Court of Queen's Bench of Alberta

Citation: Alberta Crown Attorneys' Association v Alberta (Justice and Solicitor General), 2021 ABQB 949

Date: 20211129
Docket: 1903 25805
Registry: Edmonton

Between:

Alberta Crown Attorneys' Association, Damian Rogers,
Breena Smith, Dallas Sopko, Rosalind Greenwood,
James Pickard, and Matthew Block

Applicants

- and -

Government of Alberta, Ministry of Justice and Solicitor General,
the Alberta Union of Provincial Employees,
and the Alberta Labour Relations Board

Respondents

- and –

Canadian Association of Crown Counsel

Intervenor

Memorandum of Decision
of the
Honourable Madam Justice D.A. Sulyma

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[1] The Alberta Crown Attorneys' Association (ACAA) wishes to represent Crown Prosecutors for the purpose of collective bargaining with the Province of Alberta ("POA"); however, the *Public Service Employee Relations Act*, RSA 2000 c-P-43 (*PSERA*) requires all Crown employees to collectively bargain as part of a single province-wide bargaining unit represented by the Alberta Union of Provincial Employees (AUPE). This judicial review concerns whether *PSERA* violates Crown Prosecutors' freedom of association as protected in s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[2] The ACAA had filed an application with the Alberta Labour Relations Board (the Board) to be certified as the bargaining agent for Crown Prosecutors. Before the Board, the Applicants submitted they cannot collectively bargain through the single province-wide bargaining unit represented by AUPE as to do so would affect the prosecutors' independence, put prosecutors in conflicts of interest and jeopardize the justice system's integrity. The Board denied the application and dismissed the bases of argument. The Board also found that despite some meetings with ACAA members, the POA had refused to collectively bargain with the Association. It is contended that in doing so they have denied prosecutors access to a meaningful process of collective bargaining.

[3] Of course, that submission is only relevant if the Court finds s. 2(d) has been breached. It must be noted that Alberta is the only province in Canada that mandates all-in bargaining units; that is, all government employees are to be represented by, in this case, AUPE.

[4] In four Canadian jurisdictions, Crown Prosecutors are members of a bargaining unit which is separate from all other government employees:

[5] The British Columbia Crown Counsel Association represents only Crown Prosecutors in British Columbia and collectively bargains through that association (recognition is contained in British Columbia's Crown Counsel Act). Government civil lawyers in British Columbia have an association which does not collectively bargain.

[6] The Ontario Crown Attorneys' Association represents only Crown Prosecutors in Ontario. Government civil lawyers in Ontario have their own association: The Association of Law Officers of the Crown. For collective bargaining purposes, the two Associations are represented by a council comprised of the two Associations;

[7] The Nova Scotia Crown Attorneys' Association represents only Crown Prosecutors in Nova Scotia and has a collective agreement. Government civil lawyers in Nova Scotia do not have an active association and do not collectively bargain.

[8] The New Brunswick Crown Prosecutors' Association represents only Crown Prosecutors in New Brunswick and has a collective agreement. Government civil lawyers in New Brunswick are represented by the New Brunswick Crown Counsel Association, which has a separate collective agreement.

[9] The issue here boils down to whether this group of unique government employees must bargain through one province wide bargaining unit. The ACAA is of the view that the Board's finding of no breach of s. 2(d) is incorrect. Although the Board found the government had failed to fully collectively bargain with the Association outside of *PSERA*, it denied the Applicants' *Charter* challenge to *PSERA* and thus denied the ACAA certification application.

[10] The Canadian Association of Crown Counsel (CACC) did make an application to have intervenor status before the Board and that was granted.

[11] Similarly, on application in the new year of 2021, I granted that body leave to intervene in the judicial review. That association joins with the ACAA application on the basis of the Board having erred.

[12] While it is submitted the Board has jurisdiction to consider constitutional questions, which it did here, it cannot issue a general declaration of constitutional invalidity. It does have

jurisdiction to declare statutory provisions inoperable with respect to an application before it. That was what was sought and denied here. The POA and the Ministry of Justice and Solicitor General submit that the Board properly found that the designation of AUPE as the Crown Prosecutors' bargaining agent does not contravene s. 2(d) as the freedom of association does not guarantee the level of choice argued by the CACC. They take the position that the impugned section of the *PSERA* does not contravene s. 2(d) of the *Charter*. The AUPE joins in that position and further submits the applications of both the ACAA and CACC have not established what they seek to show; that is, that ACAA's s 2.(d) rights have been breached. They requested the Court dismiss the ACAA's application and uphold the Board's decision.

