venture proposed by the Manning Foundation Opinion to be a political party in its own right requiring registration under the EFCDA. We would anticipate a likely court challenge to support this conclusion. We would also expect that Elections Alberta would move to disqualify candidates or refuse to register candidates that attempted to run, and not allow them a place on the ballot. Elections Alberta may go so far as to seize funds and property, alleging that it is a transfer offensive under Alberta law. Finally, agents of the various Constituency Associations and campaigns might well be exposed to litigation and reputational tarnish.

In our view, the Manning Foundation Opinion, in assuming a benign or at least non-objecting regulatory environment, did not proceed far enough. This will be made clearer in our own views set forth below.

D. FEDERAL AND SASKATCHEWAN MERGER HISTORY

In the federal history, it is clear that a truly new party, the Conservative Party of Canada, was created in a legislative environment that allowed consolidation and mergers of political parties. After the crushing defeat of the Progressive Conservatives in 1993 in part because of a loss of its voter base to the Reform Party, it would be 13 years before conservatives would again win a federal election. After a decade in the political wilderness the Conservative Party of Canada was created by the merge of the Progressive Conservative Party of Canada and the Canadian Alliance Party, a successor to the Reform Party. Both parties agreed to a merger and the dissolution of the combining entities. Conservatives then held power in Ottawa from 2006 to 2016.

In the new Saskatchewan Party, a new party was formed in 1997 and the old parties were abandoned but never legally dissolved. There was no merger, only an agreement that political success by the new entity was more likely. While this was eventually politically successful, considerable funds and organizational bench strength were left behind in the old parties. The decision was made to walk away from members and money, and that decision was made with confidence - an acknowledgment that something had to be done and the radical step was taken. What is noteworthy is while elected members of the legislative assembly from both the Progressive Conservative and Liberal parties created the Saskatchewan Party, both parties lived on and the Liberals actually ran candidates against the Saskatchewan Party in the first election after its creation in 1999. Of interest is the NDP won 29 seats, the Saskatchewan Party 25 and Liberals 4. The math is obvious and no change of government occurred.

Common elements from this history include the proposition that the new party involves a fresh start. This fresh start included a new constitution, name and leadership selection processes. A new political brand was required. It is also important to note that the Saskatchewan initiative did not rely on any legislative framework that was favourable or opposed to merger or unification. It struck out on its own under the existing rules creating a new party without regulatory consent required.

E. THE ALBERTA CHALLENGE

In Alberta, we face not only the political and leadership challenges of a unification effort – we also face legislative and regulatory challenges. The regulatory challenges have been alluded to in the foregoing paragraphs. The legislative challenges are more precise and are enumerated below.

Firstly, there is no merger or consolidation language in Alberta statutes allowing or facilitating a merger or unification of political parties. By the same token, there's nothing preventing such mergers or unifications. There is, however, a strong suggestion that such unifications or mergers might not be desired under Alberta law, inasmuch as the Alberta legislation articulates a strict prevention of the transfer of assets between political parties which would facilitate a unification process. There is no apparent policy reason for this, and no explanation in the statutes. This then creates the challenge.

F. LEGISLATION & COMMON LAW

1. Election Act

The *Election Act* deals with only the appointment of a Chief Electoral Officer, lists, election procedures, and post-polling day procedures. It does not address the creation of or registration of a political party.

To that extent, it is also silent on merging or amalgamating a political party.

2. Legislative Assembly Act

There is an incorrect perception in Alberta, including at Elections Alberta, that there is only one way to create a political party: through the EFCDA. However the EFCDA only deals with the registration of a political party for the purposes of being able to accept contributions; it does not create nor establish parties.

The *Legislative Assembly Act* (the “LAA”) also contemplates the idea of a political party (for the purposes of determining the budget and allowances a political party may receive). To this extent, a political party does not have to be registered under the EFCDA to exist, nor does it even have to be incorporated in anyway (as long as it does not receive any contributions). A political “party” may exist just because one or more Members of the Legislative Assembly say they are a party.

3. Election Finances and Contributions Disclosure Act

The EFCDA requires registration of political parties (and other political entities, such as candidates, constituency associations, etc.) if they want to receive contributions or establish a candidate's name on a ballot. Registration comes with a number of obligations for the purpose of publicly disclosing contributions and expenses.

(a) Registration

Section 6 provides that a political party must register before accepting any contribution, and it also sets the test for registration. The steps involved would likely be:

- (i) set up a non-profit corporation or society (though not required) and deposit no more than \$5,000.00 into its bank account, and

- (ii) meet the test for s. 6(2), most likely by having a minimum of three MLAs become members of the new entity.

There is an important question to be asked at this stage: who is the “party”? Is the political party the society or non-profit corporation which was first incorporated? Considering (i) the registered name for a political party may be different than what is incorporated, (ii) assets and liabilities may be held in a name which is different than the name which is registered under the EFCDA, and (iii) the corporate entity of a political party may be struck from Corporate Registry or dissolved. It appears that the answer to the “who is the party” question is that a political party is an unincorporated association and that the society, trust, foundation or non-profit corporation which exists is an agent of the political party.

Although it should be noted that this may not be an interpretation with which Elections Alberta agrees. Whether or not Elections Alberta agrees will likely be determined on a case-by-case basis by whether that position supports or refutes the proposition of a transfer of funds between two legacy political parties.

(b) **“Merger” of registrations**

There is no mechanism in the EFCDA by which two or more registered parties may apply to Elections Alberta to have their registrations amended such that they are one political party.

There also is no prohibition against such an application, and registered parties are entitled to amend their registrations, including their name, but Elections Alberta has stated that they will not allow for two or more political parties to amend their registrations such that they would become the same registration.²

(c) **Transfer of funds**

The EFCDA places limits upon how money and property may be transferred from a registered entity. According to Elections Alberta it has been said that they see it as their responsibility to ensure that monies from a contributor are spent by the registered entity to which they made the donation.³

It should be noted that nowhere in the EFCDA is there any direction to Elections Alberta to be such a steward for the contributions to registered political entities. E.g., nowhere in the EFCDA does the Chief Electoral Officer have the discretion to question or prohibit a payment to a vendor. The purpose of the EFCDA is only to ensure that contributions are only provided to registered entities so that every contribution and expense falls within the prescribed monetary limits and is publicly disclosed.

That is why there are some prohibitions on the transfer of funds in the EFCDA. Section 35, e.g., prohibits a registered entity from transferring to any other political entity unless that recipient is registered as well. Such a prohibition makes sense considering the purpose of the EFCDA regarding public disclosure.

² The source for this is public comments from the Chief Electoral Officer and his staff, as well as conversations members of this committee had with staff of the Chief Electoral Officer and their counsel.

³ *Ibid.*

Section 38 also explicitly permits the transfers of funds between the registered entities of a political party (an “**Intra-party Transfer**”). A registered party, a registered constituency association, a registered candidate within the same party may transfer back and forth between each other as long as those transfers are publicly disclosed.

