

January 27, 2023

VIA EMAIL

The Honourable David Eby, K.C., Premier
The Honourable Niki Sharma, K.C., Attorney General

Dear Premier and Attorney,

Re: Legislation Interfering With the Certification Process at the Labour Relations Board

Five years ago, the government made a commitment to its Legal Counsel. John Davison, then ADM of the BC Public Service Agency (“PSA”), in February 2018 told us the government had no intention of changing the legal status quo for our bargaining rights without our consent.

Today, it appears PSA is promoting legislation that would do just that, to be implemented in the upcoming session of the Legislature. I will lay out the reasons for my understanding that this is the case below.

I write you to ask that you put a stop to this and reaffirm Mr. Davison’s commitment publicly.

While it would have been bad enough for the government to legislate about some of its workers’ bargaining rights without their consent five years ago, it is worse now. We are *in the middle* of a certification hearing before the Labour Relations Board, the independent tribunal tasked with interpreting British Columbia’s labour laws.

We have played by the rules. We have made an argument that, under those laws, the BC Government Lawyers Association (BCGLA) should be certified as the bargaining agent for Legal Counsel working for the provincial government because it has demonstrated the support of the overwhelming majority of those Legal Counsel, who constitute an appropriate bargaining unit.

The Employer’s response is due a week Monday (February 6).

But instead of making their case to a neutral and independent tribunal, as every other employer would have to do, the PSA appear to want to use the Legislative Assembly as a device to get what they can’t through open argument on the generally-applicable law.

Legislation preventing strikes or changing collective agreements is universally regarded in the labour movement as draconian, and has been found to breach the *Charter*. Legislation preventing an open certification application from being determined on its merits hits at the roots of workers’ rights in an even-more-fundamental way because it stops those workers from organizing in the first place. So far as we have been able to determine, no government since modern labour

relations began after the Second World War has intervened legislatively into an open certification hearing.

Your government should not be the first.

Background

As you know, the BC Government Lawyers Association has been representing civil lawyers in government for more than 30 years. A decade ago, we obtained a mandate to seek status as a bargaining agent. We immediately began speaking with the designated representatives of the government, the Public Service Agency. As is documented in our submission to the Board, it took *years* to get responses during this process.

In 2014, after two years, the Clark government said it was inappropriate for lawyers to bargain collectively (notwithstanding that the Crown Counsel Association had done so for decades). However, they changed their position in 2015, after the Supreme Court of Canada ruled that the *Charter* protects rights of collective bargaining. However, continuing delay meant no decision was made until after the NDP was elected in 2017. This led to litigation.

While we have never shied from vindicating our rights legally, we have repeatedly asked to meet to discuss more fruitful ways of addressing issues. A bit of progress was made last summer, when we met with Acting Attorney Rankin as a result of a commitment by now-Premier Eby shortly before he resigned from cabinet to seek the leadership of the BC NDP. We told him then that we would seek a card mandate under the amendments to the *Labour Relations Code*.

The result was overwhelming: we obtained cards from more than 70% of Legal Counsel in government, despite not having a list, many people being on leave and many more working at home. I can say that the support for our organization is much higher than this raw number.

As a result, in November, we filed a certification application with the Board. The Employer, as expected, objected that Legal Counsel are not an “appropriate bargaining unit” and invoked the *Public Service Labour Relations Act*. We have argued we are an “appropriate bargaining unit”, that the *Labour Relations Code* and the *Canadian Charter of Rights and Freedoms* both guarantee our right to organize, and that the *Public Service Labour Relations Act* is irrelevant, since we are excluded from its operation. We did this in a comprehensive legal submission, authored by the lawyers for education workers and other public sector unions who won major legal battles against the Doug Ford government last Fall. The Employer’s response is due a week Monday.

If this process were left to work itself out, I would not be writing you. We are comfortable with making arguments based on the general law to independent tribunals. We are lawyers after all. But it appears that it will not be allowed to work itself out. PSA has concluded it cannot win under the existing rules (contrary to what it has said since 2012!) and wants to change them.

In February 2018, when Mr. Davison stated the Government’s refusal to recognize the BCGLA, he stated two principles that were supposed to represent the Government’s commitment to

freedom of association. He said that, *if Legal Counsel supported it*, the Government was willing to amend the *Public Service Labour Relations Act* to include us in the Professional Employees Association. He also said that the Government had no intention of taking any legislative action if we did not support it.

We regarded this as unacceptable. It is not for the employer to tell us what union to join. In free societies, employees choose unions, not employers. PEA has always supported our position. It is also consistent with the practice in every Canadian jurisdiction in which government lawyers are collectively represented (which is most of them). However, the fact that we found this to be inadequate did not alter the reality that the government had made a commitment: *no new legislation about our bargaining status without our consent*.