[13] ACAA made the argument before the Board that its members have a constitutional right to a meaningful collective bargaining process. They argue that the constitutional imperative of prosecutorial independence precludes them from bargaining through the province-wide statutory bargaining unit *PSERA* creates and the Province has refused to bargain outside of this statutory regime.

[14] They submit that they did not argue that the *Charter* guarantees Crown Prosecutors the right to any bargaining agent of their choice or to unilaterally define the bargaining unit. Nor did they argue as the Board seems to have assumed, that the *Charter* precludes Crown Prosecutors from being in a bargaining unit with any other employees. The only assertion the ACAA made and make is that *PSERA* specifically as applied to Crown Prosecutors is unconstitutional as the prosecutors' legal and constitutional obligations prevent them from joining the province-wide bargaining unit which includes not just regular members of the public but also individuals working within the Justice system, including investigators.

[15] Here they refine the argument by asserting the Board's decision is incorrect as it is inconsistent with the principle of prosecutorial independence.

[16] CACC makes somewhat different and broader arguments regarding the same issue as I will also address further.

[17] To start with, it submits that ACAA members have exercised their freedom of association guaranteed under s. 2(d) of the *Charter* in two key respects: 1) they have identified they were unwilling to engage in a process of collective bargaining that threatened the professional obligation to ensure prosecutorial independence; and 2) in light of the conflicts which would arise from joining the AUPE province-wide bargaining unit among other things they have chosen the ACAA as their bargaining agent.

[18] CACC denies that it claims there is an unfettered right to choose one own's bargaining agent. Rather, it was their submission that it is a *Charter* imperative that the ability of an employee to choose his or her own bargaining agent be protected and that it is the choice of bargaining agent that informs the extent to which a group of employees are able to meaningfully pursue their collective interests. It submits that the Applicants' choice of ACAA as their bargaining agent cannot be divorced from their choice to prioritize the protection of their prosecutorial independence and a violation of s. 2(d) should have been found.

[19] CACC submits that the facts here satisfy the threshold of substantial interference because it forces the Crown attorneys to be represented by a voice that is unlikely to speak up and challenge the government in the manner of their choosing. This submission raises a matter of

proof, in this case, lack of evidence to support this bare statement. CACC argued that where the placement of a subset of employees in a particular bargaining unit is contrary to their identified collective interests and contrary to their unequivocal preference to be represented by a different association it is a constitutional imperative that a violation of s. 2(d) be found.

[20] I note that the Board in its decision suggested that it lacked "a sufficient evidentiary foundation" upon which to decide the CACC's arguments even if it "were inclined to do so".

[21] Indeed, CACC represents that the possibility that representation by the AUPE may be workable in certain respects but that it is not properly considered at the infringement stage of the analysis. Rather, the focus is on the extent to which the government's actions have infringed the affected individuals' rights.

[22] The further argument of the CACC is based on what it calls the "submergence theory". This is a submission drawn from ***York University v UFA***, a decision of the Ontario Labour Relations Board. CACC also refers to ***OPSEU v Ontario (Minister of Education)***,2016 ONSC 2197 submitting it approves that theory.

[23] The parties have relied on the same cases to put forth their positions. It is agreed that legally the issue must be considered in context. As acknowledged by the Board, such is important. The Board observed that the right to freedom of association must be viewed in the context of the particular industry, workplace and employer/employee relationship at issue. I agree with that statement of law.

[24] All parties agree the correctness standard of review applies to the constitutional issues raised in this judicial review. This as set out in ***Canada v Vavilov***, 2019 SCC 65.

[25] The submissions of both the POA and AUPE contained a detailed analysis of their position that both the ACAA and the CACC submissions are premised on a misreading of the relevant case law and that during the course of this litigation the CACC appeared to make representations on the ACAA's behalf that had not been made by the ACAA and those points should not be addressed by me. Any submission where the CACC purports to make representations on behalf of ACAA or its members should be disregarded.

[26] I agree that at all times of this review, the CACC does not speak for the ACAA. The Respondents submit that particular arguments such as the argument that the ACAA's *Charter* claim is conjunctive and not disjunctive must therefore be disregarded. I agree with the Respondents' position that the claims of the CACC and submissions that broaden the issues before me ought to be disregarded where they go beyond the ACAA's submissions.