There are a number of prohibitions to note:

- (i) registered entities are prohibited from accepting funds from a federal party (s. 36); and
- (ii) a registered entity is prohibited from transferring to a senatorial candidate.

It is important to note that there is no explicit prohibition against transfers between one registered party to another, or from a registered entity under one political party to another registered entity of another (an “**Inter-party Transfer**”). As well, s. 35(1)(b) of the EFCDA appears to explicitly permit Inter-party Transfers, as long as the recipient is registered.

It is important however to note that Elections Alberta does not agree. They have publicly stated they interpret the EFCDA to prohibit Inter-party Transfers. The reason given was that transfers are only permitted if explicitly provided for in the EFCDA, and because Inter-party Transfers are not explicitly mentioned, they are therefore prohibited.

(d) **Effect of amalgamation**

We establish as a premise that Societies which are also political parties are created under separate statutes which govern their existence. We must turn to these rules, which are differentiated from the election and electioneering rules to establish the corporate and other legal rules governing their existence, including amalgamation.

Elections Alberta was asked about s. 32 of the *Societies Act* (Alberta), which allows for the amalgamation of two or more societies. It conceded that:

- (i) Elections Alberta has no jurisdiction over two societies amalgamating under s. 32 of the *Societies Act*, and
- (ii) in the event two or more societies which were registered parties amalgamated, Elections Alberta has no jurisdiction to prohibit the legacy parties from changing all of their assets and liabilities to the name of the amalgamated society.⁴

E.g., If X Party and Y Party amalgamate and their name becomes, Z Party, every bank account of X and Y, including every registered constituency association must change their names such that they are all Z Party.

However, Elections Alberta has said that a transfer of a legacy party’s bank account which used to be X Party and now is Z Party, into a new bank account opened by Z Party is prohibited. Elections

⁴ Staff at Elections Alberta have confirmed this in conversations with members of this Committee. And the Chief Electoral Officer has been asked to provide this in writing.

Alberta would still see the bank accounts of legacy parties transferring to the amalgamated party as Inter-party Transfers.

That is, Elections Alberta would still view the bank accounts of legacy parties transferring to the amalgamated party as Inter-party Transfers. However, no transfers will have taken place. Under tax law, for example, a merger does not affect a transfer of working capital or cash on hand. It is, rather, a consolidation. Likewise, under Generally Accepted Accounting Principles a merger does not in any way involve a transfer, but rather a fusion or consolidation. Therefore we have concluded that assets are not transferred but merged. And all Assets are included in the merger (as well as liabilities) this include memberships, licences, leases, etc.

There is no case law on this point available. However we have concluded that the current law would prevent any step being taken to seize or forfeit assets in an amalgamation. Among other compelling reasons, to cause a diminution in assets in the context of a merger that includes liabilities as well as assets would prejudice creditors and do violence to the general corporate law regime that permits and governs amalgamation procedures. It would appear from conversations with officials at Elections Alberta that this proposition is agreed.

(e) **How money is spent by a registered entity**

The new changes to the EFCDA which created Part 6.1, and which regulate the contributions and expenses of Third Parties, has an explicit prohibition against collusion with other Third Parties (s. 44.1):

“A third party shall not circumvent, or attempt to circumvent, a limit set out in this section in any manner, including by splitting itself into 2 or more third parties for the purpose of circumventing a limit or acting in collusion with another third party so that their combined election advertising expenses exceed a limit.”

There is no such prohibition on how the funds of a registered party or other registered entities are spent. Registered entities are entitled to spend their money in concert with another registered entity.

(f) **Cancellation of registration**

The EFCDA not only deals with registration, but it deals with the cancellation of registration as well.

Cancellation of registration can happen in two ways:

- (i) Elections Alberta receives an application for cancellation by the registered entity, or
- (ii) Elections Alberta begins the cancellation process for the other reasons set out in s. 10 of the EFCDA.

If a registered party or registered CA continues to comply with their statutory filing obligations for their contributions and expenses, there is no reason to apply for cancellation. A legacy party may, in fact, be entitled to stay registered until the next general election. In the event a legacy party fails to field a candidate in the next general election, Elections Alberta may commence cancellation of that legacy party.

But it should be noted that a merger (de facto or otherwise) of two legacy parties does not necessitate an application for cancellation of the legacy parties.

(g) **Effect of cancellation**

Upon cancellation, all funds are paid to Elections Alberta to pay the outstanding debts of the registered entity whose registration was cancelled. Any surplus would then would be held in trust for a period of one year. After that one year, the surplus would be paid to the General Revenue Fund.

However, cancellation is neither required or a consequence of a merger procedure, de facto or otherwise, and therefore a cancelation application of any legacy registration should not be made until there are no longer funds in the registered legacy party or the CAs.

(h) **Constituency associations**

A CA is defined, at s. 1(1)(d) as:

...with reference to an electoral division means the association or organization endorsed by a registered party or an elected independent member of the Legislative Assembly as the official association of that party or independent member in the electoral division

A CA may exist de facto for any political party, registered or not, for any electoral division. Such a CA must register if it wishes to receive contributions (s. 8).

To register, a CA must submit an application with the information required pursuant to s. 8(2): name, address, names of principal officers, name and address of the financial institution to be used, etc.

There is also an implicit requirement for an endorsement by a registered party or independent MLA for two reasons. The first reason is the very definition, as above, refers to an endorsement. With no endorsement, one cannot be a CA. The second reason is the reference in s. 8(2)(a) for the need to provide the CEO with the name of the endorsing registered party or independent MLA before one can qualify for registration.

Therefore CAs are unincorporated creatures of a registered party, existing only with the blessing of the registered party. This provides the registered party with significant leverage over the CA in that the registered party may revoke its recognition of a CA and apply for cancellation under the EFCDA as discussed above. Doing so would result in the funds of the CA being held in trust by the CEO until a replacement CA is registered.

4. Unincorporated Associations

The Alberta courts have held that an unincorporated association is not a legal entity. It cannot be sued in its own name or sue in its own name. In *International Association of Science and Technology for Development v. Hamza*, 1995 ABCA 9, Madam Justice Conrad, writing for the Alberta Court of Appeal, stated:

[17] Generally speaking, subject to certain statutory exceptions, other entities which are neither natural nor statutory persons will lack the status to commence an action. Thus, unincorporated associations and clubs are not legal entities capable of suing or being sued: see *Re Cummings and Ontario Minor Hockey Association* (1979), 26 O.R. (2d) 7 (C.A.); *Ladies of the Sacred Heart v. Armstrong's Point Association* (1961), 1961 CanLII 399 (MBCA), 36 W.W.R. 364 (Man. C.A.).

Actions involving an unincorporated association must be brought in the name of the members involved, either personally or in a representative capacity.