Until December 2022, we heard no suggestion that the Government was considering altering this commitment. It certainly was not suggested when we met with Minister Rankin last summer. Nor was there any communication from PSA suggesting anything of the kind. In December, in the course of a procedural meeting before the Board, the Employer's lawyer, Mr. Jordan, said something about "forthcoming legislation". It was difficult to understand and he made no reference to it in the course of setting dates for the certification application, even though it was known when the Legislature would be in session.

I followed up with PSA. On December 12, Alyson Blackstock wrote to say that she no longer considered the Employer bound by Mr. Davison's "alleged" statements. By the same token, she was unwilling to say whether there *would* be any legislation or what it would be. When we met with Attorney Sharma earlier this month, we specifically stated that any such legislation would be unacceptable to us, unheard of in the history of labour law and contrary to the government's past commitments. Ms. Blackstock said nothing on that occasion.

This Tuesday (January 24), BCGLA received a letter stating that PSA had a "policy proposal" or "project" that could "impact the BCLGA". We were told we must meet with them by the end of the week or else we would not be consulted at all. We were also told we would have to sign a confidentiality agreement of unknown scope (when it was presented to us, it included even the communication in which we had been asked to sign the confidentiality agreement!)

This does not appear to be in good faith. No organization could agree to confidentiality without any scope around what is supposed to be confidential. We have participated in many consultation processes over the years, and in none of them were stakeholders expected to agree to confidentiality about the very scope of a policy proposal.

Moreover, the short time frame is a contrast with the long years between 2012 and 2018 when we were seeking decisions from PSA. The content of the proposed confidentiality agreement suggests that legislation has already been drafted. This looks like a "box checking" exercise to prepare for future litigation, rather than a genuine request for information – an impression that is confirmed by placing secrecy conditions no organization could possibly agree to. This province has an inglorious tradition of taking much time (and, to be fair, consideration) when granting working people rights, while taking rights away at lightning speed and without much

consideration at all. BCGLA therefore suspects that something is up that would be contrary to Mr. Davison's commitment.

I wrote Ms. Blackstock, pointing out that we could not, as a democratic organization, sign a confidentiality agreement of unknown scope that would make it impossible to consult with our members. I further pointed out that in the event the "project" was legislation violating Mr. Davison's commitment, we would want to tell the public, the media, the Opposition and, indeed, government back bench MLAs since – as she knew from attending the meeting with Attorney Sharma – that was unacceptable to us. I accepted that some details and documents might need to be subject to confidentiality, but that transparency should be the default and those situations should be explained first. I agreed to a meeting on Friday to discuss a process that would meet both parties' needs.

Ms. Blackstock responded with another email stating that this demonstrated that BCGLA's executive did not have a mandate to represent its members, and saying PSA would go ahead without further notice to us. I have responded to this, but not yet received anything back. I am not expecting anything substantive. PSA has made up its mind.

Elected Officials Need to Reaffirm Horgan Government Commitment

What I don't know is whether the *elected* government has made up *its* mind. *You* were elected. *You* bear the responsibility for decisions. *Your* party will have to decide whether it is going to go down in Canadian history for legislatively interfering with an ongoing certification hearing.

Our members are outraged by what has happened. We have called an extraordinary general meeting to discuss action. While our work is invisible, I know you both are aware of how much our work (and indeed our long hours of overtime) are critical to the operations of government and to the government's policy agenda.

We have yet to alert the broader labour movement. I expect they will all see that what can happen to us can happen to them. As lawyers might say, bad precedents make bad law. Or as the old Wobbly slogan has it, "An injury to one is an injury to all".

At issue are some basic principles.

- If employers, rather than employees, choose unions, we do not have genuine unions.
- If independent tribunals cannot adjudicate disputes without one party changing the rules mid-stream (something only government can do), we do not have genuine tribunals.
- And if the employer function within the government can dictate to elected officials – contrary to the principles they entered politics to defend – then we do not have genuine legislatures.

We represent people who believe in these principles. They dedicate their working lives to the rule of law, fair tribunal processes, and to implementing the will of democratic legislatures. We

therefore retain the hope that the government will step back from the brink, and initiate a *real* process to make democratic collective representation *more* available to *more* employees.

But we are also trained to take a clear-eyed view of evidence. The evidence is that no commitment and no principle seems to get in the way of PSA's determination not to recognize us. And so I think we can fairly say we need a verbal or written commitment that what the Horgan government said to us in 2018 will continue to be followed. We ask that one or both of you provide that personally.

Thank you for your attention to this matter.

Yours truly,



Gareth Morley,
President, BC Government Lawyers Association

cc: Shannon Salter, Deputy to the Premier
Barbara Carmichael, A/ Deputy Attorney General
Bobbi Sadler, Deputy Minister, Public Service Agency