[27] All parties rely on portions of the Supreme Court of Canada decision in ***Mounted Police Association of Ontario v Canada (Attorney General)*** 2015, SCC 1, but in varying manners. The Respondents POA and AUPE rely on what they submit are the actual findings in the case whereas they submit that the Applicants and Intervenor pick and choose to rely on non-decisive and non-binding statements in the case, or statements made in context of the Court's review of the history of interpreting the s. 2(d) rights.

[28] In my view, the submissions of POA and AUPE that the Applicants and Intervenor have not properly quoted the principles of law that come from the ***Mounted Police*** case are correct. Accordingly, I summarize what I find to be the binding portions, which include definitions and

importantly the criteria that define the *Charter* s. 2(d) rights and that govern the issues of degree of choice and scope of the s. 2(d) protection and its principles.

[29] I accept the summary of argument in the briefs of the POA and Ministry of Justice and Solicitor General. I will summarize from the brief as I find that the POA briefs properly set out the law in this area.

[30] They argue that the CACC extends the concept of degree of choice protected by the *Freedom of Association* and such is not supported by the law in elevating employee choice to the level argued by the CACC would be to significantly overall Canadian labour law. Rather, *Freedom of Association* encompasses a right to a meaningful collective bargaining process and 2 (d) does not impose a process in which every association will obtain the recognition that it seeks.

[31] Rather, the test of the right to a meaningful collective bargaining process involves examination of whether the mechanism substantially disrupts the balance of powers between employees and employer necessary for the meaningful pursuit of collective workplace goals. Employees need only enough of a degree of choice and independence to allow them to determine and pursue their collective interests.

[32] They argue that the concept of choice was introduced by the Supreme Court in ***Mounted Police*** and the Supreme Court limited its scope, clearly stating choice and independence are not absolute and again, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. Similarly, the Court found the degree of independence required by the *Charter* is one that ensures that the activities of the association are aligned with the interests of its members.

[33] The Court stated that hallmarks of employee choice include the ability to form and join new associations, to change representatives, to set and change collective workplace goals and to dissolve existing associations. Accountability plays an important role in assessing employee choice. Choice as guaranteed by 2 (d) means that employees' representatives must be accountable.

[34] I also agree that the CACC has made incorrect submissions of law when it submits that "Where the very placement of a subset of employees in a particular bargaining unit is contrary to the identified collective interest and contrary to their unequivocal preference to be represented by a different association it is a constitutional imperative that a violation of s. 2(d) be found." I agree with the Respondents that this is an incorrect statement in law and this argument is essentially one for absolute choice, and a guaranteed outcome regarding a bargaining agent and minority protection. This is incorrect in law and an overstatement of the degree of choice protected by the freedom of association s. 2(d) rights. Many of CACC submissions are bare statements of its position here and not actually taken from any court judgment.

[35] The same arguments are made by AUPE. That is, that the ACAA and CACC have not properly addressed the issue of the significance of employee choice and independence under s. 2(d). That it has ignored the majority's statement of a meaningful process of collective bargaining and the essential features of a meaningful process of choice and independence. It submits that the majority in ***Mounted Police*** emphasized that the requirement of choice had more than one dimension and the majority was clear that considerations of employee choice included

the ability of employees to choose or change who represented them. The majority also explained choice involved the capacity for employees to set and change their collective workplace goals. As such, even where the employees had a designated bargaining agent so long as the employees could still collectively choose what workplace goals their bargaining agent pursued on their behalf, the employees retained some choice for the purposes of s. 2(d). Further, that the majority was clearly aware that their discussion of s. 2(d)'s requirements of choice and independence could be misconstrued. Accordingly, the Court repeatedly emphasized the limits of the requirements of compliance with the *Charter* being based on the degrees of independence and choice guaranteed by the labour relations scheme and there is no absolute requirement of either. Second, that choice and independence should not be considered in isolation but must be assessed globally, always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursing collective workplace goals. The majority also reiterated at least on four occasions that in recognizing s. 2(d) protected aspects of employee choice and independence, s. 2(d) did not entitle individuals to a specific model of labour relations and referred repeatedly to other Supreme Court decisions holding the same. Finally, the majority specifically cited legislation designating bargaining agents for groups of employees as an example of a labour relations model that, despite removing an element of employee choice, could nonetheless be considered constitutionally valid.