More recently, the Court of Queen's Bench of Manitoba in *Progressive Conservative Party of Manitoba v. Manitoba*, 2014 MBQB 155, held that the PC Party of Manitoba, which was an unincorporated association, did not have the capacity to sue as it was not a legal entity. It relied upon a Manitoba Court of Appeal decision, which found that the Rules of Court did not have the authority to give an unincorporated association the legal capacity to sue. "It held that unless there is legislation apart from the rules that grants an unincorporated association status to commence legal action, the association has no capacity to sue."

Like the PC Party of Manitoba, the PCAA, as a dissolved society, and unincorporated CAs are not legal entities, but a collection of individuals. They have neither the capacity to sue nor be sued.

G. POLITICAL PARTIES AND CONSTITUENCY ASSOCIATIONS

According to Elections Alberta, "political parties" are:

"political organizations that have met the legislative requirements under section 6(2) of the Election Finances and Contributions Disclosure Act."

Elections Alberta recognizes The Progressive Conservative Association of Alberta and Wildrose Political Association under the name the "Wildrose Party" as registered political parties under the EFCDA. However, the EFCDA does not define the term "political party". In fact, no Alberta legislation statutorily defines the term.

The Progressive Conservative Association of Alberta uses several trade names and trademarks. It uses the name "PC Party" and has registered "PC" and "PC Alberta" as trademarks.

The Wildrose Political Association is less complicated. It uses its pending trademark "Wildrose Party".

Attached hereto as Appendix 2 is a list of registered trademarks for both the PCAA and Wildrose.

The PCAA and the Wildrose each have 87 CAs. Although each CA is registered with Elections Alberta, none of them is an incorporated entity and appears to be an unincorporated association. An unincorporated association is a collection of individuals and not a legal entity *infra*.

H. THE PROGRESSIVE CONSERVATIVE ASSOCIATION OF ALBERTA

The Government of Alberta Corporate Registration System gives a history of the PCAA as follows:

- On December 14, 1977, the PCAA was registered as a society under the *Societies Act*; and
- On November 11, 2000, the PCAA was dissolved for failing to file annual returns.

Of interest is an Alberta Court of Queen's Bench legal proceeding, being an originating application commenced by the following Applicants:

The Progressive Conservative Association of Alberta, (a Society); Roy Deyell; The Progressive Conservative Association of Alberta (a registered political party); and Robert C. Dunseith as

President and representatives of the Progressive Conservative Association of Alberta (a registered political party)

against Charles and Hermina Relland. The application was brought pursuant to the *Societies Act* and the ABCA. The Applicants alleged that the Respondents Charles and Hermina Relland improperly and without authorization revived the PCAA as a society under section 201(1) of the ABCA.

At the application, Justice D.A. Sirrs held Charles and Hermina Relland improperly revived the PCAA as a society and declared the revival a nullity. By Order dated November 16, 2000, Justice D.A. Sirrs directed the Registrar of Corporations to dissolve the PCAA as a society and restore it to its status before the improper revival. The Registrar was also directed to issue a certificate of dissolution of the PCAA society.

So what is the PCAA? All we know is what it is not. It is not a society.

I. THE PROGRESSIVE CONSERVATIVE ASSOCIATION OF ALBERTA FOUNDATION

In addition to the PCAA, there is a related foundation, which is a Part 9 company incorporated under the *Companies Act*, RSA 2000, c C-21. The Government of Alberta Corporate Registration System gives a history of The Progressive Conservative Association of Alberta Foundation (“**Foundation**”) as follows:

- On July 30, 2002, the Foundation was registered as a non-profit private company under Part 9 of the *Companies Act* and filed Articles of Association and Memorandum of Association;
- On March 27, 2014, the Foundation replaced its Articles of Association; and
- As of November 25, 2016, the Foundation was active but had failed to file its corporate returns for the 2015 and 2016 filing years.

The Foundation’s Memorandum of Association sets out its objects as follows:

- “(a) To advance, promote, maintain, assist, establish and support, by any lawful means whatsoever
 - (i) The registered political party known as the Progressive Conservative Association of Alberta and as PC Alberta;
 - (ii) The interests and aims of the Members of the Progressive Conservative Association of Alberta;
 - (iii) The unincorporated group known as the Progressive Conservative Association of Alberta, and its Members;

and all facets thereof and all other endeavours which, in the opinion of the Directors, have some relationship or connection therewith;

- (b) To establish, provide, maintain and perform such management, administration, trust and other functions as may be required by law to be performed by a not for profit body corporate under the Elections Act of Alberta and the Election Finances and Contributions Disclosure Act of Alberta, or either of them, or as may otherwise be requested by the Progressive Conservative Association of Alberta.”

One of the main objects of the Foundation is to promote the “unincorporated group known as the Progressive Conservative Association of Alberta”. This statement strongly suggests that the PCAA is an unincorporated association. There is, therefore, considerable confusion between the words and the facts. The objects were likely drafted by legal counsel and as such the import of the words was likely understood by the incorporators of the Foundation. But this is only a supposition.

The Foundation’s 2014 Articles of Association seem to refer to the PC Party and the Foundation as separate entities. An example of this is contained in the definitions section of the Articles.

“ “Designated Members” means persons who are Members of the Foundation by virtue of their official status in the PC Party and include the Executive Director, the President and the Treasurer of the PC Party and includes up to 2 additional persons designated as Members from time to time by the Executive Committee of the PC Party.

“PC Party” means that certain political party registered under the Elections Act of Alberta and known as the Progressive Conservative Association of Alberta and also known as “PC Alberta”.”

Another example of the Foundation treating the PCAA as a separate entity is contained in section 9 dealing with applications for Foundation membership. It reads:

“9. Applications for membership shall be submitted to the Foundation by candidates seeking admission to membership. No one (other than the Designated Members) shall be admitted into membership unless approved for membership by the PC Alberta Fund.”

Unlike the eligibility requirements for membership in the PCAA, which only requires a person to pay the membership fee and agree to abide by the principles of the PCAA, membership in the Foundation requires the approval of the PC Alberta Fund.

That said, former PC executives, who this committee have spoken with, did not draw a distinction between the PCAA and the Foundation but saw them as the same entity. They were of the view that the Foundation operated under the unregistered trade name “The Progressive Conservative Association of Alberta.”

So again, we are faced with the question of what is the PCAA? The Foundation’s background does not adequately answer this question. Hence, we are of the opinion that the PCAA is either:

- An unincorporated association; or
- A Part 9 Company, being the Foundation, using the name of the dissolved society.

In its December 31, 2015 statutory year-end filing with Elections Alberta the PCAA submitted the following in the notes to its annual financial statements:

“Progressive Conservative Association of Alberta Foundation. The Progressive Conservative Association of Alberta Foundation is a company limited by guarantee, incorporated under Part 9 of the *Companies Act* (Alberta). The objects of the company are to advance, promote, maintain, assist, establish and support the Progressive Conservative Association of Alberta. The company is inactive and does not maintain a bank account. All expenses related to the company are paid for by the Association. These financial statements include expenses totaling \$nil (2014 - \$nil) related to the incorporation and sustaining of the company.”

Attached hereto as [Appendix 3](#) and [Appendix 4](#) are diagrams illustrating the organizational structure of the PCAA and Foundation, respectively.