[36] In that regard, statements in the ACAA brief are incorrect if they are meant to submit that the single Crown bargaining unit mandated by *PSERA* would not meet the requirements of choice and independence set by ***Mounted Police***. AUPE's position is that it is sufficiently independent, and AUPE's members retain sufficient choice over setting workplace goals that s 10 of *PSERA* does not violate s2(d) of the *Charter*.

[37] In ***Mounted Police,*** the scheme did violate s. 2(d) as the RCMP members could not advance their own interests through the SRRP without interreference by RCMP management. In ***OPSEU v Ontario***, the Court dealt with a new process for collective bargaining of Ontario school boards. Among other things, the legislation required that collective agreements be established in accordance with an agreement that had previously been reached with a particular teachers' union. The government's unilateral imposition on the process was the issue and the case does not stand for the broader proposition that 2 (d) protects smaller, less powerful groups of employees from having their interests submerged by the dominant employee groups of a particular sector, as was argued by CACC.

[38] I find ***OPSEU v Ontario***, 2016 ONSC 2197 does not demonstrate the proposition that s. 2(d) protects smaller less powerful groups of employees from having their interests submerged by the dominant employee groups of a particular sector. That case is about a government employer refusing to engage in a meaningful process of collective bargaining by setting predetermined bargaining outcomes and refusing to negotiate on certain topics.

[39] Here, the Respondents argue that *PSERA* includes all hallmarks of employee choice as identified by the Supreme Court. They submit that a careful review of the *PSERA* regime is proof that it complies with the enumerated SCC factors. The Court specifically stated that s. 2(d) does not give a right to every employee organization to obtain certification as a bargaining agent or to obtain the recognition it seeks.

[40] They state *PSERA* does not impose specific representatives on employees. It merely mandates a single bargaining agent; employees remain free to select those who will speak for them within the bargaining agent's roster and to replace their bargaining agent. Prosecutors would be a small selection of the province wide group of employees but this does not mean *PSERA* does not provide the required degree of choice. The hallmark of choice is a guarantee for employees as a collective, not for each minority group or subset of employees.

[41] Nothing in the *PSERA* prevents employees from setting or changing their collective workplace goals. *PSERA* allows for employees to identify and pursue their interests even if the employees are a minority group like Crown prosecutors. The Act ensures that employees are free from employer interference and that the bargaining process is under the control of employees. The Act identifies acts that are prohibited by the employer which includes participation or interference in the formation and administration of a union and it requires employers to meet and commence to bargain collectively in good faith. Under the Act, the bargaining agent is accountable to its members and owes a duty to provide representation to all of its members.

[42] The Court was clear that "*Charter* compliance is evaluated based on the degrees of independence and choice guaranteed by the labor relation scheme considered with careful attention to the entire context of the scheme and must not be considered in isolation. Assessment must be global and there must be a determination of whether employees are able to meaningful pursue collective workplace goals."

[43] The Respondents argue that the right to such entails a sufficient degree of choice but that this is a feature of the right to meaningful collective bargaining not a right itself. Degree of choice by a labor relations scheme is assessed by determining if their has been substantial interference with such bargaining. It should not be assessed on its own or elevated to a determinative factor.

[44] The Court must examine the entire scheme and the goal of such examination is to determine whether employees are able to have effective input into the selection of their collective goals. This is the key and the search is not for an ideal model of collective bargaining. The requirement of choice can be respected by a variety of labor relations models as long as such models allow collective bargaining to be pursued in a meaningful way.

[45] The Respondents submit that the *PSERA* allows such effective input into the selection of collective goals and here the necessary hallmarks of free association set by the Supreme Court of Canada have been met. In the end of such assessment, they submit the features of the *PSERA* ensure that employees in the public sector in Alberta have access to a process of meaningful collective bargaining as they have sufficient choice over workplace goals and may pursue workplace goals free from interference from their employer. Thus, the Crown prosecutors have not been left without a collective voice to determine and meet their collective goals. The system of meaningful collective bargaining here has been set in compliance with s. 2(d) of the *Charter.*

[46] In ***Mounted Police***, the Supreme Court specifically stated that the *Wagner Act* model of labor relations provides sufficient choice for employees and went further and specifically stated that designated bargaining models are acceptable under the freedom of association guaranteed by s. 2(d). The Court gave an example of a model that provides the employees' bargaining agent as designated rather than chosen by the employees that can be acceptable even where the

employees' bargaining agent under a model is designated rather than chosen by the employees. The question remains whether employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. The Court noted that beyond the examples cited, other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.