J. WILDROSE POLITICAL ASSOCIATION

The Wildrose has a more recent and therefore less convoluted legal history. The Government of Alberta Corporate Registration System shows the following:

- On June 5, 2002, the society was incorporated under the name Alberta Alliance Political Association and struck on December 2, 2005;
- On December 7, 2006, the society was revived;
- On January 28, 2008, the society changed its name to Wildrose Alliance Political Association; and
- On September 29, 2015, the society changed its name to Wildrose Political Association.

The Wildrose Constitution was approved by members at its 2016 AGM. Section 1 of the Constitution indicates that the society is also to be registered as a political party with Elections Alberta under the name of the Wildrose Party.

Wildrose's filed Bylaws consist of the Wildrose Constitution as approved by members at its 2015 AGM.

Attached hereto as [Appendix 5](#) is a diagram illustrating the organizational structure of the Wildrose.

K. AMALGAMATION MECHANICS

1. Background

Under Alberta law a society is incorporated under the Societies Act and is capable of amalgamating with another society.

One of the leading legal texts described amalgamation as follows:

From time to time it may seem advantageous for two or more companies to combine or merge their separate operations and continue as a single commercial entity. There are four basic techniques that can be employed to accomplish such a merger. First, one company may purchase the other and operate the other as a subsidiary. Second, one company may purchase the assets of the other. Third, both companies can transfer their assets to some newly created entity. Fourth, both companies can join together to form a new corporate entity. Mergers of this last type are called amalgamations, and the defining characteristic of such transactions is the fusion of two or more corporate entities. Every amalgamation involves the merger of two enterprises, but not every merger amounts to an amalgamation.⁵

It is the last, which we propose, the fusion by amalgamation of the PCAA and Wildrose to form a unified conservative entity. The effect of an amalgamation is to have the amalgamated entity have all of their assets and liabilities, strengths and weaknesses, and perfections and imperfections. In an amalgamation, there are

⁵ Kevin Patrick McGuiness, *Canadian Business Corporations Law*, 2d ed. (LexisNexis, 2007), at p. 1432

no transfers of assets, bank accounts, contributions, and as a result, the EFCDA does have application. The EFCDA does not stand in the way of an amalgamation of Alberta political parties. In light of such, Elections Alberta, which lacks the statutory authority or power to rule on corporate amalgamations, ought not to stand in the way of democratic choice and the creation of an amalgamated legal entity in which that democratic choice is manifest.

2. PCAA and Wildrose Internal Documents

We have reviewed the PCAA and Wildrose's constituting documents, bylaws, and constitutions. They do not prohibit amalgamation. They are silent on the issue. As a result, the amalgamation process is determined by statute.

3. Statutory Requirements for Amalgamation

For legal entities to amalgamate, it is necessary that they be subject to the same legislation. This requirement is clear from the express wording of the *Companies Act* and *Societies Act*. Only Part 9 companies can be amalgamated with other Part 9 companies under the *Companies Act*, and only societies can be amalgamated with other societies under the *Societies Act*. In their current form, the PCAA and Wildrose cannot be amalgamated, but if one or both changes its form, then amalgamation is legally permissible. We have identified two different scenarios taking into account the PCAA as either an unincorporated association or a Part 9 company, being the Foundation, using the trade name PCAA.

4. Scenario 1 – Combining an Unincorporated Association and a Society

Attached hereto as Appendix 6 is a diagram illustrating the mechanics of amalgamation under the first scenario.

The PCAA was a society governed by the *Societies Act*. The PCAA was dissolved and may be operating as an unincorporated association. The Wildrose is an incorporated society governed by the *Societies Act*.

Due to the passage of time, the *Societies Act* does not allow for the PCAA to be revived as a society. Instead, the PCAA needs to be reincorporated as a society. The *Societies Act* does not have a legislation provision dealing with revival or restoration. However the *Societies Act* does contemplate that a society is capable of being revived or restored. Section 6 dealing with the naming of a society states in subsection 5 as follows:

- (5) If an application is made to restore a society under this Act and, between the date of dissolution of the society and the date of its restoration, another society has come into existence with or has acquired a name that is likely to be confused with the name of the society to be restored, the Registrar may require, as a condition of the restoration, that the restored society does not pursue its original purposes, or, if it seeks to do so, that it change its name to a name approved by the Registrar or to a designated number, immediately after it is restored.

Section 209 of the ABCA states that its revival provision applies to a society removed from the register under the Companies Act. Section 208 of the ABCA deals with revival. It prohibits revival after five years of the dissolution. The PCAA was dissolved by court order on November 16, 2010. More than five years has passed. Accordingly, revival of the PCAA as a society is not an option.

Section 3 of the *Societies Act* allows five or more people to incorporate a society. The PCAA may, as an unincorporated association, select five or more representatives to incorporate the PCAA as a society. Once incorporated as a society, the PCAA would be the same type of legal entity as the Wildrose.

Section 32 of the *Societies Act* allows two or more societies to amalgamate and continue as one society. Each of the societies is required to enter an amalgamation agreement setting out the terms and effect of the amalgamation. The directors of each amalgamating society are then required to submit the amalgamation agreement to the members of the society for adoption by special resolution.

“Special resolution” is defined in section 1(d):

- (d) “special resolution” means
 - (i) a resolution passed
 - (A) at a general meeting or special meeting of which not less than 21 days’ notice specifying the intention to propose the resolution has been duly given, and
 - (B) by the vote of not less than 75% of those members who, if entitled to do so, vote in person or by proxy,
 - (ii) a resolution proposed and passed as a special resolution at a general meeting or special meeting of which less than 21 days’ notice has been given, if all the members entitled to attend and vote at the general meeting or special meeting so agree, or
 - (iii) a resolution consented to in writing by all the members who would have been entitled at a general meeting or special meeting to vote on the resolution in person or, where proxies are permitted, by proxy.

A special resolution needs 75% or more of the members to vote in person or proxy in favour of the amalgamation.

The advantage of an amalgamation is that under subsection 32(6)(b) of the *Societies Act*, the property of each amalgamating society continues to be the property of the amalgamated society. There would be no Interparty Transfers under the EFCDA.

5. **Scenario 2 – Combining a Part 9 Company and a Society**

Attached hereto as Appendix 7 is a diagram illustrating the mechanics of amalgamation under the second scenario.

If the PCAA is a Part 9 Company, being the Foundation operating under the trade name PCAA, then it may combine with the Wildrose, being a society, using the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 (“**CNFPCA**”). First, both entities would seek to effectively re-incorporate under the CNFPCA. In legal jargon, this process is called “continuance” since the entities are already incorporated but under different legislation.

Once the PCAA and Wildrose had each been “continued” as not-for-profit corporations under the CNFPCA, then they can proceed with the amalgamation process under section 204. Section 204 states:

“204 Two or more corporations may amalgamate and continue as one corporation.”

Similar to the process under the *Societies Act*, the corporations enter into an amalgamation agreement setting out the terms and conditions of effecting the amalgamation. These include:

- Provisions that are statutorily required to be included in the articles of incorporation or the bylaws;
- The names and addresses of each proposed director in the amalgamated corporation;
- The manner in which the memberships of each amalgamating corporation are to be converted into memberships of the amalgamated corporation;
- The bylaws of the amalgamated corporation; and
- Details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated corporation.

The directors of each amalgamating corporation are required to submit the amalgamation agreement for approval to a meeting of the members of the amalgamating corporation. The amalgamation agreement needs to be adopted by special resolution of the members. A special resolution is a “resolution passed by a majority of not less than two-thirds of the votes cast on that resolution.”

Upon the issuance of articles of amalgamation, the PCAA and Wildrose would continue as one corporation. Section 209 of the CNFPCA states the rights and obligations of the amalgamated corporation:

“Rights preserved

209 On the date shown in a certificate of amalgamation, the amalgamation of the amalgamating corporations and their continuance as one corporation become effective and from that date

(a) the property of each amalgamating corporation continues to be the property of the amalgamated corporation;

(a.1) for the purposes of determining whether the amalgamated corporation is a soliciting corporation or whether paragraph 235(1)(c) applies to the amalgamated corporation, the income received prior to that date by any of the amalgamating corporations is deemed to have been received by the amalgamated corporation;

(b) the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation;

(c) an existing cause of action, claim or liability to prosecution is unaffected;

(d) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued by or against the amalgamated corporation;

(e) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation; and

(f) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation.”

The advantage of an amalgamation is that under subsection 209(a) of the CNFPCA the property of each amalgamating corporation continues to be the property of the amalgamated corporation. There would be no Interparty Transfers under the EFCDA.

6. Constituency Associations and Analysis

As noted above, the PCAA and the Wildrose each has 87 CAs. Although each CA is registered with Elections Alberta, none of them is an incorporated entity and appears to be either unincorporated associations or branches of the respective political party.

Under the *Societies Act*, the existence of a branch society flows from the existence of the main society. The branch societies are therefore separate but related to the main society. The branch societies each have their own constating and governance documents, being local constitutions.

The degree of control over a CA as a branch society is different for each party. The control over the Wildrose CAs is much greater than the control over the PCAA CAs. This may result in asymmetrical treatment and handling of each CA under each party.

The *Societies Act* does not address what happens to Branch Societies in the amalgamation process. Under the *Societies Act*, PCAA, once incorporated as a society from being an unincorporated association, and the Wildrose would amalgamate. The CAs would continue to remain as branch societies.

The EFCDA defines a CA as follows:

- (d) “constituency association” with reference to an electoral division means the association or organization endorsed by a registered party or an elected independent member of the Legislative Assembly as the official association of that party or independent member in the electoral division;

At this time, all 87 of the PCAA and Wildrose CAs are registered CAs. The Act does not specifically state that a political party cannot have more than one registered CA in each electoral district.

An amalgamation agreement under the *Societies Act* could contemplate consolidation of the CAs. However, there is the risk that under section 10 of the EFCDA, Elections Alberta interprets the law as reading that only one CA can exist per electoral district and then proceed to cancel the registration of one of the CAs in each electoral district. The deregistered CA forfeits its money to the Crown. This seems like an extreme and unlikely event.

The Wildrose’s degree of control over CAs could allow the CAs for Wildrose to be wrapped up, leaving only one CA in each Electoral Division. Under s. 38 of the EFCDA, a registered CA may transfer funds to the party and other CAs, in the amalgamation agreement it could be agreed that the CA money would be transferred to the amalgamated party and then once the amalgamated party designated the one registered CA in each electoral district that the party would remit the money to the CA.

Due to the EFCDA’s lack of contemplation of an amalgamation, things become even more interesting. Perhaps, after seeking judicial guidance, Elections Alberta could allow two registered CAs. It could take the view that the new amalgamated party is not properly registered and that the CAs survive because at the time of amalgamation, they were properly endorsed and registered. That means if and when a new amalgamated party is registered and files for a new CA in an electoral district there could be the possibility of three CAs running in each electoral district. Elections Alberta would have to assert that registered CAs survive even if

the underlying political party itself is no more. This later conclusion would seem to be untenable, certainly under a branch society analysis.

Elections Alberta consent might be required for this, although it could be argued that with the amalgamation process and Wildrose control, there is no statutory authority requiring Elections Alberta consent. That being said, Elections Alberta does hold the blunt stick of registration and deregistration to enforce its opinion, until any decision is reviewed by the Courts.

The options that are available to Elections Alberta – assuming non-consolidation of Wildrose CAs – might be outlined as follows:

- Allow two CAs;
- Disallow both CAs, asserting that the merged party is not a registered party and that the former CAs, lacking a registered party's support and endorsement, must fail;
- Allow one but not the other; and
- Allow a consolidation of the two CAs.


Also under the definition of CAs in the EFCDA, it should be noted that a sitting member of the legislature could maintain their CA as a recorded CA. If there was a MLA who did not agree with this process with a CA in agreement, the pieces are in place for that CA to continue its registration.

L. QUESTIONS AND OTHER CONSIDERATIONS


As we developed our opinion set forth herein we became aware of a number of collateral questions pertinent to the issue but not directly relevant to our opinion. These include a number of technical issues surrounding a merger of political parties. In addition, while every attempt has been made to address as many aspects as possible there are political and operational issues which, although specifically not addressed in this memorandum, may arise. We also specifically highlight the problematic and uncertain nature of CA's and how they are to be handled in a corporate merger of political parties. We have outlined the issues relevant to the handling of CA's, but, in contra-distinction to our views on amalgamations of political parties as set forth herein, we are unable to develop a firm legal opinion that can be relied upon.

Yours truly,


ALBERTA CONSERVATIVE CONSOLIDATION COMMITTEE



P.N. (Rick) Breen, Q.C




Andy Crooks



Richard Jones



Julia C. Loney



Tyler Shandro

Attachments:

- Appendix 1 – Terms of Reference
- Appendix 2 – Progressive Conservative and Wildrose Trademarks
- Appendix 3 – The Progressive Conservative Party of Alberta Structure (Alternative 1)
- Appendix 4 – The Progressive Conservative Party of Alberta Structure (Alternative 2)
- Appendix 5 – Wildrose Party Structure
- Appendix 6 – Amalgamation Scenario 1 – *Societies Act* Amalgamation
- Appendix 7 – Amalgamation Scenario 2 – *Canada Not-for-profit Corporations Act* Amalgamation
- Appendix 8 – Defined Terms

APPENDIX 1

ALBERTA CONSERVATIVE CONSOLIDATION COMMITTEE (AC3)

TERMS OF REFERENCE

A small task force is being assembled to consider the possibility of a formal and complete merger of the Wildrose and Progressive Conservative Parties in Alberta. This task force will investigate:

- Statutory requirements
- Concomitant financial considerations and property management considerations
- Relevant party constating documents including party constitutions and constituency or Electoral District Association EDA constitutions
- Practical considerations
- Political Communications and Messaging Issues
- Merger management considerations

The participants of this committee are expected to work amongst themselves in a free and open manner. This will require a high degree of communications management and privacy. People must be able to express their views without being published, for they may change their minds or take a position to test it out. All conversations and research will be kept strictly confidential, circulated to committee members only. This understanding of confidentiality will include even the existence of the committee to the greatest extent possible, for example we will not give any media comment regarding the committee or raise the committee or our work in casual conversations. Comments will not be repeated outside the context of the deliberations of the task force to any media or other personnel. Communications propriety and boundaries of all parties will be respected.