[47] As above, the Respondents submit that the *PSERA* includes the hallmarks of employee choice as identified by the Supreme Court.

[48] I have approached this issue as I have described above as I find it the clearest and cleanest explanation of the principles set out in ***Mounted Police***. I agree with the Respondents that the arguments of the Applicants and the Intervenor, besides quoting inapplicable statements from ***Mounted Police*** do, in my view, very much obfuscate the real issue here. Rather, I find that instead the principles from the authority are outlined properly above.

[49] In the latter regard, the Applicants and Intervenor have stretched their argument very much beyond the principles defined.

[50] Again, the Respondents are as one in making these submissions and in my view, they properly reflect the law in this area and I conclude that here the *PSERA* sets out a labour relation scheme that complies with the legal requirements and thus allows collective bargaining to be pursued in a meaningful way that satisfies s. 2(d).

[51] I also accept the submissions of the Respondents that the notion of choice is an element of meaningful collective bargaining, but that choice does not extend to the absolute choice of bargaining agent as argued by the CACC. *PSERA* complies with the principles as outlined in the quotes above. Indeed, the Supreme Court in ***Mounted Police*** specifically stated that the Wagner Act model of labour relations provides sufficient choice for employees.

> The Wagner Act model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to choose to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification — all under the supervision of an independent labour relations board — ensure that an employer deals with the association most representative
> of its employees.

If this was not clear enough, wary of its comments on "choice" being used for *Charter* overreach, the Supreme Court went further and also specifically stated that designated bargaining models are acceptable under the freedom of association:

> The Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g., *School Boards Collective Bargaining Act*, 2014,

> S.O. 2014, c. 5) offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example; other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.

[52] ACAA and CACC have not made submissions that recognize these principles.

[53] I agree with the Respondents that the facts here are very distinguishable from the scheme of the Ontario government dealt with in ***Mounted Police***. It is distinguishable as that scheme particularly limited RCMP members by imposing on them a scheme that did not permit them to identify in advance their workplace concerns free from management's influence. This is also in accordance with the finding of the Supreme Court that the right to collective bargaining is one that guarantees a process rather than an outcome or a particular model of labor relations.

[54] I have distinguished the facts here from those considered in the cases cited above. Section 2(d) does not guarantee the degree of choice argued by the CACC. I conclude, as did the Board, that limits on the choice of bargaining agent do not violate the freedom of association guaranteed by the *Charter*.

[55] As stated above, and in argument, it is that principle that has been misinterpreted by the Applicants and Intervenor. Recall that in that case the Court found that the process failed to respect RCMP members in both its purpose and its effects. That to me appears obvious as the Court found that the Ontario government had in fact eroded choice and independence. One of the facts there was that the government had become a manager and imposed its own restrictions on future bargaining

The Principle of Prosecutorial Independence and Crown Prosecutors' Unique Role as Agents of the Attorney General

[56] The Applicants' argument below hinges on the concept of prosecutorial independence. Which, the Respondents submit, is a premise mis defined by the Applicants and Intervener. As submitted by AUPE, independence simply refers to the need for a prosecutor to be independent when exercising his or her prosecutorial discretion: A prosecutor is obliged to not take into account any irrelevant or improper considerations when making decisions related to the bringing, ending or managing of prosecutions: ***R v Cawthorne,*** 2016 SCC 32. ***Cawthorne*** cautioned against taking the independence principle too far, emphasizing that prosecutorial discretion does not somehow require prosecutors as individuals to be independent of larger structures or entities.

[57] Put simply, the Court found that the principle of prosecutorial independence requires both that a prosecutor be independent and that a reasonable person perceive him or her as independent. Crowns must be free and appear to be free to exercise prosecutorial discretion without interference.

[58] Both Respondents submit that the Applicants argues for a much more expansive definition of prosecutorial independence than is supported by the case law or the Law Society of Alberta's Professional Code.

[59] AUPE argues that the Applicants must show that somehow, simply by virtue of being AUPE members, Crowns would either take improper considerations into account when exercising prosecutorial discretion or to be seen to be taking improper considerations into account in a manner that rebuts the strong presumption that prosecutors exercise their discretion properly. It submits that ACAA can show neither of these things.

[60] The POA makes a similar submission. It states that the argument that the placement of Crowns in the GOA bargaining unit would submerge the interests of the Crowns and deny them of a meaningful process of collective bargaining is not supported by proof of this as facts and it is not supported by the cases cited by the CACC.