This task force is not a formal arm of any political party neither is it formally sanctioned by any political party.

The report of the task force if, as, and when completed may be signed by each member of the task force but each member will arrive at that decision on their own. Minority reports may also be issued.

APPENDIX 2

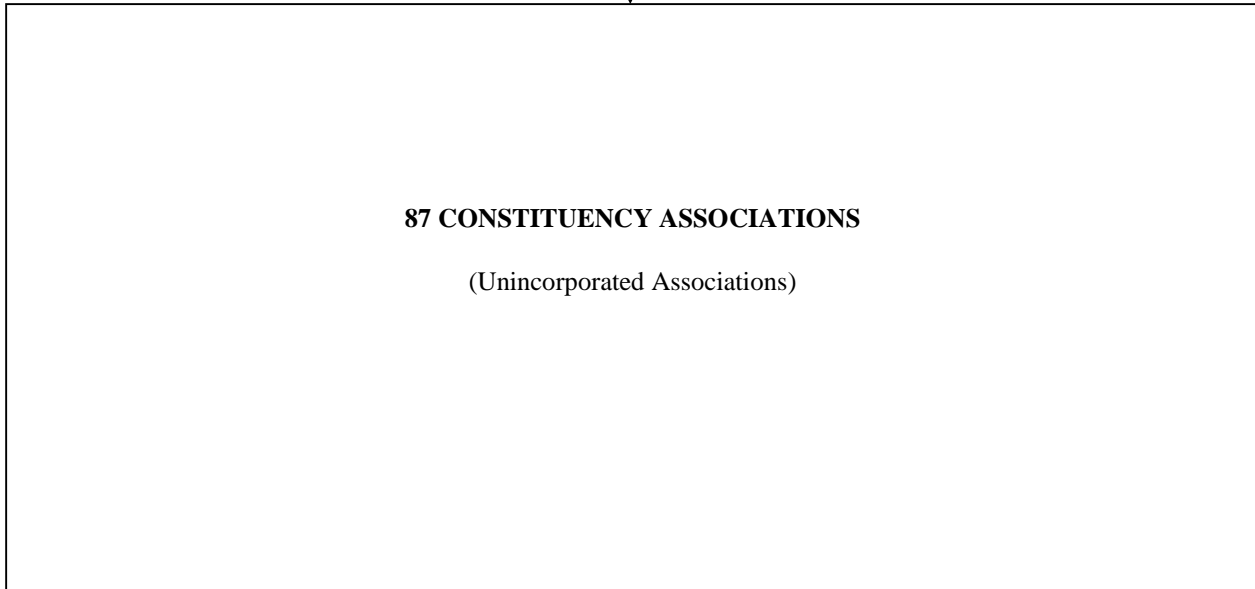
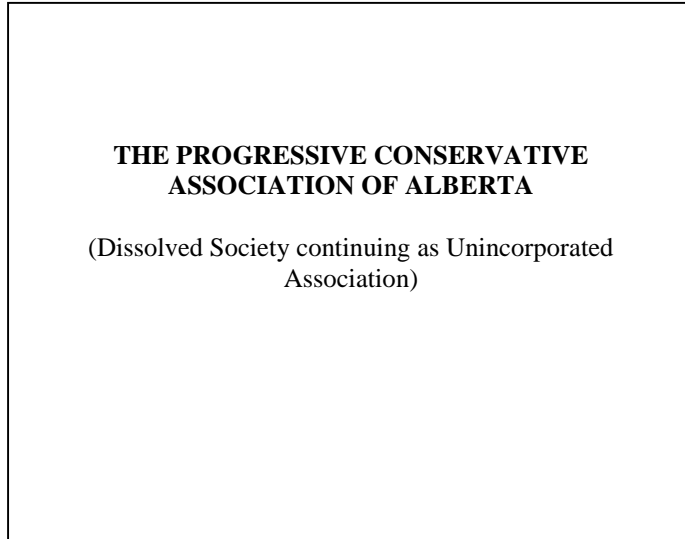
PROGRESSIVE CONSERVATIVE AND WILDROSE TRADEMARKS

Registrant	Trade-Mark	Registration No.	Registration Date
Progressive Conservative Party of Alberta	PC (Design)	TMA662641	12 April 2006
Progressive Conservative Party of Alberta	PC Alberta (Design)	TMA662640	12 April 2006
Progressive Conservative Party of Alberta	PC Alberta (Design)	TMA932761	March 29, 2016
Progressive Conservative Party of Alberta	PC Alberta (Word)	TMA932925	March 30, 2016
Wildrose Political Association	Wildrose Party (Word)		Pending