[61] Each of the Respondents expanded on their arguments, in particular the lack of evidence that AUPE will not speak up or challenge the POA in the manner of the Crown Prosecutors choosing or the Crown Prosecutors will not be able to meaningful advance their interests.

[62] Indeed, that position would actually be contrary to the Supreme Court's pronouncements that s. 2(d) does not guarantee a specific process or bargaining outcome given the lack of degree of guarantees over outcomes. Even if certain member's goals are not pursued by the bargaining agent, this alone would not constitute a violation of s. 2(d). Thus, the so called "submergence theory" is not supportable by evidence here or the law.

[63] I conclude that the interests of Crown Prosecutors have not been proved to be and will not be submerged in the all POA employee bargaining unit. Also that freedom of association does not guarantee that the interests of a minority group will not be submerged. The Board correctly found that collective bargaining through AUPE would not be detrimental to the interests of the Crown Prosecutors and there would not be any substantial interference with the process of meaningful collective bargaining. I conclude the Board correctly looked at the requirements imposed by *PSERA* here and assessed whether they breached the freedom of association rights and that it was correct for the Board to assess that *PSERA* is a framework independent of the bargaining activity between the POA and the ACAA. Again this submission was made by CACC as a bare statement without any reference to evidence here.

[64] I also would agree that according to the CACC's position, it would be a mistake to look at the labour relations regime available to the employees and instead an adjudicator would have to look at how the workers had chosen to associate. Clearly, this is not what the law requires. Rather, freedom of association does not guarantee the preferred outcomes of employees. It protects against substantial interference with the process of meaningful collective bargaining. That has not, in my view, occurred here.

[65] I also agree that the CACC's statement that "the fact that another avenue for possible collective bargaining may exist" does not necessarily trump a *Charter* claim in this context. I agree with the Respondents, if an avenue for collective bargaining exists, then there is no breach of s. 2(d). The fact that the claimant would prefer a different means of bargaining or association is not relevant. I agree it is not about trumping a *Charter* claim, but is instead about assessing

whether collective bargaining is possible. If meaningful collective bargaining is possible, there is no *Charter* violation.

[66] I do not necessarily agree with the position of POA on the sequence of addressing breach and prosecutional independence and the appropriate sequence of arguments. In my view, the Board correctly found that s. 2(d) does not provide the degree of choice argued by the ACCA and CACC and that makes the issue of prosecutorial independence not relevant to the issues of choice and analysis of the legislation and of s. 2(d).

Lack of Evidence

[67] The CACC makes representations that the interests of the Crown Prosecutors will be submerged. POA and AUPE respond that there has been no proof of such led by the Applicants and Intervenor. AUPE goes further and makes points that would belie any suggestion of submergence.

[68] The Board found, and I find, that the suggestion itself is not adequate evidence of the fact. There is no evidence that the interests of Crown Prosecutors would be lost within the all GOA employee bargaining unit.

[69] POA submits that these arguments are based on the number of Crown Prosecutors in comparison to other employees. Indeed, both the Respondents have pointed to facts that should have been proved and those include features about the makeup of AUPE and internal structural mechanisms in place to protect and advance the unique interests of any of its employees. This would include the Crown Prosecutors without proof that they would indeed be submerged or their interests not advocated.

[70] This point must be weighed by the principles governing a breach assessment of s. 2(d). It is not just a numerical exercise.

[71] Again, the Applicants and Intervenor rely on ***York University v YUFA,*** [1977] OLRB Rep 611, 1977 CarswellOnt 934, which predates the *Charter* and has different facts including the evidence proved that the interests of law professors had already been disregarded once in bargaining and there was potential for this to occur again.

[72] Many of the arguments made by the Applicants and Intervenor are based on the bold statements I have referred to above rather than the principles that govern a determination of a s. 2(d) breach. That thread goes throughout their arguments.

Alberta has Refused to Negotiate with the ACCA

[73] This is not a relevant consideration. Given the Board's and my conclusion there's been no breach of s. 2(d). *PSERA* applies so any bargaining must occur between POA and AUPE.

Conclusion

[74] Accordingly, I conclude that the Applicants and Intervenor have not made their case that the Board was incorrect in its determination of the issues. This application is dismissed.

Heard on the 4th day of March, 2021.
Dated at Edmonton, Alberta this 29th day of November, 2021.

D.A. Sulyma
J.C.Q.B.A.

Appearances:

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