APPENDIX 3

THE PROGRESSIVE CONSERVATIVE PARTY OF ALBERTA

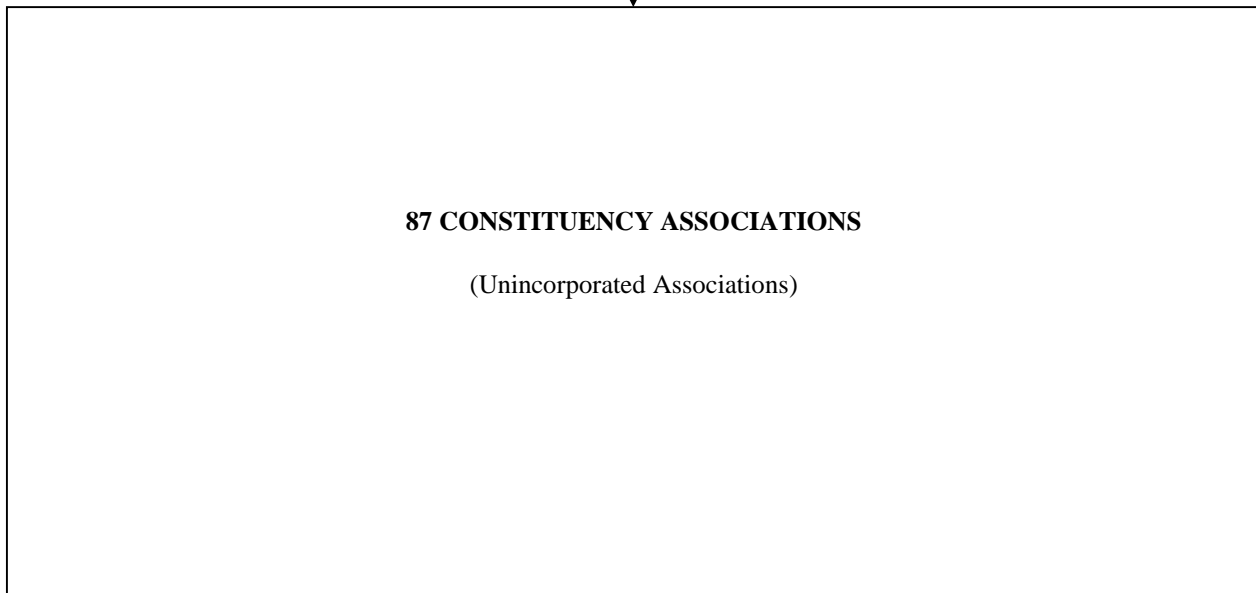
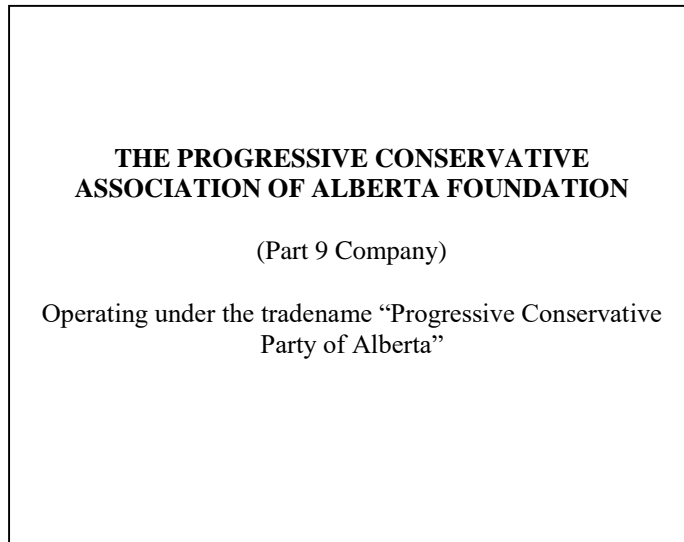
STRUCTURE (Alternative #1)



APPENDIX 4

THE PROGRESSIVE CONSERVATIVE PARTY OF ALBERTA

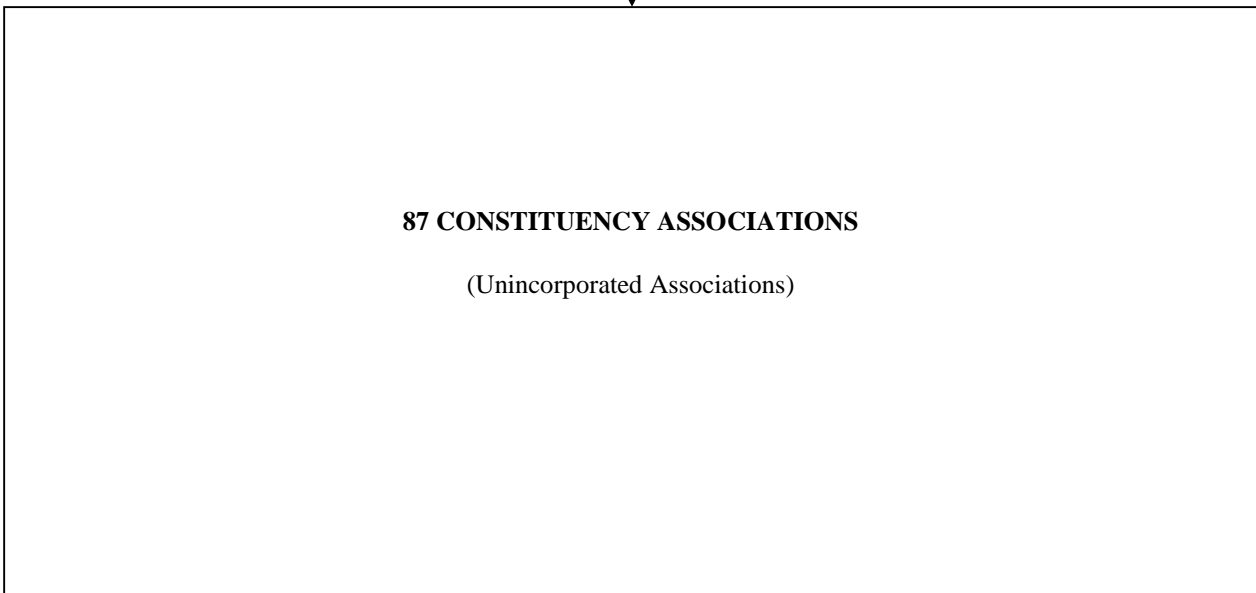
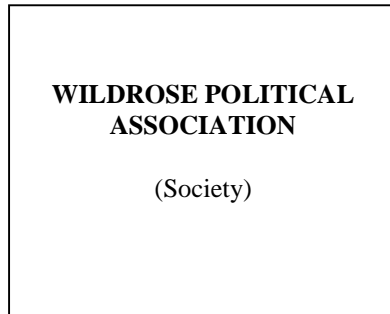
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APPENDIX 5

WILDROSE PARTY

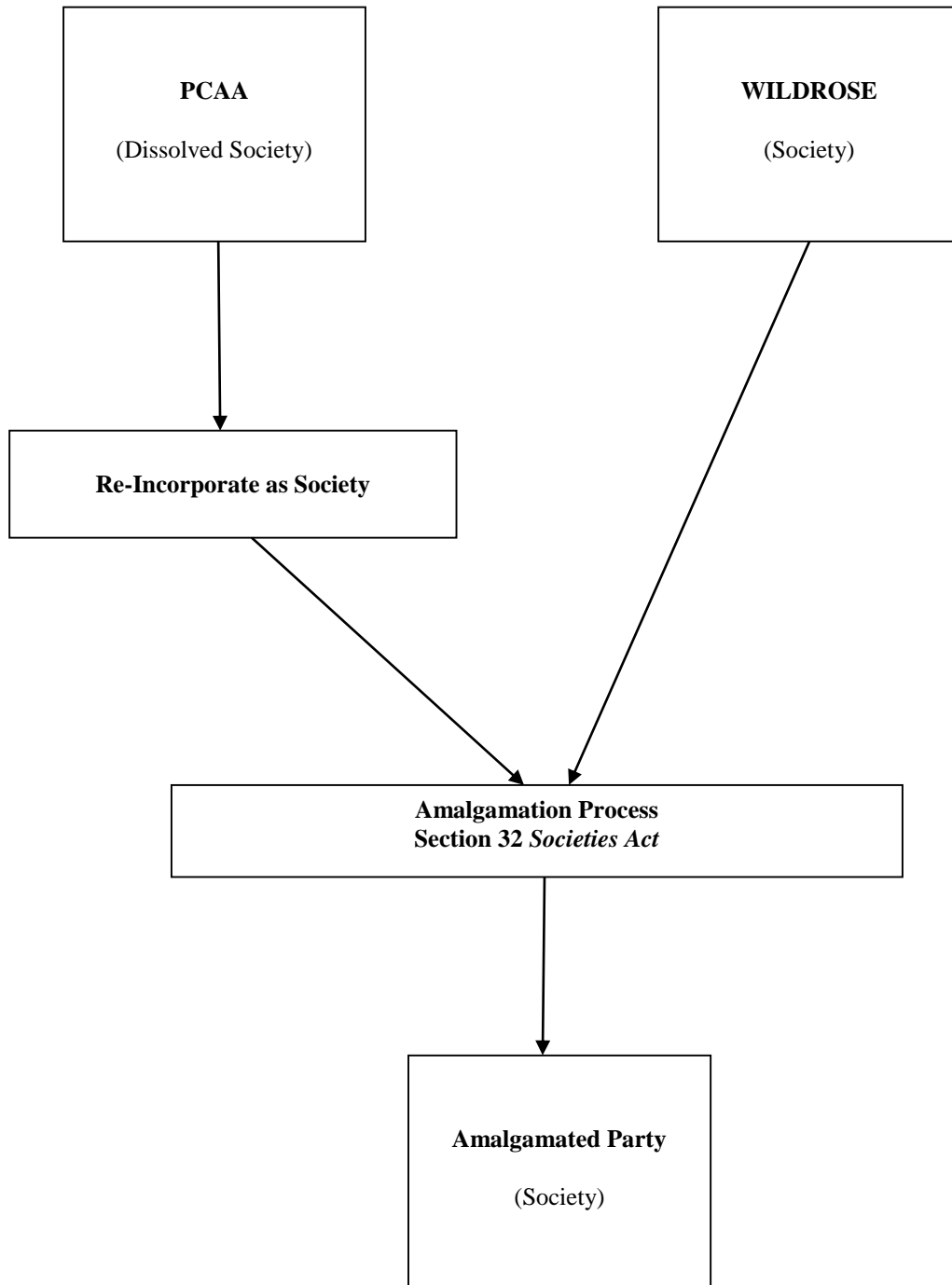
STRUCTURE



APPENDIX 6

AMALGAMATION SCENARIO 1

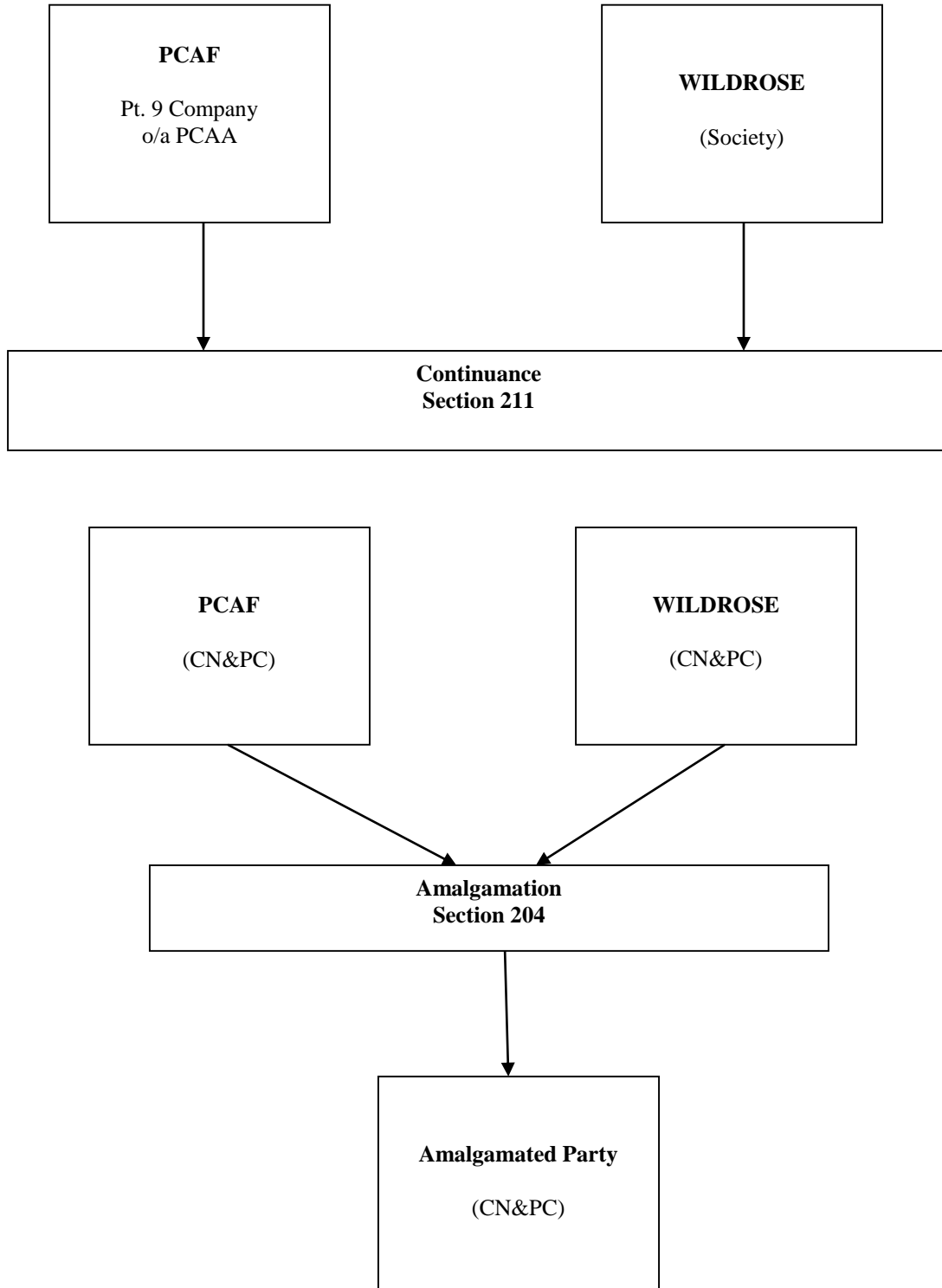
SOCIETIES ACT AMALGAMATION



APPENDIX 7

AMALGAMATION SCENARIO 2

CANADA NOT-FOR-PROFIT CORPORATIONS ACT AMALGAMATION



APPENDIX 8

DEFINED TERMS

PCAA	Progressive Conservative Association of Alberta
Wildrose	Wildrose Party
EA	Elections Alberta
ACCC	Alberta Conservative Consolidation Committee
PCAAF	Progressive Conservative Association of Alberta Foundation
EFCDA	<i>Election Finances and Contributions Disclosure Act</i>
LAA	<i>Legislative Assembly Act</i>
CA	constituency association
CAs	constituency associations
ABCA	<i>Business Corporations Act (Alberta)</i>
CNFPCA	<i>Canada Not-for-profit Corporations Act</i>
CEO	Chief Electoral Officer
Orders	Member Services' Committee Orders